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47	Meghraj Gangabux, *In the matter of*	7	448
49	Mojilal Premanand v. Gaurishankar Kushalji ...	8	635
55	Emperor v. Shankar Shrikrishna Dev ...	7	937
63	Emperor v. Mulshankar Harinand Bhat ...	7	963
72	Talukdari Settlement Officer, Gujarat v. Umiashankar Narsiram Pandya ...	8	165
75	Govind Pandurang Kamat, *In re* ...	8	632

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93	Dagdu v. Nana ...	8	644
97	Talukdari Settlement Officer v. Chhaganlal Dwarkadas ...	8	624
103	Jeewandas Dhanji v. Ranchoddas Chaturbhuj ...	8	168
110	Treacher & Co., Ltd. v. Mahomedally Adamji Peerbhoy ...	7	669
130	Purshotumdas Ramgopal v. Ramgopal Hiralal ...	8	171
137	Emperor v. Fulji Ditya ...	8	623
139	Channalapa Chenbasa v. Abdul Vahab	8	645
146	Laddha Ebrahim & Co. v. Assistant Collector, Poona ...	8	166
153	Sakrappa *bin* Lingappa Hebsur v. Shivappa *bin* Basappa ...	8	647
156	Dassa Ramchandra Prabhu v. Narsinha ...	9	768
163	Bai Parvati, *In re* ...	8	631
169	Shri Sitaram Pandit Bapu Maharaj v. Shri Harihar Pandit Bhau Maharaj ...	8	625

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182	Ranchodlal Vandravandas Patvari v. Secretary of State	9	765
190	Kishandas Shivram Marwadi v. Nama Rama Vir ...	8	651
196	Tribhuwandas Kalliandas Gajjar v. Jivanchand Lallubhai Co. ...	8	179
199	Jeewanbai v. Manordas Lachmondas ...	8	649
204	Radhabai v. Ramchandra Vishnu	9	351
213	Baluram Ramkissen v. Bai Pannabai ...	11	351
217	Fakiruddin *bin* Amiruddin Ziawoodin v. Abdul Hussein Peerbhoy	11	352
225	Emperor v. Vinayak Damodar Savarkar ...	10	956
231	Somana Basappa v. Gadigeya Kornaya ...	9	941
236	Emperor v. Kalekhan Sardarkhan	8	1050
239	Balambhat *bin* Ravjibhat v. Vinayak Ganpatrav Patvardhan	10	746
243	Somchand Bhikhabhai v. Chhaganlal Khupchand	10	803
245	Balkrishna Wammaji Gavankar v. Shiva Chima Mhatra	10	811

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9	Birch v. Emperor ...	9	581
13	Rassul Haji Cassum, *In re* ...	9	344
19	Aryodaya Spinning and Weaving Co. Ltd v. Siva Virchand	9	348
22	Salekhan v. Vishvanath ...	9	349
27	Anupram, *In re* ...	9	350
30	Radhabai v. Ramchandra ...	9	351
38	Digambar v. Narayan ...	9	354
49	Jafarkhan v. Daudshah ...	9	358
56	Bachi v. Bikhchand ...	9	393
59	Bur Singh v. Uttam Singh ...	9	33
67	Kumar Chandra v. Prasanna Kumari Dasi ...	9	122

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90	Someshwar v. Noranbai ...	9	765
92	Ranchhodlal v. Secretary of State	9	765
101	Dassa Ramchandra v. Narsimha ...	9	768
109	Narsangji v. Ranchhodbhai ...	9	929
113	Somana v. Gadigeya ...	9	941
118	Ganbirsingji v. Agarsing ...	9	943
123	Shrigopal v. Dhanalal ...	9	944
126	Jehangir D. Davar, *In re* ...	9	945
131	Laxman, *In re* ...	9	947
133	Dwarkaprasad v. Jamnadas ...	9	948
141	Jehangir v. Kaikhushru ...	9	951

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158	Pherozshaw v. Waghji ...	10	746
161	Madhoprasad v. Ajudyaprasad ...	10	748
162	Hope Mills Ltd. v. Sir Cowasji J. Redymoney ...	10	748
200	Emperor v. Mahomed Isaf Habib	10	769
201	Emperor v. Suleman Ibrahim ...	10	802
203	Emperor v. Amir Bala ...	10	802
207	Somchand v. Chhaganlal ...	10	803
209	Emperor v. Noor Mahomed ...	10	804
212	West End Watch Co. v. Berna Watch Co. ...	10	805
230	Balkrishna v. Shiva Chima ...	10	811
233	Manilal v. Motibhai ...	10	812
237	Eknath Ranoji v. Ranoji Bowaji	10	813
240	Gurunath v. Yamanava ...	10	814
242	Kashinath v. Vinayak ...	10	814
245	Bai Ganga v. Rajaram ...	10	815
251	Bai Machhbai v. Bai Hirbai ...	10	816
256	Vyankappacharya v. Yamnasami	10	817
259	Collector of Ahmedabad v. Lavji ...	10	818
264	Ebrahim v. Chunilal ...	10	888
268	Abdulali v. Miakhan ...	10	890
273	Secretary of State v. Gajanan ...	10	639
280	Bhiwa v. Devchand ...	10	909
284	Dayaram v. Laxman ...	10	910
287	Anandibai v. Hari Suba ...	10	911
292	Ganpatsing v. Bajibhai ...	10	912
296	Emperor v. Vinayak Damodar Savarkar ...	10	956
307	Narayan v. Umbar ...	10	913
313	Lakmidas v. Bhaiji ...	10	914
319	Bai Bhikaji v. Bai Dinbai ...	11	350
323	Baluram v. Bai Pannabai ...	11	351
326	Fakiruddin v. Abdul Hossein ...	11	352
332	Advocate-General of Bombay v. Eardoonji ...	11	356
345	Temulji Jamsetji v. Bombay Tramway Company Limited ...	11	362
352	Govindrao Narhar v. Ambalal ...	11	366
359	Kishen Parshad v. Har Narain Singh ...	9	739
367	Haji Ashfaq Hussain v. Gauri Sahai ...	9	975
375	Bhagbati Barmanya v. Kali Charan Singh ...	10	641
384	Bhawani v. Kunwar Himmat Bahadur ...	10	274
391	Hanif-un-nissa v. Faiz-un-nissa ...	11	398
396	Damodar Narayan v. Dalgliesh ...	9	913
404	Umrao Singh v. Lachhman Singh	10	285
413	Mahomed Jan v. Bishun Singh ...	10	272
419	Srimati Nityamoni v. Madhu Sudan ...	11	384
421	Sri Sri Ishwar Shyam Chand Jiu v. Ram Kanai Ghose ...	10	683
427	Khunni Lal v. Krishna Narain ...	10	477
440	Bishun Chand v. Bijoy Singh ...	11	399
447	Lingam Krishna Bhupati v. Maharaja of Vizianagram ...	10	272
451	Purna Sashi v. Kalidhan Rai ...	11	412
464	Maung Pe v. Ma Lon Ma Gale ...	11	497
471	Motilal v. Advocate-Generel of Bombay ...	11	547
480	Bhaishanker v. Mulji ...	11	551
482	Tricumdas Mills Company Ltd., *In re* ...	11	552
487	Bai Jamnabai, *In re* ...	11	554
494	Emperor v. De Souza ...	11	610
499	Emperor v Ranchhod ...	11	613
503	Emperor v. Keshavlal ...	11	586
505	Baba Yeshwant, *In re* ...	11	614
508	Trimbak Kashiram v. Abaji ...	11	558
511	Husainkhan v. Gulabkhatum ...	11	558
517	Lakhmichand v. Kachubhai ...	11	559
520	Srinivasa v. Venkatavarada ...	11	447

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(A).—4 BURMA LAW TIMES, FROM JANUARY TO APRIL, 1911.

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7	Maung Tet Tun v. Ma Shwe Chein	8	978
9	Ebrahim v. King-Emperor ...	9	449
10	U Aung Min v. Lutchumanan Chetty ...	9	450
11	King-Emperor v. Po Yin ...	9	450
12	Maung Po Kyin v. Anamalay Chetty ...	9	452
13	Maung Ba Shwe v. Ma Nyun...	9	457
14	Nga Mya v. King-Emperor ...	9	458
16	Maung Kauk Sit v. Muthuveerappa Chetty ...	9	460
16	Findlay & Son v. Nursee Tejsee	9	460
17	Arunachelam Chetty v. Maung Po Thin ...	9	461
18	Subbiah Pillai v. Abdul Rashid...	9	462
19	Ma Sein v. Chidambaram Chetty...	9	463
21	Irrawaddy Flotilla & Co, Ltd. v. Nachiappa Chetty ...	9	465
23	Maung Ba Kyaw v. Ma Saw ...	9	467
24	King-Emperor v. Lansha ...	9	468
24	Venkatachellan Chetty v. Maung Kyauk Len ...	9	469
26	Commissioners for the Port of Rangoon v. Moolla Dawood Sons & Co. ...	9	470
28	Maung Po Thet v. Anamalay Chetty	9	472
30	J. M. v. King-Emperor ...	8	469
33	Birch v. Emperor ...	9	581
35	Bur Singh v. Uttam Singh ...	9	33
40	Maung Pya v. Maung O Za ...	9	770
41	Ma Thaw v. Ma Sein ...	3	716
43	Chenniah Chetty v. Ma Mi ...	9	771
44	Abdul Majid v. Abdul Majid ...	9	772
45	Venkatachellum Chetty v. Nagappa Chetty ...	9	773
46	Maung Po On v. Maung Tum U ...	9	774
47	Pallaneappa Chetty v. Ma Shwe Me	9	774
48	Madanjit v. King-Emperor ...	9	775
50	Naga Po Chit v. King-Emperor...	9	778
56	Po Thoung v. King-Emperor ...	10	705
65	Kumar Chandra Kishore Roy v. Prasanna Kumari Dasi ...	9	722
67	Palaneappa Chetty v. Mathu Chetty	10	770
67	King-Emperor v. Nga Lu Nyun...	10	771
68	Ma Kywe v. King-Emperor ...	10	772
68	Nga Po Hnyin v. King-Emperor	10	772
69	King-Emperor v. Mya Mya Din ...	10	773
69	Nga Po Tok v. King-Emperor	10	773
70	Maung Ba Chit v. King-Emperor	10	774
71	Lu Gale v. King-Emperor ...	10	775
71	Ana Pena Nater Sha v. Anamalay Chetty ...	10	776
74	Ma Hnin Gaing v. Ma Tha Li ...	10	778
74	Maung Bya v. Maung San Thu ...	10	779
76	Maung Aung Myat v. Ma Ywet...	10	780
81	Subramoniam Chetty v. Pichai Rowther ...	10	786
83	Mahomed Jewa Motalla v. Wilson	10	787
84	U Dhammaloka v. King-Emperor	10	789
87	Charles Stevens, *In the matter of*...	10	792
87	Chari v. King-Emperor ...	10	792
89	Somasundaram Chetty v. Muthu Veerappa Chetty ...	10	794
91	King-Emperor v. Kan Haw ...	10	796
95	Maung Kyauk Gyi v. Mhung Lu Nyo ...	10	801
97	King-Emperor v. Ali Cassim ...	10	929
113	Mahomed Ally v. Emperor ...	10	917
115	Ma Lon Ma v. Mg Shwe Byu ...	10	919
117	Arunachallam v. Veerappa ...	10	864
117	Ket Foon v. Emperor ..	10	921
118	Mg Lu Gale v. Venkatachellam ...	10	922

(B).—5 LOWER BURMA CHIEF COURT RULINGS, FROM OCTOBER TO DECEMBER, 1910.

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219	Aung Ban v. Nan Ko ...	8	961	241	J. Reid v. So Hlaing ...	8	952
221	Po Thaung v. King-Emperor ...	10	705	251	Venkatachellan Chetty v. Kyauk Lon ...	9	469
231	Shwe Gon v. Hnin Bwin ...	9	442				

6 LOWER BURMA CHIEF COURT RULINGS, FROM JANUARY TO JUNE, 1911.

Page of Vol. 6 L. B. R. 1911.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1910-11. V.	P.	Page of Vol. 6 L. B. R. 1911.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1911. V.	P.
1	George Gillespie & Co., Ltd., v. Maung Maung ...	8	441	16	Lu Gale v. Maung Sein ...	11	929
4	Po Chit v. King-Eemperor ...	9	778	17	V. P. Govindasawmy v. K. V. K. Koolayappa Rowther ...	11	930

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1 UPPER BURMA RULINGS, FROM OCTOBER 1910 TO MARCH, 1911.

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57	K. E. v. Nga San Myin ...	11	250	75	Nga Tok v. Subramonian Chetty ...	10	994
61	Mi Ngwe Zan v. Mi Shwe Taik ...	10	987	78	U Teik Ka v. Nga Tin Byu ...	10	996
66	Nga Po Aung v. K. E. ...	11	256	82	Baijnath Singh v. Mi Gauk ...	11	742
66	Nga Po Tun v. Mi Thet Pon ...	10	991	84	Mi Bu v. Nga Po Saung ...	11	743
69	Nga Pwe v. Mi Chan Tha ...	10	993	86	Nga Naing v. Mi Bu ...	11	745
70	Nga San Hmi v. K. E. ...	11	247	87	Nga Tha Kin v. K. E. ...	11	792
73	Nga Tha Tu v. K. E. ...	11	249				

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(A).—38 I. L. R., CALCUTTA SERIES, FROM JANUARY TO MAY, 1911.

Page of Vol. 38 I. L. R. Cal. 1911.	Names of Parties.	Corresponding Vol. and page of Ind. Cas. 1910-11. V.	P.
1	Suchand Ghosal *v.* Balaram ...	6	810
13	Asad Ali Mollah *v.* Haidar Ali ...	6	826
24	Harendra Kumar *v.* Girish Chandra	7	798
28	British and Foreign Marine Insurance Co., Ltd. *v.* India General Navigation and Railway Co., Ltd.	9	364
50	British and Foreign Marine Insurance Co., Ltd. *v.* India General Steam Navigation and Railway Co., Ltd. ...	9	960
53	Grey *v.* Charusila Dasi ...	7	247
60	Gobind Pershad *v.* Harihar Charan	7	330
68	Hari Charan *v.* Girish Chandra ...	7	747
75	Surendra Nath *v.* Emperor ...	7	629
96	Emperor *v* Chaturbhuj Sahu ...	8	119
106	Shashi Bhushan Seal *v.* Emperor	7	317
110	British American Tobacco Co., Ltd. *v.* Mahbub Buksh ...	7	279
125	Sagar Chandra Mandal *v.* Digambar ...	10	858
127	Anglo-Indian Jute Mills Co. *v.* Omademull ...	10	859
143	Ramdhari *v.* Ram Charitter ...	7	333
153	Durga Prasad Singh *v.* Ram Doyal	10	955
156	Kali Prasanna Bose *v.* Emperor ...	9	916
169	Emperor *v.* Abani Bhushan ...	8	770
180	Parmeswar Singh *v.* Emperor ...	7	812
182	Gur Pershad Singh *v* Dhuni Rai	7	806
188	Radha Prasad Mallick *v.* Ranimoni Dasi ...	8	1061
202	Sarat Chandra Mitra *v.* Emperor	7	641
214	Joy Chandra *v.* Emperor ...	10	948
227	Surendra Prosad *v.* Emperor ...	10	954
230	British India Steam Navigation Co. *v.* Secretary of State for India	8	107
253	Manmohan Ghose *v.* Emperor ...	8	531
268	Gobinda Chandra *v.* Corporation of Calcutta ...	8	706
270	Jatindra Nath *v.* Prasanna Kumar	8	842
278	Dwarka Nath *v.* Dambarudhar ...	9	394
284	Bali Panda *v.* Jadumani Santra	7	475
288	Pratap Udainath Shah Deo *v.* Madan Mohan Nath ...	7	787
293	Lal Mohan *v.* Kali Kishore	9	965
296	Khagendra Nath *v.* Bhupendra Narain ...	8	530
302	Haru Tanti *v.* Satish Roy ...	9	45
304	Bajrangi *v.* Emperor ...	9	64
307	Amanat Sardar *v.* Nagendra Biswas ...	9	65
309	Abiruddin Ahmed, *In re* ...	8	1108
327	Chandra Kishore Roy *v.* Prasanna Kumari Dasi ...	9	122
335	Nityamoni *v.* Madhu Sudan ...	11	384
339	Asimaddi *v.* Sundari Bibi ...	10	345
342	Hossainara Begam *v.* Rahimannessa Begam ...	8	837
355	Bur Singh *v.* Uttam Singh ...	9	33
368	Naloo Patra *v.* Emperor ...	11	595
372	Manindra Chandra *v.* Secretary of State for India ...	9	311
378	Sarat Chandra Das *v.* Secretary of State for India ...	9	859
387	Ram Saran *v.* Raghu Nandan ...	9	6
391	Raghunath Singh *v.* Abdhut Singh	9	202
394	Kumud Nath Roy *v.* Jotindra Nath	9	189
405	Jumna Dass *v.* Harcharan Dass ...	11	416
408	Bhona *v.* Emperor ...	9	555

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3	Husainara Begum *v.* Rahamannessa Begum ...	8	837
13	Tara Prosad *v.* Kristo Prosad ...	7	473
16	Nityamoni Dasi *v.* Gokul Chandra Sen ...	9	210

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21	Gobind Prasad *v.* Teknarain Mahton	7	330
26	Mochai Mandal *v.* Meseruddin Mollah ...	9	213
30	Barada Prosad Roy *v.* Annoda Mohan Roy ...	6	359
34	Jogendra Lal *v.* Atindra Lal ...	2	638
38	Hara Chandra Bairagi *v.* Bepin Behari Das ...	6	860
43	Hari Charan Gorai *v.* Srish Chunder Sadhukhan ...	7	747
47	Bhuban Mohini Debi *v.* Kiran Bala Debi ...	9	215
51	Jatindra Nath *v.* Prasanna Kumar	8	842
58	Kumar Chandra Kishore *v.* Prasanna Kumari Dasi ...	9	122
63	Muhammad Bakar *v.* Nawab Mirza Muhammad Bakar Ali Khan ...	9	391
69	Bachi *v.* Bikchand Jiomal ...	9	393
72	Bur Singh *v.* Uttam Singh ...	9	33
78	Budhan Sha *v.* Sitanath Sha ...	7	578
85	Nafar Chandra *v.* Ratnamala Debi	7	921
90	Secretary of State *v.* British India Steam Navigation Company ...	9	183
102	Hareck Chand *v.* Charu Chandra Sinda ...	8	766
109	Rakhaldas Mukerji v. Madhab Chandra Singha ...	8	828
115	Sarip Jan Bibi v. Aftabuddin Miah	8	30
119	Purna Chandra v. Rasik Chandra ...	9	568
124	Manindra Chandra Nandi v. Secretary of State ...	9	311
129	Birch v. King-Emperor ...	9	581
132	Bhupendra Kumar v. Purna Chandra ...	8	34
139	Hingu Miah v. Heramba Chandra	8	81
148	Bepin Behary Mitter v. Prokash Chandra Sarkar ...	7	760
150	Hari Lal v. Bengal Nagpur Railway Co. ...	9	331
153	Braja Sunder Roy Chowdhury v. Mati Lal Mozumdar ...	5	493
157	Upendra Nath Nag Chowdhry v. Bhupendra Nath Nag Chowdhry	9	582
158	Tarakant Ghose v. Rai Kishore Ghose ...	6	361
159	Bejoy Chand Mahatap Bahadur v. P. K. Mozumdar ...	9	582
162	Lakshmi Charan Seu v. Sris Chandra Roy ...	9	584
165	Prasanna Kumar Mookerjee v. Burn and Co. ...	7	270
183	Radha Prosad Mullick v. Ranimoni Dasi ...	8	1061
192	Basanta Kumari Guha v. Ramkanai Sen Poddar ...	9	698
203	Guru Prosad Singh v. Dhari Rai ...	7	806
203	Easin Khan v. Abdul Waheb Sikdar ...	6	138
212	Krishna Chandra Basu v. Mohendra ...	9	704
216	Joy Narain Jana v. Upendra Narain Ray ...	9	706
217	Aroj Ali Mandal v. King-Emperor	9	707
219	Harimati Dasi v. Corporation of Calcutta ...	8	891
221	Kumud Nath Roy v. Rai Jatindra Nath Chowdhury ...	9	189
228	Surendra Nath Roy v. Krishnasakhi Dasi ...	9	110
234	Baikunt Nath Chakrabarti v. Hara Lal Pal Chowdhury ...	9	116
239	Faiz Ali Khan v. Sitara Begam ...	7	704
243	Sasirama Kumari v. Meherban Khan ...	9	918
250	Khetra Nath Ghatak v. Piru Bauri	9	478
255	Golam Mowala v. Abdool Sowar Mondul ...	9	922
257	Joytara v. Prankrishna Seal ...	7	769
262	Jogendra Chandra Mitter v. Rajendra Nath Mitter ...	9	923
267	Rammoyi Dasi v. Rupai Pramanick	9	801
271	Bipin Behary Mitra v. Tincowri Pathak ...	9	374
277	Sham Chandra Dafadar v. Gadhadhar Mandal ...	9	377
284	Sarat Chandra Sinha v Nritya Gopal ...	8	47
289	Dhanpat Singh Kulari v Juarmul Tushimul ...	7	161
293	Maizuddi Biswas v. Ishan Chandra Das Sircar ...	7	849
300	Champak Latika Mitra v. Nafar Chandra Pal ...	8	44
305	Bhuiya Sarat Kumar Das Mahapatra v. Akshoy Narayan Das ...	9	961
312	Nanda Kumar Saha v. Gobinda Mohan Das ...	6	135
316	Meser Mullick v. Hafizuddi Mullick	9	965
318	Jagadish Chunder Sanyal v. Lal Mohan Poddar ...	7	864
322	Debendra Nath Bhattacharjee v. Haridas Bhattacharjee ...	7	844
327	Gobinda Chandra Addy v. Corporation of Calcutta ...	8	706
329	Lal Mohan Mandal v. Kali Kishore Bhuymali ...	9	965
331	Lal Behary Singh v. King-Emperor	9	361

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335	Edward Thornton *v* King-Emperor	9	480
339	Bhuban Mohun *v* Girish Narain ...	10	87
345	Kishen Parshad *v.* Har Narain Singh ...	9	739
351	Ashfaq Hussain *v.* Gauri Sahai ...	9	975
357	King *v.* Secretary of State for India in Council ...	9	858
360	Sarat Chandra Das *v.* Secretary of State for India in Council ...	9	859
365	Srinivasa Prasad Singh *v.* Kesho Prasad Singh ...	9	862
390	Kesho Prasad Singh *v.* F. A. Slacke and W. C. Macpherson ...	10	253
394	Kesho Prasad Singh *v.* Srinivasa Prasad Singh ...	10	256
399	Ganes Narayan Singh *v.* Malida ...	10	450
404	Ramsona *v.* Sonamala ...	10	90
412	Raghunath Singh *v.* Abdhut Singh	9	202
415	Nityananda *v.* Nanda Kumar ...	10	163
418	Bazlul Karim *v.* Satis Chandra ...	10	325
425	Haru Panti *v* Satis Roy ...	9	45
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Additional evidence on appeal—*Power of Appellate Court—Legitimate occasion for taking additional evidence.*

The legitimate occasion for the admission of additional evidence by an Appellate Court arises when, on examining the evidence as it stands, some inherent defect becomes apparent.

Where a Sub-Judge on appeal did not examine the evidence and come to any conclusion that a fresh local investigation was needed to enable him to pronounce judgment, but remanded the case for further investigation: *Held*, that the order of the Sub-Judge was wholly without jurisdiction.

Kessowji Issur v. *G. I. P. Ry. Co.*, 31 B. 381; 11 C. W. N. 721; 6 C. L. J. 5; 4 A. L. J. 461; 2 M. L. T. 435; 9 Bom. L. R. 67; 17 M. L. J. 347 (P. C.); and *Krishnama Chariar* v. *Narasimha Chariar*, 31 M. 114; 3 M. L. T. 308, relied upon. JANKI KOER *v.* LAL MAN ROY **332**

Adhsali, definition of—Right of *Adhsalidar* to partition **147**

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Administration, letters of—Widow managing her husband's estate—Removal—Grant of Letters of Administration—Liability to account **670**

Administration—concld.

—— ——, *letters of—Probate and Administration Act (V of 1881), scope and object of—Question of title—Effect of grant of Letters—Power of Court to give possession of property.*

It is not necessary, in proceedings under the Probate and Administration Act on an application for Letters of Administration, to decide what the estate of the deceased consisted of.

Questions of title can only be determined in a regular suit.

The fact that a Court has granted Letters to a person does not authorize it subsequently to give him possession of any property. The grant of Letters of Administration does not, without further proceedings, entitle the grantee to possession. Except in regard to the exhibition of an inventory and the revocation of Letters, the Court becomes *functus officio* after the grant.

Maung Ye Gyan v. *Ma Hmi*, 1 L. B. R. 155; *Karim Bux* v. *King-Emperor*, 2 L. B. R. 161; *Mi Pwa* v. *Mi Thein Yon*, 4 L. B. R. 287, followed. NGA PWE *v.* MI CHAN THA, U. B. R. (1910) I, 69 **993**

Administrator—*Alienation without leave of Court—Voidable, not void—Benefit to estate—Repayment of debt of owner of property—Avoidance of alienation—Keeping advantage obtained under alienation—Probate and Administration Act (V of 1881), s.* 90.

An alienation by an administrator without leave of the Court, where such leave is necessary under section 90 of the Probate and Administration Act, is not void but merely voidable; and, consequently, no person who is entitled to avoid the transaction ought to be allowed to do so in such a manner as to enable him to recover property which would otherwise be lost to him and at the same time to keep the money or other advantages which he has obtained under it.

The Eastern Mortgage and Agency Co. Ld. v. *Rebati Kumar Roy*, 3 C. L. J. 260, followed.

Where it is found that an administrator created a mortgage without the permission of the Court, but he did it for the benefit of the estate, that is, to repay a loan taken by the original owner, the mortgage should not be avoided unconditionally; and when the plaintiff does not offer to pay off the mortgage, the transaction cannot be set aside. CHARU CHANDRA PAL *v.* KALIDAS CHANDRA, 13 C. L. J. 447 **269**

Admiralty Jurisdiction Act, 1860, s. 1 **705**

—— — **Offences Act, 1858, s. 1** **705**

Admissibility of *chaukidar's* register of births and deaths **713**

—— —— — Document executed in a Native State, stamped according to the laws of that State—Admissibility in evidence in British India **247**

—— —— Lease Term exceeding one year—Evidence not admissible without registration—Whether admissible to prove present demise—Relation of landlord and tenant **892**

—— —— of plans and maps prepared by Government **653**

—— — — — of register of transfers to prove transfers **225**

Admissibility—concld.

——————— of statements previously made by witness and recorded in the absence of accused 119

——————————Subsequent conduct of parties, when admissible 1004

Admission—Effect of attestation 424

——————, *effect of—Burden of proof.*

An admission by a party, though not necessarily conclusive, is sufficient by itself to shift the burden of proving the contrary on to the person making it or his representative-in-interest.

Chandra Kunwar v. *Chaudhri Narpat Singh*, 29 A. 184; 11 C. W. N. 321; 4 A. L. J. 102; 5 C. L. J. 115; 17 M. L. J. 103; 2 M. L. T. 109; 9 Bom. L. R. 267, followed. SAKHA RAM *v.* SHRI RAM, 7 N. L. R. 23 700

Adverse possession — Mortgagee cannot hold adversely to mortgagor 999

——————*Co-heirs—One heir managing property—Other heir minor—Brother and sister.*

A Muhammadan brother and sister inherited together property left by their deceased father. The sister's name was not recorded in the revenue papers to the extent of the share legally inherited by her nor did she get profits proportionate to that share. The sister was a minor at the time of her father's death and her brother used to manage the property. She lived in the same house with her brother and died in that house:

Held, that under these circumstances it could not be said that the sister was excluded from her legal share and that the brother was in adverse possession. INAYAT HUSSAIN *v.* AZIZ BANNO 413

——————————*Mortgage by trespasser—Mortgagee in possession for over* 12 *years—Prescriptive title complete.*

A., a trespasser in respect of a certain fixed rate holding, mortgaged it to *B.* in 1884. *B.* remained in possession of the property ever since:

Held, that the possession of *B.* was equivalent to the possession of his mortgagor, and as he had been in possession for over 12 years, it must be held that *A.* and *B.* had acquired a title by adverse possession. BENI MADHO SINGH *v.* DEBI SARAN DUBE 545

——————————*Physical possession—Abridgment of title Adverse possession—Registration of name, whether equivalent to possession.*

Although a person may be in physical possession of property, his title therein may be abridged by reason of adverse possession on the part of his opponent.

Although registration of name under the Land Registration Act may be evidence of possession, it is not necessarily equivalent to actual possession, nor is it sufficient to interrupt the adverse possession of the opponent of the person whose name has been registered. JOY KALI ROY *v.* HEMANGINI DEBI 363

——————————*ripening into ownership—Trespasser—Constructive possession—Presumption—Trespasser of a part not a trespasser of the whole—Burden of proof—Evidence Act (I of* 1872*), s.* 114*—Limitation Act (XV of* 1877*), Sch. II, art.* 144.

(1) Adverse possession which ripens into ownership, under the Indian Limitation Act, must be actual, exclusive and continuous for more than 12 years.

(2) No presumption of constructive possession ought to be made in favour of a trespasser.

Adverse possession—concld.

(3) A trespasser by virtue of being in adverse possession of a part cannot be deemed to be in adverse possession of the whole. A plaintiff who bases his title on adverse possession for more than 12 years must prove that his possession was actual, continuous, exclusive and adverse for more than 12 years.

(4) The law relating to presumptions is not intended to enable a wrong-doer to turn it to his own account. A wrong-doer, therefore, cannot be allowed to call in aid the provisions of section 114 of the Indian Evidence Act to establish his title.

Jagjivan Das v. *Bai Amba*, 25 B. 362; *Vithal Das* v. *Secretary of State for India*, 26 B. 410; *Tarubai* v. *Venkatarao*, 27 B. 43; *Secretary of State for India* v. *Krishnamoni Gupta*, 29 C. 518; 29 I. A. 104; *Wali Ahmed Chowdhry* v. *Totameah Chowdhry*, 31 C. 397; *Udit Narain* v. *Golab Chand*, 26 I. A. 236; 27 C. 221; *Rains* v. *Baxton*, 14 Ch. D. 537; 49 L. J. Ch. 473; 43 L. T. 88; 28 W. R. 954, referred to. ZAHURAN *v.* RAHIM, 8 A. L. J. 247 742

Agency. *See* PRINCIPAL AND AGENT.

Agra Tenancy Act (II of 1901), s. 4 (12) 284

——————————**ss. 10, 202**—*Exchange—Ex-proprietary tenancy—Suit for possession in Civil Court—Defendant pleading tenancy—Procedure.*

By virtue of section 10 of the Agra Tenancy Act, 1901, no ex-proprietary tenancy arises where there is an exchange of *Zemindari* between co-sharers.

Where in a suit for possession in a Civil Court, the defendant pleads that he held the land as a tenant, the Court of first instance is bound to follow the procedure laid down in section 202 of the Agra Tenancy Act, II of 1901, and to require the defendant by order in writing, to institute within three months a suit in the Revenue Court for the determination of the question whether the defendant is plaintiff's tenant or not. KURA SINGH *v.* CHHALLU, 8 A. L. J. 329 845

——————————**ss. 11, 34**—*Holding of tenancy for over twelve years without payment of rent with consent of* zemindar—*Acquisition of occupancy-right.*

A tenant who has been in possession of a holding for over twelve years with the consent of the *zemindar* can acquire an occupancy-right in the holding notwithstanding the fact that he has been paying no rent to the *zemindar*. Section 34 of the Agra Tenancy Act, 1901, does not apply to such a case. KHUSHI RAM *v.* MAHA SINGH 112

——————————**s. 34** 112

——————————**s. 34** — *Applicability of the section—Tenant holding with consent of* Zemindar.

Section 34 of the Agra Tenancy Act, 1901, applies to a case where a person occupies land without the consent of the landholder and not where he occupies it as his tenant. CHIDDA SINGH *v.* RUP RAM 224

——————————**s. 40** 465

——————**s. 57 (b)**—*Ejectment—Trees planted by tenant—Breach of contract.*

A tenant who plants trees in contravention of the contract under which he holds the holding, is liable to ejectment under section 57 (*d*) of the Agra Tenancy Act, 1901. SHIAM NARAIN SINGH *v.* RAM PRASAD 2

Agra Tenancy Act—concld.

——— ——— ——— s. 90 465

——— ——— ——— s. 108—*Entries of payment of rent in a pocket-book—Presumption as to full payment of rent—Receipt — Rent—Revision—Government revenue remitted.*

In a suit for arrears of rent the defendants pleaded that they had paid the rent claimed by the plaintiff in full and that nothing was due from them. In support of their plea they produced a pocket-book which contained certain entries of payments made. The plaintiff admitted the entries:

Held, that the entries in the pocket-book did not amount to receipts within the meaning of section 108 of the Agra Tenancy Act, 1901, therefore, they raised no presumption that the payments entered in the book amounted to an acquittance in full of all demands up to the dates on which the entries were made.

Where Government revenue for a period is remitted but the rent payable by lessees is not expressly remitted and they are themselves liable to pay Government revenue, they cannot claim any remission in the rent payable to the lessor. GULAB SINGH v. DEBI SINGH, 8 A. L. J. 505 1002

——— ——— ——— s. 146, Sch. 4, No. 6—*Suit for damages—Distraint—Cause of action, when accrues—Knowledge of plaintiff—Limitation.*

Under No. 6 of the 4th Schedule to the Agra Tenancy Act, the limitation for a suit for compensation for wrongful acts of a distrainer, brought under section 146, is three months from the date on which the right to sue accrued. Such right to sue accrues when the plaintiff's property is lost, destroyed or damaged or he has knowledge of the loss, destruction or damage. DAMBAR SINGH v. BALWANT SINGH, 8 A. L. J. 503 502

——— ——— ——— s. 158—*Rent-free grant—Resumption—"Two successors," meaning of—Proof as to who the original grantee was.*

Section 158 of the Agra Tenancy Act does not provide that the person succeeding must necessarily be the heir of the person who preceded him.

For the purpose of section 158 it is not necessary to prove who the original grantee was. NIHAL SINGH v. BALDEO PERSHAD 39

——— ——— ——— s. 202 845

Agreement *to supply funds for litigation, effect of—Right to recover property based on such agreement—Sale—Conveyance.*

One *I.* was entitled to succeed to certain property on the death of a widow as being the nearest reversioner of the widow's deceased husband. The property was in possession of remoter reversioners In order to prosecute his claim he entered into an agreement with the plaintiff, by which he agreed to give him half the property in dispute in lieu of the funds supplied to him by the plaintiff for the expenses of the suit. The plaintiff and *I.* jointly sued for possession of the property. Before decision of the case, *I.* died and the question arose whether on the basis of the said agreement plaintiff could recover half of his share in the property The Courts below allowed the plaintiff's claim:

Held, on appeal, that the agreement in question did not amount to a sale as defined in the Transfer of Property Act or to a "conveyance" as defined in the

Agreement—concld.

Indian Stamp Act and that it did not transfer any property to the plaintiff nor did it confer any title on him.

Raghunath v. *Nilkanth*, 20 C. 843; 20 I. A. 112; *Lal Achal Ram* v. *Raja Kazim Husain Khan*, 8 O.C. 155; 9 C. W. N. 477; 27 A. 271; 15 M. L. J. 197; *Bajrangi Singh* v. *Bhagwan Bakhsh Singh*, 11 O. C. 301; *Haji Niyamat Ali* v. *Ilahi Bakhsh*, 8 Ind. Cas. 500, followed. INDAR SINGH v. KESRI SINGH, 14 O. C. 139 179

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Amendment Pleading—Alteration in description of property detailed in plaint made beyond limitation Power of Court to make the amendment—Effect on limitation 476

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——— **of decree.** *See* DECREE, AMENDMENT OF.

of plaint—Amendment in second appeal Complicated question of law involved—Authorities as to remedy open to plaintiff conflicting Plaintiff adhering to his own view—Amendment allowed Amendment, when to be allowed—General rule 218

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——— ——— Joinder of causes of action and parties—Suit for possession as heir—Impleading of different alienees in one suit—Trial of separate issues—Interlocutory judgments—Practice 48

——— ——— ——— Pleadings—Practice—Contradiction—Raising an objection by Court 991

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——— ——— ——— Suit for recovery of debt—Amendment of plaint into a suit for partnership accounts not permissible 250

——— ——— ——— Various causes of action joined 738

——— ——— ——— *Relief misconceived—Granting of appropriate relief.*

A suit ought not to be dismissed merely because the plaintiff has misconceived the appropriate reliefs to which he was entitled. He should be allowed to amend his plaint by inserting a prayer for proper reliefs. ABDULKADIR v. BANGARU SWAMI NAICKEN, 2 M. W. N 270; 9 M L T. 423 260

——— ——— **of pleadings,** when to be allowed 532

Animals—*Damage caused by vicious animals—Elephants, whether* feræ naturæ*—Liability of both owner and servant entrusted with keep of animals.*

The test for determining whether an animal is vicious by nature or not, is whether years ago and continuously up to the present time the progeny of this class of animals has been found by experience to be harmless.

Filburn v. *People' Palace Aquarium Co.*, 25 Q. B. D. 258; 59 L. J. Q. B. 471; 38 W. R. 706; 55 J. P. 181; referred

Animals—concld.

In each case the question is, whether the particular class of animals is dangerous, though individuals may be tamed, and if a person keeps an animal belonging to a dangerous class, he must take the risk of any damage it may do.

The liability of the owner of an animal does not depend on the manner or extent of its employment, but on the nature of the class to which such animal belongs.

Elephants as a class are dangerous though individuals may be tamed and domesticated, and both the owner of the elephant and the servant to whose keeping it is entrusted are liable in damages for any harm done by it.

Mahadar Mohanta v. *Balaram Gagoi*, 35 C. 413; 12 C. W. N 547, distinguished.

Maung Kyam Dun v. *Narayanan Chetty*, 2 U. B. R. 570, referred to. MANKADA KOVILAGAM *v.* MALANKATTIL KOPPAN, 21 M. L. J. 434; 9 M. L. T. 496 **108**

Appeal, abatement of. *See* ABATEMENT.

——— Additional evidence on appeal Power of Appellate Court – Legitimate occasion for taking additional evidence

——— Amending plaint according to decision of Appellate Court Appeal from order Acquiescence - Conduct Estoppel Right to file appeal **463**

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——— dismissed for non-payment of proper Court-fee Cross objections, whether can be entertained after such dismissal of appeal – General rule —Exceptions **207**

——— filed without copy of decree—Copy of judgment obtained first– Copy of decree applied for after expiry of ordinary period of limitation— Exclusion of time taken in obtaining copy of decree —Time requisite for obtaining copy—Sufficient cause **866**

——— heard *ex parte* against defendant No. 2 in lower Appellate Court—Second appeal by defendant No. 1 making plaintiff alone respondent—Rehearing of appeal, application for, by defendant No. 2 —Jurisdiction of lower Appellate Court to entertain application **275**

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——— Order assessing value of property to be sold **371**

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——Order rejecting an application for review **725**

——— Plaint - Signature by plaintiff essential— Defect in signature, effect of—Defect in signature, no ground for interference **731**

——Power of Appellate Court to adjudge questions not subject of an issue **351**

— Power of Appellate Court to allow withdrawal of suit **813**

——— Power of Appellate Court to decide case on the evidence on record **225**

— Rejection of application to be put in possession of the estate of the deceased **414**

— Remand by lower Appellate Court – Second decision by first Court and lower Appellate Court— Subsequent appeal from remand order without appealing from second decree of lower Appellate Court—Appeal incompetent **514**

— Sale Application to set aside sale—Compromise between decree holder and judgment-debtor behind back of auction-purchaser, to have sale set aside, if valid - Right of auction-purchaser to appeal **148**

——Suit, proper trial of - First Court not taking defendant's evidence and dismissing suit— Lower Appellate Court decreeing claim upon the same evidence—Irregularity **441**

, *ground for – Pleader's inability to go on with the case - Prayer for time not acceded to.*

Where an appellant's Pleader falls ill on the day of hearing and time is given to engage another Pleader but the Pleader so engaged does not argue the case but applies for time which is not allowed and the case is proceeded with, the order of the Court refusing to allow further time is not open to second appeal. JADU BANS *v.* BHUNESRI **214**

———*Revision—Punjab Courts Act (XVIII of 1884), s.* 70 (1) (*a*) *and* (*b*)*—Civil Procedure Code (Act V of* 1908), *s.* 104 (2) *and O. XLIII, r.* 1 (*a*)*— Order of remand—Jurisdiction.*

An order of remand directing a lower Court to hear a suit on the ground that it had jurisdiction to do so, is not open to revision under section 70 (1) (*a*) of the Punjab Courts Act, or appeal under section 70 (1) (*b*) of that Act.

Sardar Arur Singh v. *Bua Ditta*, 4 P. R. 1911; 9 Ind. Cas. 674, followed. MANNU LAL *v.* HAR CHARAN DAS **36**

— *Three suits—One judgment—Separate orders —No consolidation—One appeal, irregular.*

One appeal from three distinct orders recorded in three distinct execution cases which were decided by one judgment, as the objections taken in the several cases were of the same description, is incompetent and irregular when there was no order of consolidation of the cases.

Royal Insurance Co, v. *Akhoy Coomar Dutt*, 6 C. W. N. 41; *Panchanada* v. *Vaithinatha*, 29 M. 333; *Mariamnissa* v. *Joynab*, 33 C. 1101; 10 C. W. N. 934; 4 C. L. J. 149; *Damodar* v. *Sheoram*, 29 A. 730 and *Laharia* v. *Debia*, 33 A. 51 (F. B.), relied upon.

Appeal—concld.

Enayetoolah v. *Radha*, 15 W. R. 395; *Kashi Prasad* v. *Secretary of State*, 29 C. 140; *Gopal Lal Tagore* v. *Tilluck Chunder*, 3 W. R. (P. C.) 1; 10 M. I. A. 183; *Doorga Pershad* v *Tara Pershad*, 3 W. R. (P. C.) 11; 10 M. I. A. 203 and *Soorendra Pershad* v. *Nundun Misser*, 21 W. R. 196, referred to and explained.

Chatterput v. *Gopi Chand*, 4 C. W. N. 446; 26 C. 750, distinguished. RAKHAL CHANDRA TEWARY *v.* MANMATHA NATH MITTER **415**

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——— ——— — Question of fact. *See* QUESTION OF FACT.

——— ——— Suit decreed in part—Plaintiff's appeal in so far as his claim dismissed—Defendant's appeal in so far as plaintiff's claim decreed Plaintiff's appeal dismissed and that of defendant decreed—Plaintiff's further appeal only in so far as defendant's appeal allowed, effect of **238**

Appeal to Privy Council. *See* PRIVY COUNCIL APPEAL.

Appropriation of payments. *See* CONTRACT ACT, s. 59.

Approver, evidence of—Corroboration—Practice—Photographing of under-trial prisoner condemned **582**

——— ———*Conviction based on evidence of approver alone.*

A conviction should not be based on the evidence of an approver alone unless it is corroborated by reliable, independent evidence. NANZIGADU *v.* EMPEROR **284**

Arbitration—Order filing an award—Decree based thereon **512**

——— *Application not signed by all parties interested in the suit at the time of reference, whether invalid and award illegal—Civil Procedure Code (Act V of 1908), Sch. II, s 1*

If all the parties interested at the time when a reference is made to arbitration have not joined the reference, the reference is invalid and the award which follows such reference is also invalid.

Arbitration—concld.

Pitam Mal v. *Sadiq Ali*, 24 A. 229; *Kadhu Singh* v. *Baljit Singh*, 29 A. 423; 4 A. L. J. 847; A. W. N. (1907), 147; *Ishar Das* v. *Keshab Deo*, 32 A 657; 7 A. L. J. 807; 7 Ind. Cas. 68, referred to. HASWA *v.* MAHBUB, 8 A L. J. 645 **559**

——— — ———*Award—Private arbitration Order filing award—Appeal—Civil Procedure Code (Act V of 1908), s. 104, sub-s. (1) cl. (f) and Sch. II, s . 21—Legal misconduct of arbitrator—Hearing evidence behind back of one party—Private inquiries—Award incomplete—Leaving certain matters undetermined—Award bad and unenforceable.*

An order directing a private award to be filed and a decree to be drawn up on the basis thereof, under section 21 of Schedule II of the Civil Procedure Code of 1908, is appealable under section 104, sub-section (1), clause (*f*).

In arbitration proceedings, both sides must be heard, and each in the presence of the other.

Consequently, an arbitrator entirely misconceives his duty, who takes upon himself to hear evidence behind the back of the party interested in controverting it; and it is legal misconduct on the part of an arbitrator to make private inquiries and to base his award on information which he has privately obtained.

Therefore, an award based partly on private inquiries cannot be treated as binding.

An award should be a final decision on all matters referred to the arbitrator. Where it leaves undecided one of the cardinal points in controversy, the award is bad. GANES NARAIN SINGH *v.* MALIDA KOER, 13 C. L. J. 399 **450**

——— — **—Act (IX of 1899), s. 15**—*Appeal from an order under s. 15—Civil Procedure Code (Act V of 1908), ss. 104, 106, 115—Appeal treated as a revision.*

A proceeding under the Arbitration Act is not a suit and does not end in a decree. There is no provision in the Act requiring a Court to make an order filing or refusing to file an award. The award is filed by the arbitrators under section 11 and unless it is remitted to them under section 13 (1) or set aside under section 14 it becomes "enforceable as if it were a decree of Court." The order of a Court, under the Act, in whatever terms it may be expressed, is one either setting aside or refusing to set aside an award. There is no provision in section 104, Civil Procedure Code, for an appeal against such an order, and it is outside the scope of section 104 (*f*), which deals with orders filing or refusing to file an award.

The fact that an award is "enforceable as if it were a decree" makes it clear that it is not a decree, though it may be executed as though it were a decree.

In this case an appeal was treated as a revision. KEWALRAM *v.* DONALD GRAHAM AND CO. **211**

Arms Act (XI of 1878), ss. 14, 15 and 19, cl. (f)—*Accused made over gun to another a year and a half ago—If accused liable to punishment.*

Where it is proved that a person who kept a gun for some time made it over to another to keep for him, he cannot be convicted of an offence under section 19, clause (*f*), of the Arms Act. AKHIL NATH *v.* EMPEROR, 15 C. W. N. 440 **688**

——— — ——— **ss. 15, 19 (f)** **688**

Arms Act—concld.

——— ——— ——— **ss. 19 (f), 20**—*Concealment of arms after arrest.*

The first part of section 20, does not deal with cases of concealment or of attempts at concealment, made by a man who has arms on his person, or in a bag which he is carrying, or which are otherwise in his immediate personal possession, only on being arrested. It is meant to deal with cases of concealment before arrest.

Where an offence under section 19 (*f*) has been committed, no proceedings ought to be instituted without the previous sanction of the District Magistrate. If such sanction has not been obtained the proceedings are null and void. The absence of sanction cannot be treated as a mere irregularity. GOPALAKRISHNA IYER *v.* EMPEROR, 2 M. W. N. 271; 9 M. L. T. 475 **261**

——— **s. 20** **261**

Army Act, (1881), s. 194 **719**

Arrest—Decree obtained in Sonthal *Parganahs*—No arrest in execution—Transfer of decree to Court outside Sonthal *Pargannahs*—Whether decree may be executed by arrest of judgment-debtor **538**

Assignment *admitted by assignor—When can be impugned by a third party—Pleadings.*

Ordinarily, an assignment cannot be impugned by a third party when the assignor admits it. But a third party is entitled to impugn it when the transfer is a colourable one, and has been entered into with the object of defrauding him. JWALA PRASAD *v.* BHARAT SINGH **226**

——— ——— ——— *Sham transaction—Burden of proof—Consideration—Practice—Decision on issue of fact—No specific issue framed.*

If the parties to a suit adduce evidence on a question of fact and a decision is arrived at thereon, that decision will be good, notwithstanding the question not being put in issue, provided neither party is prejudiced thereby.

The burden of proving the reality of the consideration in the case of an assignment lies on the assignee. AYYALAMMAI SERVAIGARAR *v.* NALLASAWMI PILLAI, 9 M. L. T. 407 **291**

——— ——— **of debt**—*Validity to be tested by what law—Transfer of Property Act (IV of* 1882*), ss.* 130, 131—*Notice to debtor.*

The validity of an assignment must be tested with reference to the law as it stood at the time when it was made.

Abdul Aziz v. *Appayasami*, 27 M. 131; 31 I. A. 1 at p. 9 and *Baidya Nath* v. *Kaminikant*, 6 C. L. J. 572, relied upon.

The provision of section 131 of the Transfer of Property Act, as it originally stood, did not invalidate a transfer of an actionable claim made without notice: it merely suspended the operation of the assignment as against the debtor until notice had been given.

Kalka Prasad v. *Chandan Singh*, 10 A. 20, referred to. ISMAIL MOLLAH *v.* JADU NATH, 13 C. L. J. 641 **510**

Assignment of Government Revenue—*Right of Government to remit such revenue—Assignee bound by remission*

The assignee of Government revenue takes the assignment subject to all the rights of Government to assess, enhance, reduce, remit or suspend the revenue. Hence, if the Government remits a portion of the assigned revenue the assignee cannot realize that portion from the *zemindars*. BENI MADHO *v.* BHAGWAN PRASHAD, 8 A. L. J. 554 **144**

Attachment—Effect of dismissal of application for execution **245**

——— ———, Jurisdiction of Civil Courts to attach trees **473**

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——— ——— ——— *before judgment—Objection on ground that property not saleable, if to be taken when attachment is made—If not taken then, whether investigation of question is barred—Civil Procedure Code (Act XIV of* 1882*), ss.* 266, 483, 487.

When an application is made for attachment before judgment, a defendant is not, at that time, obliged to take exception to the validity of the attachment on the ground that the property is not transferable. If he takes that objection after a decree is passed, the investigation of the question is not barred for the reason that he omitted to take it before.

Mungal Pershad v. *Grija Kant*, 8 I. A. 123; 8 C. 51; 11 C. L. R. 113; *Durga Charan* v *Kali Prosonna*, 26 C. 727; 3 C. W. N. 586; *Sheikh Murulla* v. *Sheikh Burulla*, 9 C. W. N. 972; *Coventry* v. *Tulsi Prasad*, 8 C. W. N. 672 and *Dwarkanath* v. *Tarini Sankar*, 34 C. 199; 11 C. W. N. 513; 5 C. L. J. 294, distinguished. BASIRAN MALO *v.* KATYANI DEBI, 15 C. W. N. 795; 38 C. 448 **305**

——— ——— ——— *before judgment of property situate outside the Court's jurisdiction—Allowable under the new Code—Civil Procedure Code (Act V of* 1908*), ss.* 46 *and* 138, *O. XXXVIII, r.* 5—*Civil Procedure Code (Act XIV of* 1882*), ss.* 483, 648.

Though the property, referred to in clause (*b*) of Order XXXVIII, rule 5, of the new Civil Procedure Code, must be property within the local limits of the Court's jurisdiction, no such restriction is imposed with regard to the property mentioned in clause (*a*). The rule clearly permits the attachment before judgment of property situate either within or without the legal limits of the Court's jurisdiction.

The removal from the new rule of this restriction as to the locality in which property capable of being attached under it must be situate, which there was in the corresponding section 483 of the old Code, has altered the law. SOMASUNDARAM CHETTY *v.* MUTHU VEERAPPA, 4 BUR. L. T. 89 **794**

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Bengal Act VIII (B. C.) of 1865, s. 6—*"All costs of process"—Whether include costs of execution—Sale in execution of rent-decree—Some of costs entered in sale proclamation, not really due, effect of—Unregistered purchaser—Title—Superiority—Purchaser at rent sale.*

The words "all costs of process" in section 6 of Act VIII B. C. of 1865 are quite wide enough to include costs of execution such, for instance, as the fees necessary for the issue of an attachment or a sale-proclamation.

If the plaintiff judgment-debtor, in a suit to set aside a sale for arrears of rent, succeed in proving that some of the costs of process entered in the sale proclamation was not really due from him, the sale which followed in perfect good faith on that sale-proclamation cannot be regarded as null and void.

An unregistered purchaser of a tenure cannot set up his title against a person purchasing at a sale of the tenure for arrears of rent, and cannot succeed in a suit for possession or for a declaration that the sale was collusive.

Sham Chand Koondoo v. *Brojo Nath Pal*, 21 W. R. 94; *Kristo Chunder Ghose* v. *Raj Kristo Bandyopadhaya*, 2 C. 24; *Palit Shahu* v. *Hari Mahanti*, 27 C. 789; *Niladri Mahanti* v. *Bichitranand Roy*, 6 Ind. Cas. 605; 37 C. 823; 14 C. W. N. 905; 12 C. L. J. 158, followed.

Sheik Afzul Ali v. *Lalla Gurnarain*, 6 W. R. Act X Rulings p. 59, doubted. KIRPA SINDHU ROY *v.* BANCHA NIDHI MAHANTI 899

——— Embankment (Act VI B. C. of 1882), ss. 56, 57, 68, 86—*Collector—Power to apportion embankment charges—Contract between zemindar and tenure-holder—Civil Court—Jurisdiction to interfere with Collector's order—Specific Relief Act (I of 1877), ss. 54, 56.*

Under the Bengal Embankment Act, the Collector is authorised to assess the embankment charges on tenures after due notice; and the tenure-holders are bound to pay those sums to the *zemindar*. The Collector's order is not subject to any contract made between the tenure-holders and the *zemindar*; that is, the order is not a nullity even if it be contrary to any such contract.

Section 86 of the Embankment Act enacts that orders passed under section 68 shall be final. The Civil Courts, therefore, have no jurisdiction to modify or alter such orders. SHIBA PRASAD *v.* GOSSAIN DAS DATTA 192

——— ss. 57, 68, 86 192

——— Land Registration Act (VII of 1876 B. C.), ss. 78, 81 467

——— Municipal Act (III B. C. of 1886), s. 6, cl. (11), s 15, proviso, cls. (i) and (ii), ss. 85, 103—*Qualification to vote—Payment of rates and income-tax—Voter must be legally liable to pay rates and tax—Owner—Occupier.*

A person whose income is below the taxable minimum, but who submits to the levy of the income-tax, does not thereby acquire the statutory qualification as a voter as contemplated by section 15 proviso, clause (*ii*), of the Bengal Municipal Act.

Bengal Municipal Act—concld.

The payment of rates to be available as a qualifying circumstance for a voter under section 15 proviso, clause (*i*), must be by a person legally liable to pay the same.

Where a son has contributed considerable sums of money towards the acquisition and subsequent improvement of a house which was purchased in the name of his father who lives at Benares in retirement the son is rightly treated by the Municipality as "owner" and is, therefore, liable under section 103 of the Act to pay rates assessed on the house, and entitled to vote under section 15, clause *(i)*. NARENDRA NATH *v.* NAGENDRA NATH, 13 C. L. J. 471; 15 C. W. N. 586; 38 C. 501 43

——— ——— ss. 15 pro. (i) & (ii), 85, 103 43

——— Public Demands Recovery Act (I B. C. of 1895)—*Certificate—Rent not settled by agreement or by Court.*

No sum can be levied from any one on account of his occupation of Government land by the certificate procedure under the Public Demands Recovery Act till rent has been settled by agreement of parties or has been assessed by a competent Court JUTHI SINGH *v.* SECRETARY OF STATE 335

——— ——— ss. 15, 17 (1) 532

——— Tenancy Act (VIII of 1885), ss. 21, 44, 45, 182—*Homestead—Raiyat holding land at another village under different landlord—Ejectment—Non-occupancy raiyat—Expiration of term.*

The land in dispute was let to the defendant in 1896 for three years. Upon the expiry of that term, he was allowed to hold over and on October 12th, 1905, the plaintiff-landlord served him with notice to quit the land on April 14th, 1906. A suit for ejectment was filed on December 4th, 1906:

Held, that as the notice was not served within six months before the expiration of the term, nor the suit instituted within six months after the expiration of the term, the suit was barred under sections 44 and 45 of the Bengal Tenancy Act.

Obiter dictum.—The provisions of the Bengal Tenancy Act are applicable to the homestead of a person who is a *raiyat*, although he is not a *raiyat* of the village in which the homestead land is situated and is not a *raiyat* of the same landlord as the landlord of the homestead land.

Kirpa Nath Chakravarti v. *Sheikh Anu*, 4 C. L. J. 332; 10 C. W. N. 944, relied upon. HARIHAR CHATTOPADHYAYA, *v.* DINU BERA, 14 C. L. J. 170 139

——— ——— ——— ——— ss. 44, 45 139

——— ——— ——— ——— s. 50—*Presumption of fixity of rent—Suit not under Bengal Tenancy Act—Presumption from circumstances.*

In cases to which section 50 of the Bengal Tenancy Act has no application, a Court may draw any appropriate inference from the facts proved by the evidence on the record.

Dinendra Narain v. *Tituram*, 30 C. 801; *Grant* v. *Robinson*, 11 C. W. N. 242; *Nundo Lal* v. *Aturmoni*, 12 C. W. N. 432 and *Gulab Misser* v. *Kalanand Singh*, 6 Ind Cas. 217; 14 C. W. N. 884; 12 C. L. J. 107, referred to. NITYANANDA PAL *v.* NANDA KUMAR, 13 C. L. J. 415 163

Bengal Tenancy Act—contd.

s. 50 — *Presumption of permanency—Suit or proceeding under Act—Ejectment suit on ground of transfer of non-transferable holding, if suit under Act—Second appeal—Misconstruction of document—Mistake as to meaning of portion of evidence which is documentary—Civil Procedure Code (Act V of* 1908), *s* 100—*Usage or custom of transferability—Ingredients, what are, to prove the custom—Growing usage, if binding upon landlord.*

Although the presumption mentioned in section 50 of the Bengal Tenancy Act applies only to cases which may be called suits or proceedings under the Act, yet even in cases where that section is not directly applicable, the Court may act on a similar presumption if the facts justify the necessary inference.

Dulhin Golab Koer v. *Bolla Kurim*, 25 C. 744; 2 C. W. N. 580; *Dinendra Narain* v. *Titu Ram*, 30 C. 801 and *Nanda Lal* v. *Atarmoni Dasee*, 35 C. 763; 12 C. W. N. 432, relied upon.

A suit for ejectment on the allegation that the tenant of a non-transferable holding has sold it to the defendant and has abandoned the land, is not a suit or proceeding under the Bengal Tenancy Act.

Sarat Chandra Ghose v. *Shyama Chand*, 10 C. W. N. 930, followed.

Though the misconstruction of a document which is the foundation of a suit or which is in the nature of a contract or a document of title, is a ground for second appeal, a second appeal does not lie because some portion of the evidence is in writing and the Judge in the Court of Appeal below makes a mistake as to the meaning of it.

Nowbut Singh v. *Chutterdharee*, 19 W. R 222; *Shib Chandra* v. *Chandra Narain*, 1 C. L. J. 232; 32 C. 719; *Ananda Chandra* v. *Parbati Nath*, 4 C. L. J. 198; and *Braja Mohan* v. *Thakur Das*, 4 Ind. Cas. 732; 10 C. L. J. 593, followed.

In a suit for ejectment on the ground that the tenant of a non-transferable holding has sold it to the defendant, the only circumstance that the tenancy has been held for about 25 years before the date of transfer at a uniform rate of rent is by itself insufficient to justify the inference that the rent was fixed in perpetuity.

In order to prove a custom or usage of transferability, what is necessary to prove is that such transfers have been made to the knowledge and without the consent of the landlord and that they have been recognised by him either without the payment of *nazar* or upon payment of a *nazar* also fixed by custom.

Sibo Sundari v. *Raj Mohun Guho*, 8 C. W. N. 214; and *Radha Kishore* v. *Ananda Pria*, 8 C. W. N. 235, relied upon.

It is not necessary to prove that the landlord has actually made an objection to a transfer and has been unsuccessful.

A growing usage of transferability is of no avail against the landlord; the usage to be effective must have already grown up.

Ambika v. *Dya Ghazi*, 10 C W N 497: *Rasik Lall Dutt* v. *Bidhu Mukhi*, 10 C. W. N. 719; 4 C L. J. 346; 33 C. 1094 and *Rajendra Kishore* v. *Chandranath*, 12 C. W. N. 878, followed.

But a usage of transferability after it has grown up, affects not merely tenancies created thereafter, but also existing tenancies to which the benefit of the usage attaches. BUZLUL KARIM *v.* SATISH CHANDRA, 13 C. L. J. 418; 15 C. W. N. 752 **325**

Bengal Tenancy Act—contd.

ss. 50 cl. (2), 85, 86, cl. (b)—*Presumption of permanency—Suit not under Bengal Tenancy Act Estoppel—Defendant producing false* pattah, *whether entitled to benefit of presumption—Re-entry by landlord—Tenant surrendering—Ejectment of under-*raiyat.

Although the provisions of section 50, clause (2), of the Bengal Tenancy Act apply only to suits or proceedings under the Act, it does not follow that a Court is precluded from drawing an inference from the fact of long payment of rent, at an uniform rate, that the *jote* has been held at a fixed rent since the Permanent Settlement.

Although the defendant set up a false *pattah*, dated some time before the Permanent Settlement, yet he is not precluded from asking the Court to draw an inference as to the fixity of rent if he has proved other facts which would give rise to such an inference.

Caspersz v. *Kedar Nath Sarbadhikari*, 5 C. W. N. 858 at p. 861, followed.

Where a *raiyat* surrenders his holding the landlord can re-enter by ejecting the under-*raiyat* without a notice to quit if not protected by section 85 or section 86 clause (*b*) of the Bengal Tenancy Act.

Nilkanta Chaki v. *Ghatto Sheikh*, 4 C. W. N. 667; and *Badan Chandra Das* v. *Rajeswari Debya*, 2 C. L. J. 570, followed. MUKTA SUNDARI *v.* BADAL CHANDRA BHOWMIK **164**

s. 60 **467**

s. 85 **164**

s. 85—*Sub-lease by* raiyat *—Invalidity—By whom may be questioned—Permanent lease given by* raiyat.

The question of the invalidity of a sub-lease granted by a *raiyat* in contravention of the provisions of section 85 of the Bengal Tenancy Act, can be raised only by the landlord of the *raiyat*.

Where, therefore, a plaintiff seeks to recover possession of disputed land on the strength of a permanent lease which is found to have been executed by a *raiyat*, the defendant, who is a trespasser having no title to the land, cannot question the validity of the lease. MANIK BARAI *v.* RANI CHARAN MANDAL, 13 C. L. J. 649 **469**

s. 85, cl. (3)—*Under-*raiyat *allowed to hold over—Ejectment, forcible, if legal.*

The provision in sub-section 3 of section 85 of the Bengal Tenancy Act, that the sub-lease shall not be valid for more than nine years from the commencement of the Act, applies only as between the under-*raiyat* and the landlord of the *raiyat*; it does not apply as between the tenant and the sub-tenant.

If the provisions of section 85, sub-section (3), are not enforced immediately upon the termination of 9 years after the commencement of the Bengal Tenancy Act, and if the under-*raiyat* is allowed to hold over and continue in occupation of the land of the tenancy, his tenancy must be terminated in accordance with the provisions of the law, and till such steps have been taken, he cannot be forcibly ejected from the land.

The *raiyat* of a holding executed a sub-lease in

Bengal Tenancy Act—contd.
favour of certain persons on May 30th, 1879. These latter again executed a sub-lease in favour of the plaintiff on February 20th, 1885. The interest of the *raiyat* was subsequently acquired by the defendant, under deeds of conveyance in 1883 and 1897, who forcibly ejected the plaintiff:

Held, that the defendant, being the representative-in-interest of the *raiyat*, is not entitled as between himself and the plaintiff to take up the position that the lease of May 30th, 1879, was inoperative, and that the plaintiff must succeed. ARAB ALI *v.* RACHIMADDI, 13 C. L. J. 656 562

——— s. 86, cl. (b) 164

——— ss. 153, 153A—*Execution of decree—Decree made by special officer—Order in execution made by officer not specially empowered—Appeal, whether lies—Deposit under s. 153A—Decree executed for whole amount without deducting amount deposited under s. 153A.*

The test to be applied in determining whether an order in execution is appealable under clause (*b*) of section 153 of the Bengal Tenancy Act, is the qualification of the officer who passed that order and not that of the officer who passed the decree in the suit.

Therefore, when an order for the reversal of a sale in execution of a decree is made by an officer not specially empowered to exercise final jurisdiction, the order is open to appeal although the decree was made by an officer specially empowered.

Although section 153A of the Bengal Tenancy Act does not specifically prescribe the mode of applying the money deposited by a person at whose instance an *ex parte* decree is set aside, yet it is reasonably clear that the intention of the Legislature was that if at re-trial the decree is ultimately made in favour of the landlord, he should, in the first instance, apply the sum deposited towards satisfaction of his decree and take out execution for the balance only of the judgment-debt. SHEO PARSAN RAI *v.* BISHUN PARGASH NARAIN, 15 C. W. N. 760 539

——— s. 153A 539

——— s. 171 — *Under-tenure-holder, deposit by—Saving superior tenure from sale for arrears of rent—Sale likely to be brought about partially by reason of his own default—Equitable defence.*

An under-tenure-holder, who has saved a superior tenure from sale in execution of a decree for arrears of rent by a deposit under section 171 of the Bengal Tenancy Act, is entitled to maintain a suit for the recovery of the amount deposited by him by enforcing the charge created in his favour by the section, although the impending sale was likely to be brought about partially, at any rate, by reason of his own default.

But to such a claim the defendant is entitled to interpose an equitable defence.

If it is established that part of the sum deposited by him to avert the sale was payable by him to the superior landlord, he is not entitled to recover that sum. HEMENDRA KUMAR GHOSE *v.* RAJENDRA BALA DASI, 13 C. L. J. 454 270

——— s. 174 — *Sale in execution of rent decree—Deposit by judgment-debtor—Subsequent withdrawal of deposit—Previous purchaser, application by—Allegation that deposit made with his money—Fresh deposit allowed to be made by him.*

A sale was held in execution of a rent decree, and the judgment-debtor made a deposit under section 174 of the Bengal Tenancy Act. Subsequently, the judgment-debtor made an application for leave to withdraw the deposit and thereupon the Court refused to set aside the sale. Then the present petitioner appeared and alleged that he had purchased the property long ago and that the deposit was made with his money. The Court dismissed his petition on the ground that he had no *locus standi*:

Held, that, in the interests of justice, the petitioner ought to be allowed to use the name of the judgment-debtor and to make a fresh deposit now within seven days from the arrival of the record in the Court below. ADHAR CHANDRA *v.* RAM CHARAN 526

——— s. 182 139

——— Sch. III, art. 3 54

Berar Land Revenue Code, 1896—*Forfeiture of rights on non-payment of revenue—Re-grant—Improvement—Co-sharers' Rights inter se.*

When under the Berar Land Revenue Code a co-sharer in a holding has caused by his own default a forfeiture of the rights of himself and his co-sharers, and subsequently obtained a re-grant of the holding, whether by a timely payment which averted sale, or by buying it in at a sale, he is bound by a well-known rule of equity to hold the estate thus acquired in trust for his co-sharers as well as himself, and cannot use his own neglect of duty to defeat their title.

A co-sharer, who has incurred expenditure on repair or improvement of the common property, can claim a rateable contribution for it from his co-sharers if he did not intend to benefit them gratuitously, and they are benefited by his act. SHANKAR LAL *v.* MULCHAND, 7 N. L. R. 11 694

——— s. 56 — *Forfeiture-sale—Effect of equities—Burden of proof.*

Section 56 of the Berar Land Revenue Code affords absolute protection against incumbrances, created by the ex-occupant of a forfeited holding, to a purchaser thereof in pursuance of a sale made under that section, but where no such sale is made, the effect of the forfeiture and subsequent acquisition of the forfeited property are to be determined with reference to the ordinary law, and are, therefore, subject to the control of equities arising out of the conduct of the parties.

Amolal Banechand v. *Dhondi*, 30 B. 466; 8 Bom. L. R. 360, referred to

A mortgagee who claims in equity to enforce his mortgage against property not mortgaged to him, in substitution for mortgaged property which has been destroyed, is bound to establish that the destruction of the original security took place under such circumstances as to raise an equity in his favour, so as to fasten his mortgage on property acquired by the mortgagors after the extinction of his security. DEORAO *v.* BANAI, 7 N. L. R. 2 689

Berar Municipal Law of 1886, s. 146 (1)—*Penal Code (Act XLV of 1860), s. 168—"Pecuniary interest," meaning of—Vice-Chairman of Municipal Board issuing contracts—Private loan to contractor to carry on works—Recovery out of realization from cheques issued by Vice-Chairman.*

A member of a Municipal Board in Berar who lends money to a contractor, upon the personal credit

Berar Municipal Law of 1886—concld.
of such contractor, for the purpose of a contract with the Municipal Board violates section 146 (1) of the Berar Municipal Act and is liable to punishment under section 168 of the Penal Code.

In a Municipal contract, in the name of *B.* which is entirely worked with the money of *A.*, *B.* is merely the *benamidar* of *A.*

A., the Vice-Chairman of a Municipal Board, had authority to enter into contracts for the Municipality, to pass contractor's bills and to issue cheques in payment thereof. *A.* gave two contracts for the construction of Municipal drains to *B.*, *B.* had no capital to carry out these works so *A.*, who carried on a money lending business on his own behalf, advanced the money and re-paid himself out of the realizations of Municipal cheques issued by himself:

Held, that *A.* had a pecuniary interest in the contracts within the meaning of section 146 (1) of the Berar Municipal Act and was guilty of an offence under section 168 of the Penal Code as applied to Berar.

Todd v. *Robinson*, (1885) 54 L. J. Q. B. 47; 14 Q. B. D. 739; 52 L. T. 120; 49 J. P. 278; *Nicholson* v. *Fields* (1862) 31 L. J. Ex. 233; 7 H. & N. 810; 10 W. R. 304 *Lewis* v. *Carr*, (1877) 46 L. J. Ex. 314; 1 Ex. D. 484; 36 L. T. 44; 24 W. R. 940; *Nell* v. *Longbottom*, (1894) 63 L. J. Q. B. 490; 1 Q. B. 767; 10 R. 193; 70 L. T. 499; and *City of London Electric Lighting Co.* v. *London Corporation*, (1903) A. C. 434; 72 L. J. Ch. 737; 89 L. T. 310; 52 W. R. 158; 67 J. P. 457; 2 L. G. R. 93, relied upon.

Le Feuvre v. *Lankester*, (1854) 23 L. J. Q. B. 254; 3 El. & Bl. 530; 2 C. L. R. 1426; 18 Jur 894; 2 W. R. 307, distinguished. A. B. *v.* EMPEROR, 7 N. L. R. 53 **577**

Bill of exchange—Hundi *drawn in favour of third person in discharge of debt due on a pro-note—Conditional discharge—Receipt for the amount of* hundi—*Endorsement on the pro-note—Presumption of conditional discharge.*

As a general rule a bill of exchange or *hundi* given for a debt operates only as a conditional discharge of the debt but the contrary may be proved in any particular case.

D. owed a debt to *P.* on a pro-note. *P.* in his turn was indebted to *T.* At *P.*'s request *D.* drew a *hundi* for Rs. 1,000 in favour of *T.* and the payment of that amount was endorsed on the original pro-note of *D.* in favour of *P. T.* did not present the *hundi* to the drawee. The question was whether *P.* had accepted the *hundi* unconditionally in part satisfaction of the amount due from *D*:

Held, that as *T.* was under no obligation to present the *hundi* to the drawee, it did not amount to an unconditional discharge:

Held, further, that the endorsement of receipt on the pro-note was insufficient to rebut the presumption of the discharge being only conditional. PALANIAPPA CHETTY *v.* ARUNACHELLAM CHETTY, 2 M. W. N. 318; 21 M. L. J. 432; 9 M. L. T. 482 **118**

Bombay General Clauses Act (I of 1904) **972**

Breach of contract—Right to sue for damages, whether assignable—Contract for payment of debts—Breach of contract—Repudiation of liability by promisor—Cause of action—Right of promisee to sue promisor—Limitation—Promisee to wait for a reasonable time **320**

Buddhist Law—*Ecclesiastical Courts—Decision of* Thathanabaing—*Jurisdiction — Plaintiff layman —Claim for restoration of property dedicated to monastery—Decision of Revenue authorities.*

Ecclesiastical Courts are not deprived of jurisdiction merely because the plaintiff is a layman.

Wun Chit v. *Zawta*, U. B. R. (1897-01), II, 52 relied upon.

Certain *wuttagan* property was originally dedicated by plaintiff's ancestor to a monastery and then confiscated and re-dedicated by the Burmese King. Plaintiff, a layman, applied to the *Thathanabaing* for the restoration of the land and after a decision was given by him and his Council, the plaintiff sued to enforce that decision. The Monks of the monastery, who were defendants, pleaded that the Ecclesiastical Courts had no jurisdiction and that the Ecclesiastical Courts could not give a decision in conflict with the decisions of the Revenue authorities. Some of the defendants had submitted to the jurisdiction:

Held, that the Ecclesiastical Courts had jurisdiction over the matter. Their decision was a pronouncement on the religious duty of Monks towards the descendant of a *taga* and it purported to give effect to the religious rule on that point and was directed against subordinate ecclesiastics. Even if the plaintiff had no right to re-claim the land enforceable in a Court of law, he was not debarred from addressing himself to the ecclesiastical authorities and invoking their own religious rules or maxims in his favour. The defendants could not object to the decision of these authorities:

Held, further, that the decisions of the Revenue authorities were no bar to the decision in question. The land was declared to be *wuttagan* and there was nothing to prevent the ecclesiastical authorities from resigning their rights in it to a grandson of a former owner. U TEIK KA *v.* NGA TIN BYU, U. B. R. (1910) I, 78 **996**

———————*Inheritance*—Orasa *son — Devolution of the status on the next eldest son—Transmission of right.*

If a first-born son dies in infancy, the status of '*orasa*' is capable of devolving on the next eldest son and does so devolve when he attains his majority, provided that he is unaffected by any of the disabilities or disqualifications mentioned in the texts on the subject. He can transmit the superior right of inheritance to his own issue in the same way as an '*orasa*', who is actually the first-born of the family, can do.

Ma Mya Thu v. *Po Thin*, S. J. L. B. 585; *San Dwa* v. *Ma Min Tha*, 8 Bur. L. R. 60; *Po San* v. *Po Min*, 3 L. B. R. 45; *Tun Myaing* v. *Ba Tun*, 2 L. B. R. 292, followed. MA HNIN GAING *v.* MA THA LI, 4 BUR. L. T. 74 **778**

Burden of proof. *See* HINDU LAW—JOINT FAMILY.

———————Adoption — Inheritance — Converts from Hinduism to Muhammadanism **816**

———————Alienation by widow—Necessity **676**

———————Assignment—Consideration **291**

———————Breach in the state of union—Re-union **911**

———————Custom—Alienation **36**

Bengal Tenancy Act—contd.

favour of certain persons on May 30th, 1879. These latter again executed a sub-lease in favour of the plaintiff on February 20th, 1885. The interest of the *raiyat* was subsequently acquired by the defendant, under deeds of conveyance in 1883 and 1897, who forcibly ejected the plaintiff:

Held, that the defendant, being the representative-in-interest of the *raiyat*, is not entitled as between himself and the plaintiff to take up the position that the lease of May 30th, 1879, was inoperative, and that the plaintiff must succeed. ARAB ALI *v.* RACHIMADDI, 13 C. L. J. 656 **562**

——— **s. 86, cl. (b) 164**

——— **ss. 153, 153A**—*Execution of decree—Decree made by special officer—Order in execution made by officer not specially empowered—Appeal, whether lies—Deposit under s. 153A—Decree executed for whole amount without deducting amount deposited under s. 153A.*

The test to be applied in determining whether an order in execution is appealable under clause (*b*) of section 153 of the Bengal Tenancy Act, is the qualification of the officer who passed that order and not that of the officer who passed the decree in the suit.

Therefore, when an order for the reversal of a sale in execution of a decree is made by an officer not specially empowered to exercise final jurisdiction, the order is open to appeal although the decree was made by an officer specially empowered.

Although section 153A of the Bengal Tenancy Act does not specifically prescribe the mode of applying the money deposited by a person at whose instance an *ex parte* decree is set aside, yet it is reasonably clear that the intention of the Legislature was that if at re-trial the decree is ultimately made in favour of the landlord, he should, in the first instance, apply the sum deposited towards satisfaction of his decree and take out execution for the balance only of the judgment-debt. SHEO PARSAN RAI *v.* BISHUN PARGASH NARAIN, 15 C. W. N. 760 **539**

——— **s. 153A 539**

——— **s. 171** — *Under-tenure-holder, deposit by—Saving superior tenure from sale for arrears of rent—Sale likely to be brought about partially by reason of his own default—Equitable defence.*

An under-tenure-holder, who has saved a superior tenure from sale in execution of a decree for arrears of rent by a deposit under section 171 of the Bengal Tenancy Act, is entitled to maintain a suit for the recovery of the amount deposited by him by enforcing the charge created in his favour by the section, although the impending sale was likely to be brought about partially, at any rate, by reason of his own default.

But to such a claim the defendant is entitled to interpose an equitable defence.

If it is established that part of the sum deposited by him to avert the sale was payable by him to the superior landlord, he is not entitled to recover that sum. HEMENDRA KUMAR GHOSE *v.* RAJENDRA BALA DASI, 13 C. L. J. 454 **270**

——— **s. 174** — *Sale in execution of rent decree—Deposit by judgment-debtor—Subsequent withdrawal of deposit—Previous purchaser, application by—Allegation that deposit made with his money—Fresh deposit allowed to be made by him.*

Bengal Tenancy Act—concld.

A sale was held in execution of a rent decree, and the judgment-debtor made a deposit under section 174 of the Bengal Tenancy Act. Subsequently, the judgment-debtor made an application for leave to withdraw the deposit and thereupon the Court refused to set aside the sale. Then the present petitioner appeared and alleged that he had purchased the property long ago and that the deposit was made with his money. The Court dismissed his petition on the ground that he had no *locus standi*:

Held, that, in the interests of justice, the petitioner ought to be allowed to use the name of the judgment-debtor and to make a fresh deposit now within seven days from the arrival of the record in the Court below. ADHAR CHANDRA *v.* RAM CHARAN **526**

——— **s. 182 139**

——— **Sch. III, art. 3 54**

Berar Land Revenue Code, 1896—*Forfeiture of rights on non-payment of revenue—Re-grant—Improvement—Co-sharers' Rights* inter se.

When under the Berar Land Revenue Code a co-sharer in a holding has caused by his own default a forfeiture of the rights of himself and his co-sharers, and subsequently obtained a re-grant of the holding, whether by a timely payment which averted sale, or by buying it in at a sale, he is bound by a well-known rule of equity to hold the estate thus acquired in trust for his co-sharers as well as himself, and cannot use his own neglect of duty to defeat their title.

A co-sharer, who has incurred expenditure on repair or improvement of the common property, can claim a rateable contribution for it from his co-sharers if he did not intend to benefit them gratuitously, and they are benefited by his act. SHANKAR LAL *v.* MULCHAND, 7 N. L. R. 11 **694**

——— **s. 56** — *Forfeiture-sale—Effect of equities—Burden of proof.*

Section 56 of the Berar Land Revenue Code affords absolute protection against incumbrances, created by the ex-occupant of a forfeited holding, to a purchaser thereof in pursuance of a sale made under that section, but where no such sale is made, the effect of the forfeiture and subsequent acquisition of the forfeited property are to be determined with reference to the ordinary law, and are, therefore, subject to the control of equities arising out of the conduct of the parties.

Amolal Banechand v. *Dhondi*, 30 B. 466; 8 Bom. L. R. 360, referred to

A mortgagee who claims in equity to enforce his mortgage against property not mortgaged to him, in substitution for mortgaged property which has been destroyed, is bound to establish that the destruction of the original security took place under such circumstances as to raise an equity in his favour, so as to fasten his mortgage on property acquired by the mortgagors after the extinction of his security. DEORAO *v.* BANAI, 7 N. L. R. 2 **689**

Berar Municipal Law of 1886, s. 146 (1)—*Penal Code (Act XLV of 1860), s. 168—"Pecuniary interest," meaning of—Vice-Chairman of Municipal Board issuing contracts—Private loan to contractor to carry on works—Recovery out of realization from cheques issued by Vice-Chairman.*

A member of a Municipal Board in Berar who lends money to a contractor, upon the personal credit

Berar Municipal Law of 1886—concld.
of such contractor, for the purpose of a contract with the Municipal Board violates section 146 (1) of the Berar Municipal Act and is liable to punishment under section 168 of the Penal Code.

In a Municipal contract, in the name of *B.* which is entirely worked with the money of *A.*, *B.* is merely the *benamidar* of *A.*

A., the Vice-Chairman of a Municipal Board, had authority to enter into contracts for the Municipality, to pass contractor's bills and to issue cheques in payment thereof. *A.* gave two contracts for the construction of Municipal drains to *B.*, *B.* had no capital to carry out these works so *A.*, who carried on a money lending business on his own behalf, advanced the money and re-paid himself out of the realizations of Municipal cheques issued by himself:

Held, that *A.* had a pecuniary interest in the contracts within the meaning of section 146 (1) of the Berar Municipal Act and was guilty of an offence under section 168 of the Penal Code as applied to Berar.

Todd v. *Robinson*, (1885) 54 L. J. Q. B. 47; 14 Q. B. D. 739; 52 L. T. 120; 49 J. P. 278; *Nicholson* v. *Fields* (1862) 31 L. J. Ex. 233; 7 H. & N. 810; 10 W. R. 304 *Lewis* v. *Carr*, (1877) 46 L. J. Ex. 314; 1 Ex. D. 484; 36 L. T. 41; 24 W. R. 940; *Nell* v. *Longbottom*, (1894) 63 L. J. Q. B. 490; 1 Q. B. 767; 10 R. 193; 70 L. T. 499; and *City of London Electric Lighting Co.* v. *London Corporation*, (1903) A. C. 434; 72 L. J. Ch. 737; 89 L. T. 310; 52 W. R. 158; 67 J. P. 457; 2 L. G. R. 93, relied upon.

Le Feuvre v. *Lankester*, (1854) 23 L. J. Q. B. 254; 3 El. & Bl. 530; 2 C. L. R. 1426; 18 Jur 894; 2 W. R. 307, distinguished. A. B. *v.* EMPEROR, 7 N. L. R. 53 **577**

Bill of exchange—Hundi *drawn in favour of third person in discharge of debt due on a pro-note—Conditional discharge—Receipt for the amount of* hundi—*Endorsement on the pro-note—Presumption of conditional discharge.*

As a general rule a bill of exchange or *hundi* given for a debt operates only as a conditional discharge of the debt but the contrary may be proved in any particular case.

D. owed a debt to *P.* on a pro-note. *P.* in his turn was indebted to *T.* At *P.*'s request *D.* drew a *hundi* for Rs. 1,000 in favour of *T.* and the payment of that amount was endorsed on the original pro-note of *D.* in favour of *P. T.* did not present the *hundi* to the drawee. The question was whether *P.* had accepted the *hundi* unconditionally in part satisfaction of the amount due from *D*:

Held, that as *T.* was under no obligation to present the *hundi* to the drawee, it did not amount to an unconditional discharge:

Held, further, that the endorsement of receipt on the pro-note was insufficient to rebut the presumption of the discharge being only conditional. PALANIAPPA CHETTY *v.* ARUNACHELLAM CHETTY, 2 M. W. N. 318; 21 M. L. J. 432; 9 M. L. T. 482 **118**

Bombay General Clauses Act (I of 1904) **972**

Breach of contract—Right to sue for damages, whether assignable—Contract for payment of debts—Breach of contract—Repudiation of liability by promisor—Cause of action—Right of promisee to sue promisor—Limitation—Promisee to wait for a reasonable time **320**

Buddhist Law—*Ecclesiastical Courts—Decision of* Thathanabaing—*Jurisdiction — Plaintiff layman —Claim for restoration of property dedicated to monastery—Decision of Revenue authorities.*

Ecclesiastical Courts are not deprived of jurisdiction merely because the plaintiff is a layman.

Wun Chit v. *Zawta*, U. B. R. (1897-01), II, 52 relied upon.

Certain *wuttagan* property was originally dedicated by plaintiff's ancestor to a monastery and then confiscated and re-dedicated by the Burmese King. Plaintiff, a layman, applied to the *Thathanabaing* for the restoration of the land and after a decision was given by him and his Council, the plaintiff sued to enforce that decision. The Monks of the monastery, who were defendants, pleaded that the Ecclesiastical Courts had no jurisdiction and that the Ecclesiastical Courts could not give a decision in conflict with the decisions of the Revenue authorities. Some of the defendants had submitted to the jurisdiction:

Held, that the Ecclesiastical Courts had jurisdiction over the matter. Their decision was a pronouncement on the religious duty of Monks towards the descendant of a *taga* and it purported to give effect to the religious rule on that point and was directed against subordinate ecclesiastics. Even if the plaintiff had no right to re-claim the land enforceable in a Court of law, he was not debarred from addressing himself to the ecclesiastical authorities and invoking their own religious rules or maxims in his favour. The defendants could not object to the decision of these authorities:

Held, further, that the decisions of the Revenue authorities were no bar to the decision in question. The land was declared to be *wuttagan* and there was nothing to prevent the ecclesiastical authorities from resigning their rights in it to a grandson of a former owner. U TEIK KA *v.* NGA TIN BYU, U. B. R. (1910) I, 78 **996**

———————*Inheritance*—Orasa *son — Devolution of the status on the next eldest son—Transmission of right.*

If a first-born son dies in infancy, the status of '*orasa*' is capable of devolving on the next eldest son and does so devolve when he attains his majority, provided that he is unaffected by any of the disabilities or disqualifications mentioned in the texts on the subject. He can transmit the superior right of inheritance to his own issue in the same way as an '*orasa*', who is actually the first-born of the family, can do.

Ma Mya Thu v. *Po Thin*, S. J. L. B. 585; *San Dwa* v. *Ma Min Tha*, 8 Bur. L. R. 60; *Po San* v. *Po Min*, 3 L. B. R. 45; *Tun Myaing* v. *Ba Tun*, 2 L. B. R. 292, followed. MA HNIN GAING *v.* MA THA LI, 4 BUR. L. T. 74 **778**

Burden of proof. *See* HINDU LAW—JOINT FAMILY.

———————Adoption — Inheritance — Converts from Hinduism to Muhammadanism **816**

———————Alienation by widow—Necessity **676**

———————Assignment—Consideration **291**

———————Breach in the state of union—Re-union **911**

———————Custom—Alienation **36**

Burden of proof—concld.

——— ——— Custom—Succession to *Mahant*-ship **824**

——— ——— ——— Effect of admission **700**

——— ——— ——— Exclusion of daughters **387**

——— ——— ——— Legitimacy—Non-access **389**

——— ——— ——— Onus on defendant—Plaintiff producing his evidence without waiting for the evidence of the defendant—Whether plaintiff can rely upon the plea that defendant has not discharged his onus **223**

——— ——— ——— Promissory note—Partial discharge **674**

——— ——— ——— Question of status decided by Probate Court—Power of Civil Court to go into question in regular suit—Regular suit against administratrix—Person in lawful possession **987**

——— ——— ——— Scope of *gumashta's* authority **456**

——— ——— ——— Suit for possession by mortgagee not brought until last day of limitation—Execution of mortgage admitted—Consideration denied—Presumption—*Onus* on plaintiff to prove consideration **927**

——— ——— ——— Tenant-in-common—Suit for possession—Presumption **554**

——— ——— ——— Title for land **424**

——— ——— ——— Trustee or Manager of minor's property, mixing his own property with that of the other, effect of **57**

——— ——— ——— Will—Probate **130**

——— ——— ——— *Release—Suit to set aside a release-deed—Failure of consideration.*

Plaintiff brought a suit to set aside a release-deed on the ground that there was failure of consideration. Defendant admitted that the consideration mentioned in the deed was not true but contended, nevertheless, that there was consideration for the release-deed:

Held, that the burden of proving the failure of consideration lay on the plaintiff. RAVIA BIVI AMMAL *v.* KADIR BATCHA ROWTHAR, 9 M. L. T. 480 **501**

Burial ground of Ponnas—Consecration—Removal of dead body **780**

Burma Gambling Act (I of 1899), ss. 3, 7, 12—*"Common gaming house"—Presumption under s. 7—Whether rebutted by circumstances—Revision—Power to interfere with sentences of persons who have not appealed.*

Where there is no independent evidence as to the actual taking of the commission by the accused and the conviction of the accused rests on the bare presumption coupled with the discovery of the instruments of gaming under section 7 of the Burma Gambling Act, it is necessary to consider very carefully whether the legal presumption is rebutted by the circumstances of the case and by the evidence produced for the defence.

In exercise of its revisional jurisdiction, the High Court can, on the appeal of one accused, deal with the sentences passed on the other co-accused who have not appealed. CHARI *v.* EMPEROR, 4 BUR. L. T. 87 **792**

——— ——— ——— **s. 7** **792**

Burma Gambling Act—concld.

——— ——— ——— **s. 7**—*Criminal Procedure Code (Act V of 1898), s. 103—Search—Ward Headmen and block-elders not qualified to be witnesses of search.*

By the Full Bench (*Ormond, J.* dissenting):

The words "respectable inhabitants" in section 103 of the Criminal Procedure Code should not be construed to include ward headmen and block-elders who are appointed by the Deputy Commissioner.

King-Emperor v. *Kwe Haw*, 4 L. B. R. 213; 14 Bur. L. R. 81, 7 Cr. L. J. 479, followed.

Per *Twomey, J.*—"Respectability" in this context means much the same thing as impartiality, the presumption being that all respectable people are *prima facie* impartial. There is no sufficient reason for holding that ward headmen as a class should not be regarded as impartial. The genesis of the presumption under section 7 of the Gambling Act is traceable not to the respectability or impartiality of the persons who witnessed the search but to the sufficiency of the grounds on which the warrant was issued under section 6 coupled with the finding of cards or other instruments of gaming in the place searched.

Pa Ya v. *King-Emperor*, U. B. R. (1908) Gamb. 1; 8 Cr. L. J. 413, followed.

Per *Hartnoll, J.*—As the duties of the ward headmen and block-elders appointed under the Lower Burma Towns Act, 1892, or the Burma Towns Act, 1907, include duties which relate to the prevention of certain offences and the discovery of crime and as it is part of their duty to assist all Officers of the Government in the execution of their public duties, they are not such persons as the Legislature contemplated should be called as witnesses within the meaning of section 103 (1) of the Code of Criminal Procedure.

Per *Fox, C.J.*—The ward headmen and the block-elders, although appointed by a Deputy Commissioner, having the same duties to perform as wardmen appointed by the Commissioner of Police, Rangoon, are not qualified witnesses to the search under section 103 of the Code of Criminal Procedure, which applies whatever the offence may be and is not confined to searches under the Gambling Act.

Per *Ormond, J.*—The witnesses to a search should not be policemen but there is no necessity to further limit the words "respectable inhabitants". Ward headmen and block-elders are not policemen. The appointment or selection of the witnesses rests with the Officer or person conducting the search and if the selection is not *bona fide* the Court will have no difficulty in coming to the conclusion that there was no entry or search within the meaning of the Burma Gambling Act or the Code. EMPEROR *v.* KAN HAW, 4 BUR. L. T. 91 **796 F. B.**

——— ——— ——— **s. 10**—*Place to which public have access—Fenced garden not such a place.*

"The place to which the public have access" in section 10 of the Burma Gambling Act must be a place akin to or of the same nature as a street or a thoroughfare.

A fenced garden which is private property cannot be held to be akin to or of the same nature as a street or thoroughfare.

Ah Kon v. *King-Emperor*, 2 L. B. R. 195; 10 Bur. L. R. 37, 1 Cr. L. J. 461; followed. LU GALE *v.* EMPEROR, 4 BUR. L. T. 71 **775**

——— ——— ——— **s. 12** **792**

Calcutta High Court, Original Side Rules, r. 483 253

——— ——— ——— ——— Charter, cl. 12 895

——— ——— Municipal Act (III B. C. of 1899), s 341—Verandah *existing for* 60 *years —Fixture attached to building.*

A *verandah* which has been in existence as part of the original building for more than 60 years and does no one any harm, is not a *fixture* attached to a building and, therefore, does not come within section 341 of the Calcutta Municipal Act. BARADA PRASAD ROY *v.* CORPORATION OF CALCUTTA, 13 C. L J. 611; 15 C. W. N. 730 **310**

Corporate Body cannot be made co-plaintiff without its consent **515**

Carrier, meaning of **972**

Cause of action. *See* MISJOINDER OF CAUSES OF ACTION; RIGHT TO SUE.

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Central Provinces Tenancy Act (IX of 1883), s. 46—*Occupancy-holding—Succession how governed—Hindu Law—Succession—Son remaining joint with father.*

In the case of Hindus, Courts should, in dealing with agricultural land, follow the Hindu Law of inheritance so far as it may be consistent with the principles of a legislative enactment such as the Central Provinces Tenancy Act.

Ghanya v. *Ukund Rao*, 4 N. L R. 9, retied upon.

When an occupancy-tenant dies, his right in his holding shall devolve as if it were land.

A Hindu son who has remained joint with his father is his heir and succeeds to his separate or self-acquired property, in preference to one who has separated. ATMARAM *v.* LALA, 7 N. L. R. 36 **733**

——— ——— (XI of 1898, s. 35—*Surrender of portion of a holding with consent of landlord, validity of.*

The rule referred to in *Sarjuprasad* v. *Muratlal*, 14 C. P. L. R. 33, is clearly to prevent a tenant from giving up portion of a holding without the landlord's consent, but where a landlord has accepted the surrender of a defined portion of a holding and allowed the tenant to continue as tenant of the remainder on a defined rent, the tenant cannot be allowed to resile from the transaction. SUNDAR *v.* SITARAM, 7 N. L. R. 8 **692**

——— ——— ——— ——— s. 41—*Mortgage—Absolute occupancy-holding along with other property—Court cannot apportion charge.*

If an absolute occupancy-holding is mortgaged without notice to the landlord, the fact that other property, moveable or immoveable, is included in the mortgage, does not entitle the mortgagee for the purpose of upholding the mortgage to ask the Court to value such other property, apportion the mortgage-debt between it and the absolute occupancy-holding in proportion to their values, and thus reduce the charge on the absolute occupancy-holding within the limit prescribed by section 41 of the Tenancy Act for a mortgage without notice to the landlord.

Beni Parshad v. *Dharamdas Kalar*, 14 C. P. L R. 17, distinguished. GANGADHAR RAO *v.* LAXMAN RAO, 7 N. L. R. 20 **698**

Central Provinces Tenancy Act—(1898)—concld.

——— ——— ——— ——— ss. 49 and 51—*Rent —Private agreement—Superseded by settlement.*

Sections 49 and 51 of the Central Provinces Tenancy Act must be read together, and their united effect is that a private agreement, not inconsistent with the Act, as to the rent payable, may be given effect to until the next settlement, but at the next settlement the agreed upon rate of rent is superseded by the rate fixed by the Settlement Officer. BHIKAJI *v.* TUKARAM, 7 N. L. R. 17 **697**

——— ——— ——— ——— s. 51 **697**

Cess—Essentials to be proved **465**

Charges in the alternative—Alternative charges **168**

Charge—Decree for sale of property—Mortgage **481**

——— ——— Unregistered sale of land **919**

——— ——— ———*Misjoinder—Criminal Procedure Code (Act V of* 1908), *s.* 235.

The accused was charged under section 170, Indian Penal Code, with personating a Police officer and thereby, in such assumed character, doing or attempting to do an act under colour of such office; he was further charged on three charges of extortion in respect of three sums, and in the alternative on three charges of cheating in respect of the three sums, and finally of an attempt at extortion in respect of a certain sum, under section 384, Indian Penal Code, read with section 511, Indian Penal Code:

Held, that there was no misjoider of charges, the offences charged having been committed in the same transaction.

Queen-Empress v. *Wazir Jan*, 10 A 58, followed. JAGDISH KUMAR *v.* ATMA RAM, 15 C W. N. 732 **944**

——— ——— *Previous convictions not set out distinctly in the charge sheet, effect of—Material omission—Enhanced punishment—Penal Code (Act XLV of* 1860), *s.* 75.

It is a part of the duty of the Courts to draw charge sheets accurately, and where they fail to do this the persons convicted are entitled to the benefit of any material omission.

Where enhanced sentences are contemplated under section 75, Indian Penal Code, a separate head of charge must be distinctly drawn with this object.

Where this was not done the Court reduced the enhanced punishment awarded under section 75, Indian Penal Code, though there was some reference to previous convictions in the statements of the accused recorded on the reverse of the charge sheets. DUNGRI *v.* EMPEROR, 139 P. L. R. 911 **241**

Charter Act, s. 15 **8, 618**

Chaukidar's Register of Births and Deaths, *admissibility of—Public Record —Evidence Act (I of* 1872), *s.* 35.

An entry in a *Chaukidar's* Register of Births and Deaths was relied upon as proof of the date of the birth of a person. The entry was admittedly not made by the *Chaukidar* and there was no evidence that it was made by any other public servant or that it was the duty of any public servant to make it:

Held, that the register was not admissible under section 35 of the Evidence Act. SAMPAT *v.* GAURI SHANKAR, 14 O. C. 68; 2 IND. CAS. 19 **713**

Chief Court "Rules and Orders" R. XXX (3) and (4)—*Pre-emption suit—Pleader's fee—Method of calculating.*

Pleader's fees in a suit for pre-emption should be calculated under clause (4) and not under clause (3) of Rule XXX of the Chief Court "Rules and Orders," *i.e.*, with reference either to the amount decreed, or according to the valuation of the suit, or according to such sum, not exceeding the valuation, as the Court thinks reasonable, and fixes with reference to the importance of the subject of dispute. BALU *v.* MADAN GOPAL **38**

Circumstantial evidence — Conviction based on circumstantial evidence **929**

Civil Procedure Code (Act VIII of 1859), s. 246, scope of **424**

——— ——— ——— ——— (Act XIV of 1882), s. 13—Question of status decided by Probate Court—Power of Civil Court to go into question in regular suit—Burden of proof - Regular suit against administratrix—Person in lawful possession **987**

——— ——— ——— ——— s. 13—*Prior mortgage of entire share—Subsequent mortgage of* ⅔rds *share—Suit on subsequent mortgage—Redemption of the prior mortgage—No prayer in the suit for possession of* ⅓rd *share—Second suit for possession of* ⅓rd *share barred*—Res judicata.

D, father of *R*, *L* and *G*, mortgaged his property with possession to *S*. Subsequently *R* and *L* mortgaged their ⅔rds share in the equity of redemption to *B*. *B* instituted a suit for sale of the property on the basis of his mortgage. *S*, the prior mortgagee, was made a party to the suit. *S*'s entire mortgage was redeemed by *B*, but only ⅔rds of the property was sold. In his plaint *B* had not prayed for possession of ⅓rd share which had not been mortgaged to him but which he had to redeem from *S*. In a subsequent suit, *B* sought possession of that ⅓rd share :

Held, that the second suit was barred by *res judicata*. *B* ought to have prayed for possession of the share in his previous suit.

Vinayak v *Dattatraya*, 26 B. 661, relied upon. BHURA *v.* GHURE, 8 A. L. J. 352 **925**

——— ——— ——— ——— s. 13—Res judicata—*Decision of Probate Court about relationship of parties—Subsequent civil suit—Whether question of relationship is* res judicata.

Every matter decided in proceedings for grant of Probate or Letters of Administration does not operate as *res judicata* in a subsequent civil suit between the parties. The decision is final and conclusive in so far as its immediate purpose is concerned, and no suit is maintainable to qualify or take away its effect but if a matter has been decided incidentally, the decision does not operate as *res judicata*.

The plaintiffs, alleging themselves to be the reversionary heirs of *P*., sought to obtain Letters of Administration to his estate. They were opposed by the present defendant. The District Judge found that the plaintiffs had failed to establish the relationship and disallowed their application. The plaintiffs then brought this suit to recover possession of the properties upon declaration of their title:

Held, that the decision of the Probate Court did not operate as *res judicata*, because that Court was not competent to try the present suit, and the matter now directly and substantially in issue was not directly and substantially in issue in the proceedings for grant of Letters of Administration, but arose only incidentally for the determination of the question of representation to the estate of *P*. LALIT MOHAN DAS *v.* RADHA RAMAN SAHA, 13 C. L. J. 547 **434**

——— ——— ——— ——— ss. 13, 44 (b)—Res judicata—*Prior donee not estopped by judgment in an action after gift—Priority of estate—Joining causes of action in respect of two different estates—Misjoinder.*

The donee of a house cannot be estopped as being privy in estate by a judgment obtained in an action against the donor commenced after the gift.

Mercantile Investment and General Trust Company v. *River Plate Trust, Loan and Agency Company*, (1894) 1 Ch. 578; 8 R. 791; 70 L. T. 131 42 W. R. 365; 63 L. J. Ch. 366; *The Natal Land and Colonization Co.* v. *Good*, (1868) 5 Moore P. C. (N. S.) 132; L. R. 2 P. C. 121; 16 W. R. 1086; *Naizullah Khan* v. *Nazir Begum*, 15 A. 108, referred to.

A person claiming property as the heir of his father on the ground that his mother had no title to the property, which she purported to dispose of by way of gift to his daughter, cannot join in the same suit another cause of action based on the ground that the daughter had obtained a good title to the property from her grandmother and he was entitled to it as her father. ABDUL ALI *v.* MIAKHAN, 13 BOM. L. R. 268 **890**

——— ——— s. 16—*Suit for recovery of price of lands - Jurisdiction - Small Cause suit—Provincial Small Cause Courts Act* (*IX of* 1887), *s.* 23, *effect of.*

A suit to recover unpaid purchase-money of land is not a suit for the determination of a right to, or interest in, immoveable property and is congnizable by a Small Cause Court.

Section 16 of the Civil Procedure Code, 1882, does not preclude all Courts, other than the Court within whose local jurisdiction certain immoveable property is situated, from trying any question relating to title to that property where it is merely incidental to the reliefs which the plaintiff seeks by his suit.

Where a Small Cause Court returns a plaint under section 23 of the Provincial Small Cause Courts Act for presentation to the proper Court on the ground that the relief claimed by the plaintiff depends on proof of plaintiff's title to land, it is not incumbent on the plaintiff to present the plaint to the Court having local jurisdiction over the property. He may present his plaint to any Civil Court which has jurisdiction to try the suit.

The effect of an order under section 23 is merely to remove the bar to the jurisdiction of the ordinary Courts imposed by section 16 of the Provincial Small Cause Courts Act.

Veeraraghava v. *Krishnasami*, 6 M. 344 and *Ahmad Khan* v. *Abdul Rahman Khan*, 26 A. 603, followed.

Matur Subbayya v. *Kota Krishnaiya*, 28 M. 227, not approved. SOWDAGER NABEEKHAN *v.* MUHAMMAD HUSSAIN, 9 M. L. T. 372 **267**

——— ——— ——— ——— s. 44 (b) **890**

——— ——— ——— ——— s. 78—*Service of summons—Defendart absent from home—Endorsement by father, how far effective.*

Civil Procedure Code—(1882)—contd.

In defendant's absence from home his father, who was residing with him, endorsed on the back of a summons, meant for service on the defendant, that he had gone to Sargodha:

Held, that the summons was not duly served on the defendant within the meaning of section 78, Civil Procedure Code, 1882, as it cannot be said that the defendant "could not be found," especially when no attempt whatever was made to find him and there was nothing to show that he was deliberately keeping out of the way to avoid service. HARDYAL *v.* PIR SANT DAS, 136 P. L. R. 1911 **242**

——— ——— ——— ——— **ss. 102, 103**—*Date fixed for the appointment of a guardian* ad litem *for a deceased defendant—Another date fixed for the hearing of the suit—Non-appearance of plaintiff on the former date—Dismissal of suit—Restoration—Sufficient cause.*

The hearing of a suit was fixed for 25th July and an application by the plaintiff to appoint a guardian *ad litem* for a defendant, who had died was fixed for the 16th July. The plaintiff and his Pleader failed to appear on the latter date, and the Court dismissed the suit for want of prosecution and subsequently rejected the plaintiff's application for restoration of the case.

Held, that, as the date on which the plaintiff did not appear was not the date fixed for the hearing of the suit itself, the order dismissing the suit was illegal and the case ought to have been restored as all that was before the Court on the 15th July was the plaintiff's application for the appointment of a guardian *ad litem*. DEBI SAHAI *v.* SARASWATI, 8 A. L. J. 612 **313**

——— ——— ——— ——— ——— **s. 103** **313**

——— ——— ——— ——— ——— **s. 206**—*Order directing amendment — Decree — Appeal — Revision—Appeal from amended decree—Plea of non-conformity with compromise—Merits of the decree.*

An order under section 206, Civil Procedure Code, 1882, directing amendment of a decree, not in conformity with the judgment, is not a decree and is consequently not appealable.

Nalinakshya Ghoshal v. *Mafacksnar Hossain*, 28 C. 177, *Khan Shirin* v. *Nasir Khan*, 101 P. R. 1888; *Brojo Lal Rai* v. *Tara Prosanna Bhattacharji*, 3 C. L. J. 188, followed.

Visvanathan v. *Ramanathan*, 24 M. 646, dissented from.

But when a decree has been amended, the amended decree can be attacked on the merits by way of appeal.

Brojo Lal v. *Tara Prosanna Battacharji*, 3 C. L. J. 188, followed.

A petition for revision lies against an order directing amendment.

The plea that a decree does not accord with the compromise, on which the judgment was based, is an attack on the amended decree on the merits and can only be taken in appeal and not in revision.

Brojo Lal Rai v. *Tara Prosanna Battacharji*, (1905) 3 C. L. J. 188, followed. BAWA SINGH *v.* LACHMAN SINGH, 24 P. R. 1911 **850**

——— ——— ——— ——— **ss. 234, 244** **532**

——— ——— ——— ——— **s. 248** **411, 532**

Civil Procedure Code—(1882)—contd.

——— ——— ——— ——— **s 260** — *Attachment — Sale — Conditions to be complied with.*

In cases under section 260 of the Civil Procedure Code of 1882 a valid subsisting attachment is an indispensable precedent to a sale under that section. The section is a highly penal one and must be construed strictly. Under it when a sale is ordered the following conditions must exist:

(*a*) a valid original attachment;

(*b*) application *within* one year of that attachment by decree-holder for sale;

(*c*) lapse of one year from date of attachment.

Therefore, where an order of attachment was made on 27th June 1908 and was carried out on 20th July 1908 and no application for sale was made by 20th July 1909:

Held, that the attachment ceased to exist. The order for sale, therefore, was set aside. BADRI PERSHAD *v.* FAKIRA, 170 P. L. R. 1911 **341**

——— ——— ——— ——— **s. 266** **305**

——— ——— ——— ——— **ss. 268, 274**—*Execution of decree—Usufructuary mortgage—Attachment and sale of the mortgage debt under section* 268 *not permissible—Attachment of interest in immoveable property.*

In the case of a purely usufructuary mortgage where there is no debt payable by the mortgagor, the procedure by attachment under section 268 is inapplicable. The procedure should be by attachment under section 274 of the interest in immoveable property and its sale in accordance with the provisions of the Code.

Taarvadi Bholanath v *Bai Kashi*, 26 B. 305, distinguished. MANILAL *v.* MOTIBHAI, 13 BOM. L. R. 233 **812**

——— ——— ——— ——— ——— **s. 274**—Attachment of usufructuary mortgage **812**

——— ——— ——— ——— ——— **s. 282**—*Auction-purchaser no party to order is not bound by it—Objection limited to ownership—Order deciding lien—Not order under s* 282.

An auction-purchaser in an execution sale cannot be regarded as a party to the miscellaneous order passed under section 282 of the Code of Civil Procedure, 1882, not being a representative of either the judgment-debtor or of the judgment-creditor, and is, therefore, not bound by the order.

Where an intervenor seeks to raise an attachment upon the ground that the property belongs to him and there is no question raised by him directly that he is entitled to a lien, the order of the Court that the property may be sold subject to his lien, cannot be treated as an order under section 282 of the Civil Procedure Code, 1882, but may be regarded as one made under section 287. NARAYAN *v.* UMBAR ADAM, 13 BOM. L. R. 307 **913**

——— ——— ——— ——— **s. 287**—Deliberate undervaluation in sale proclamation **475**

——— ——— ——— ——— **s. 295 (b)**—*Mortgage — Mortgaged property sold under s.* 295 (*b*)—*Right of mortgagee plaintiff to interest on sale proceeds.*

Where part of mortgaged property is sold under section 295 (*b*) of the Civil Procedure Code, 1882, the mortgagee plaintiff is entitled to recover interest on the sale proceeds and there is no duty imposed on him under the section to draw the amount out of Court and apply it in part satisfaction of the mortgage-debt. KOTTIPALAPUDI *v.* MAGANTI SEETHAYA **552**

Civil Procedure Code—(1882)—contd.

——— ——— ——— ——— **s. 310A** **458**

——— ——— ——— ——— **s. 311** — Deliberate under-valuation for sale proclamation **475**

——— **s. 335**—*Application by a person other than the judgment-debtor to be restored to possession of a portion of a house sold in execution of decree—Application dismissed for want of evidence—Suit to establish the right—Limitation Act (XV of 1877), Sch. II, Art. 11.*

A house was sold in execution of a mortgage decree. S., who was not a party to the decree, applied under section 335 of the Code of Civil Procedure, 1882, to recover possession of a room in the house. Her application was dismissed because she did not adduce any evidence. Three years afterwards she sued for recovery of the room referred to above:

Held, that her suit was barred by Article 11 of the Second Schedule to the Limitation Act, 1877.

Sarat Chandra Bisu v. *Tarini Prashad Pal Chowdhry*, 34 C. 491; 11 C. W. N. 487, distinguished.

Sarâhari Lal v. *Ambika Pershad*, 15 C. 521; 15 I. A. 123, *Rahmin Bux* v *Abdul Kader*, 32 C. 537; *Lachmi Narian* v. *Martindel*, 19 A 253, *Bibi Aliman* v. *Dhakeshwar Pershad Narain Singh*, 1 C. L J. 296, referred to. SHAGUN CHAND *v.* SHIBBI, 8 A. L. J. 626 **401**

——— ——— ——— **s. 368,** application of, to execution proceedings **405**

——— ——— **s. 373**—*Withdrawal of suit with liberty to bring fresh suit - Application to be treated as indivisible—Leave to withdraw without liberty to bring fresh suit, not to be given—Appeal treated as application for revision.*

An application for leave to withdraw from a suit with liberty to bring a fresh suit on the same cause of action, should be dealt with as an indivisible whole. A Court which grants leave to withdraw but does not give the liberty prayed for, acts without jurisdiction, and if the order is not appealable, the High Court will interfere in revision treating the appeal as an application for revision.

Mahant Bihari Dasji v. *Parshotam Das Rim Das*, 32 B. 345; 10 Bom. L. R. 293 and *Sitara Begum* v. *Faiz Ali Khan*, 9 Ind. Cas. 594; relied upon. BHAGWAT PERSHAD *v.* LACHMI PERSHAD **346**

——— ——— ——— ——— **s. 424** — *Interpretation—Suit against Secretary of State — Injunction—Notice may be dispensed with in case of immediate need.*

In section 424 of the Civil Procedure Code of 1882 the repetition of the word 'against' shows that the 'act' described in the section was meant to relate only to the public officer, not to the Secretary of State.

The words "no suit shall be instituted against the Secretary of State in Council" are wide enough to include suits of every kind, whether for injunction or otherwise.

Where there is serious injury so imminent that it can only be prevented by an immediate injunction, a Court will not be debarred from entertaining the suit and issuing the injunction though the section requires previous notice, if it is owing to the immediate need of the injunction that the plaintiff has come to the Court for relief before giving the required notice. SECRETARY OF STATE *v.* GAJANAN KRISHNA MAVLANKAR, 13 BOM. L. R. 273 **639**

Civil Procedure Code—(1882)—concld.

——— ——— ——— **s. 462** — *Compromise—Minor interested—Leave of Court not obtained—Compromise voidable.*

A compromise entered into by the parties to a suit in which a minor is interested, shall not bind the minor unless the leave of the Court is obtained under section 462 of the old Code of Civil Procedure, (Order XXXII, rule 7, of the new Code), and where the minor comes forward to set aside the compromise the Court has no power to uphold it on the ground that it is for the benefit of the minor or that the minor has derived benefit from it. BHIWA JOTIBA *v.* DEVCHAND BECHAR, 13 BOM. L. R. 280 **909**

——— ——— ——— ——— **s. 483** **305, 794**

——— ——— ——— ——— **s. 487** **305**

——— ——— ——— ——— **s. 544** **27**

——— ——— ——— ——— **s. 568** **675**

——— ——— ——— ——— **s. 629** **725**

——— ——— ——— ——— **s. 648** **794**

Civil Procedure Code (Act V of 1908), ss. 2, 74—*Decree - Order - Execution of decree—Order assessing value of property to be sold—Appeal.*

Every judicial order, made in the course of execution proceedings, is not an order under section 47 of the Code; for an order to be a decree it must conclusively determine the rights of the parties.

An order made in execution of a decree, by which the Court assessed, according to the statement of the decree-holder, the value of the property directed to be sold under the decree at a certain figure, is not one falling under section 47, and consequently is not appealable. DEOKI NANDAN SINGH *v.* BANSI SINGH, 14 C. L. J. 35 **371**

——— ——— ——— ——— **s. 2 (2)** **345**

——— ——— ——— **s. 2 (2)** "Decree", meaning of **736**

——— ——— ——— **s. 11** Res judicata *between co-defendants—Issue affecting defendant necessary to be decided for giving relief to the plaintiff.*

Where it is necessary to determine a certain issue for the purpose of granting relief to the plaintiff, and the Court, as a matter of fact, decides that issue, and the decision affects the defendants *inter se*, the decision will operate as *res judicata* between the co-defendants. GULAB SINGH *v.* NET SINGH **324**

——— ——— ——— ——— **s. 11** — Res judicata — *Ejectment suit in Revenue Court—Question of title decided—Second suit in Civil Court barred.*

A brought a suit in a Revenue Court for ejectment against certain persons on the ground of a lease. They pleaded proprietary title which was decided in their favour. *A* then brought the present suit for declaration of her title and possession in the Civil Court as against the defendants in the former suit as well as against some other persons:

Held, that the decision of the Revenue Court in the previous suit was *res-judicata* so far as the defendants in that suit were concerned.

Bihari v *Sheobalak*, 29 A. 601; A. W. N. (1907) 189, 4 A. L. J. 545, referred to. BED SARAN KUAR *v.* BHAGAT DEO, 8 A. L. J. 341 **924 F. B.**

Civil Procedure Code—(1908)—contd.

——— ——— ——— ——— **S. 11**—Res judicata—*Landlord and tenant—Suit for rent—Plea of improper* patta—*Question of title—Trial of suits and trial of issues—Explicit findings on issues necessary to operate as* res judicata—*Madras Rent Recovery Act (VIII of* 1865*), ss.* 3, 4, 7.

The plaintiff, a landlord, sued defendants, his tenants, for rent for *Fasli* 1316. Defendants pleaded that the *patta* tendered was not a proper one as a portion of the land did not belong to the plaintiff who had entered a larger extent of *jerayati* land in the *patta* than he held. The plaintiff contended that the matter was *res judicata* by reason of an action for rent for a prior *fasli*, the terms of which were the same as in the present case, where the defendant raised the same plea and the Court found that the *patta* tendered was a proper one.

Per *Sankaran Nair, J.*—As there was no express finding in the previous suit as to the title to the lands which was definitely raised in this suit, the matter was *not res judicata*, and it could not be implied that there was any decision on the question now raised, that is, whether the lands in dispute belong to the plaintiff or to the defendants.

Section 1 of Act V of 908 deals with two classes of cases, *viz*, trials of suits and trials of issues. In the case of trials of suits, the suits must be either dismissed or decreed. In the case of trials of issues the Judge records finding on the issues. In the first case, the decree may render it necessary to imply a decision on a question not expressly decided. In the latter, from its very nature, no implication is necessary, but there must be a clear decision to create the bar by *res judicata*.

To hold that an issue has been determined it must appear that the matter raised by that issue was alleged by one party and denied by the other, and that there was a finding of the Court thereon; where there is no such finding, the question can be tried in a subsequent suit.

A plaintiff need not sue on all his causes of action; if he fails on one title, he may recover on another title.

Per *Munro, J.*—The finding in the previous suit that the *pattas* were proper, *i.e.*, that they were such as defendants were bound to accept, was a finding that the relationship of landlord and tenant subsisted between the plaintiff and the defendants in respect of the lands entered in the *pattas*, and the defendants cannot be allowed again to put plaintiff to proof of his title. BAMMIDI BAYYA NAIDU *v.* BAMMIDI PARADESI NAIDU, 21 M. L. J. 344

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——— ——— **S. 11**—*Suit for possession—Mortgagee from an ostensible owner party—Plea of estoppel not raised by mortgagee—Suit by mortgagee*—Res judicata—*Transfer of Property Act (IV of* 1882*), s.* 41—Bona fide *transferee—Transferee making no inquiry as to his transferor's title.*

R mortgaged the property in dispute to *N P.* brought a suit against *R* and *N.* for possession and *P.*'s title was denied therein. The result of the final decision in that suit was that *P.* got a decree for possession. *N.* then on the strength of his mortgage brought this suit for sale of the property and pleaded that *P.* was estopped from denying his title as mortgagee:

Held, that *N.* could set up this plea in the former suit. As he did not do so, the decision in that suit operated as *res judicata*.

N., when the mortgage was executed by *R.*, did make no inquiry as to *R*'s title. He used to live in the same locality and lend money to the family of *R.* Apparently he was acquainted with all the circumstances of *R.*'s family:

Held, that he could not claim to be a *bona fide* transferee without notice within the meaning of section 41 of the Transfer of Property Act, 1882.

A transferee from an ostensible owner can defeat the real owner only if after taking reasonable care to ascertain that the transferor has power to make the transfer, he acts in good faith. PATESHRI PARTAB NARAIN SINGH *v.* NAGESHAR PERSHAD, 8 A. L. J. 358

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Civil Procedure Code—(1908)—contd.

——— ——— ——— ——— **S. 11, Explanation (4)**—Res judicata *Defendant omitting to put forward a plea in his defence, effect of—Plaintiff bound to set up all possible claims in his suit—Pleadings.*

A mortgagee instituted a suit for sale of the property based on his mortgage executed by the mother of the plaintiff, impleading him and the mother on the ground that she had after the mortgage gifted the property to him. In that suit it was found that the mother of the plaintiff had full rights in the property and that she was competent to mortgage. A decree for sale was passed and the decree-holder purchased the property. Subsequent to the purchase, the plaintiff sued to recover a share of the property on the ground that his mother was not competent to mortgage it and that the defendant in execution of his decree had purchased only the life-interest of his (plaintiff's) mother, which terminated with her death:

Held, that the suit was barred by the rule of *res judicata*. It was necessary for the plaintiff to have raised all the pleas available to him in that suit in order to defeat the defendant and if any plea was not taken and the defendant got his decree, it was no more open to the plaintiff to bring the suit for possession on the ground that his mother had only a life-estate and as such the mortgage and the sale held in execution of the decree were not binding on him. A plaintiff and a defendant are both bound to take every possible plea in support of his action or defence as the case may be.

Srimut Rajah Moottoo Viyadya v. *Katama Natchiar*, 11 M. I. A. 50; 10 W. R. 1; *Daya Shankar* v. *Ganya Sahai*, 12 O. C. 347; 4 Ind. Cas. 763, referred to. GIRJA DAYAL *v* BRIJ BHUKHAN

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——— **ss. 11, Exp. IV, 47**—*Application in execution—Regular suit—Decree for trees—Excess trees in possession of decree-holder—Suit for recovery of excess trees not barred—Pleadings—Practice—Amendment of plaint—Contradiction—Raising an objection by Court.*

If execution proceedings are still going on, it is not material whether the party dissatisfied by an order in execution applies expressly under section 47, Civil Procedure Code, or purports to bring a regular suit, provided the Court is the same.

To admit of an application under section 47, the decree must be capable of execution and must be still in course of execution.

If an application has been made under section 47 and disposed of, the decision is *res judicata* and on that ground a subsequent suit will be barred.

Civil Procedure Code—(1908)—contd.

Nga Kye v. *Mi E. Me*, U B. R. 1897-1901, II 249; *Fakruddin Mahomed Ahsan* v. *Official Trustee of Bengal*, 10 C. 538; *Nga Sa Gyi* v. *Ye Ban*, U. B. R. 1904-06, II, C. P. 36, referred to.

For Exp. IV, of section 11, Civil Procedure Code, to apply, the claim must have been within the knowledge of the person making it, during the previous proceedings.

Manekbai v. *Virchand*, 9 Bom. L. R. 1020, referred to.

A decree for possession of trees was executed. The judgment-debtor subsequently found that there were excess trees in possession of the decree-holder. The former consequently brought a regular suit for the recovery of the excess trees. It was alleged that the judgment-debtor was not aware of the fact till the execution proceedings had closed and the time for an appeal from or a review of the final order in execution was past:

Held, that the suit was not barred by section 47 of the Civil Procedure Code.

Where a plaint has been amended, the suit cannot be dismissed on the ground that the amended plaint puts forward a new case, if there is no irreconcilable contradiction between the allegations in the original plaint and the allegations in the amended plaint.

An Appellate Court should not take the objection that the amended plaint put forward a new case of its own motion, nor should it decide the point without giving the plaintiff an opportunity of explanation. NGA PO TUN *v.* MI THET PON, U. B. R. (1910) 166 **991**

——————**ss. 15, 20, 21 980**

——————**s. 46 794**

——————**s. 47 991**

——————**s. 47**—Objection by judgment-debtor that auction-purchaser has taken possession of property to which he is not entitled **714**

——————**s. 47**—Order assessing value of property to be sold **371**

——————**s. 47, O. XXI, Rr. 89, 92**—*Execution of decree—Sale, setting aside of, by payment—Deposit within thirty days—Court closed on thirtieth day—Deposit on re-opening day, validity of*—Actus curiæ neminem gravabit.

In execution of a decree for money, the immoveable properties of the judgment-debtor were sold and purchased by the decree-holder on July 20th, 1909. On August 19th, 1909, the judgment-debtor made an application to have the sale set aside under rule 89 of Order XXI of the Civil Procedure Code. The agent of the judgment-debtor was ready to deposit the money and a *challan* was duly filled up and placed in the hands of the proper officer for signature of the presiding officer, but he was informed that as the presiding officer had left the Court, his signature could not be obtained on that day. The next day the money was deposited. The sale was set aside:

Held, that the order setting the sale aside is within the scope of section 47 of the Code and is appealable: the application for revision in this case was, therefore, treated by the High Court as an appeal

Held, also, that as the judgment-debtor could not deposit the money on the last day owing to the absence of the presiding officer, the maxim *actus curiæ neminem gravabit* applied, and the deposit made the next day was valid and the sale was properly set aside. MAHOMED AKBAR JAMAN KHAN *v.* SUKHDEO PANDAY, 13 C. L. J. 467 **51**

Civil Procedure Code—(1908)—contd.

——————**s. 47 and O. XXI, r. 90**—*Fraud—Payment to decree-holder before date of sale—Fraud in conduct or publication of sale—Second appeal, whether lies.*

An application to set aside an execution-sale was made on the ground of fraud, the fraud being that the decree had been satisfied by payment to the husband of the decree-holder on the day before the sale, but the payment was not certified and the sale was held:

Held, that the matter did not come within the scope of Order XXI, rule 90, of the Code, inasmuch as the fraud alleged was not fraud in the conduct or publication of the sale, but it came within the scope of section 47 of the Code, and that, therefore a second appeal lay:

Held, also, that so far as the execution Court was concerned, the payment could not be regarded as having been made and the allegation of fraud consequently fell to the ground, and that the sale could not be set aside. ALOKESHI DASI *v.* BIRAJ MOHINI DASI **625**

——————**ss. 47, 102** *Second appeal—Execution of decree—Suit of nature cognizable by Small Cause Court and valued at below Rs. 500.*

No second appeal lies against an order in execution of a decree in a suit, valued at less than Rs. 500, of the nature cognizable by a Court of Small Causes.

Chand Monee Dasya v. *Santo Moxee Dasya*, 24 C. 707; 1 C. W. N. 534; *Nemai Chand Kanji* v *Deno Nath Kanji*, 2 C. W. N. 691, *Hira Lal* v *Chandra Kanto Ghose*, 26 C 539; 3 C. W N 403 and *Bhubon, Mohun* v. *Raja Peary Mohan Mukerjee*, 3 C. W. N. 399 26 C. 324, distinguished.

Lala Kandha Pershad v. *Lala Lal Behary Lal*, 25 C. 872, *Shayama Charan Mitter* v *Debendra Nath Mukerjee*, 27 C. 484 4 C. W. N. 269, *Dindayal* v *Patra Khan*, 18 A. 181, *Narayan Parmamand* v. *Nagindas Bhavdas*, 30 B 113; 7 Bom. L R. 543 and *Marula Ammal* v. *Marula Maracori*, 30 M 212; 17 M. L. J. 376; relied upon. WARISH MUNSHI *v.* APTABUDDIN BEPARI **412**

——————**s. 47, cl 2 187**

——————**ss. 73, 115**—*Rateable distribution of assets—"Assets held by Court," meaning of—Execution sale—Assets held when whole of purchase-money is paid—Receiver—Application for execution—Subsequent leave obtained from Court, if valid—Rival decree-holders—One decree against judgment-debtors of other decree and other persons—Whether rateable distribution allowable—Revision—Refusal to exercise jurisdiction—Erroneous interpretation of law.*

Till the whole of the purchase-money of property sold in execution of a decree, has been deposited, it cannot be held that the assets are held by the Court and admit of rateable distribution under section 73 of the Civil Procedure Code and consequently, till the whole of the purchase-money has been deposited by the purchaser, it is open to the decree-holders to apply for execution.

Civil Procedure Code—(1908)—contd.

Hafez Mahomed Ali v. *Damodar Pramanik*, 18 C. 242; *Ramanathan Chettier* v. *Subramania Sastrial*, 26 M. 179; and *Arunachellam* v. *Haji Sheikh Meera*, 34 M. 25; 8 M. L. T. 226; 1 M. W. N. 688; 7 Ind. Cas. 856, relied upon.

Where leave was obtained to proceed against a Receiver after an application for execution had been presented and before the Court was called upon to make rateable distribution of the assets:

Held, that the consent of the Court which appointed the Receiver was not a condition precedent to the institution of a proceeding against the Receiver, and that the leave and the proceeding were valid.

Banku Behary Dey v. *Harendra Nath Mukherj*, 8 Ind Cas. 1; 15 C. W. N 54, followed

Promotha Nath v. *Khetranath Mukerjee*, 32 C. 270; 9 C. W. N. 247, dissented from.

Where the judgment-debtors against whom one decree-holder has obtained decrees are all judgment-debtors under the decrees held by another, there is no bar to rateable distribution under section 73 of the Code of Civil Procedure.

Ganesh Das Bagri v *Shiva Lakshman Bhakat*, 30 C. 583 (F. B.) *Gatti Lal* v *Bir Bahadur Sahai*, 27 A. 158; *Ramanathan Chettiar* v *Subramania Sastrial*, 26 M. 179, and *Chhotalal Harkison Das* v. *Nabibhai Mianji*, 29 B. 528; 7 Bom. L. R 567, followed

The test to be applied in a revision case is, whether the Court below has refused to exercise the jurisdiction vested in it by law; it is immaterial that such refusal is based upon a misapprehension of the true effect of statutory provisions on the subject.

Vishvambhar v *Vasudev*, 6 B. 708 and *Ross* v. *Pitambar*, 25 A. 504, referred to

Therefore, where the Court below refused to exercise the jurisdiction vested in it, by reason of an erroneous interpretation of section 73 of the Code of Civil Procedure: *Held*, that the High Court was competent to interfere. MAHARAJA OF BURDWAN *v.* APURBA KRISHNA ROY, 14 C. L. J. 50; 15 C. W. N. 872

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——— ——— ——— ——— **ss. 92, 93**—*Collector*—*Powers cannot be exercised by his subordinates.*

The duties which are imposed upon a Collector by the Government Resolution under section 93 of the Code are duties of a very special nature, and cannot be discharged by his subordinates notwithstanding that they are discharging the functions of a Collector in revenue matters. SOMCHAND BHIKHA BHAI *v.* CHHAGAN LAL, 13 BOM. L. R. 207; 35 B. 243.

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——— ——— ——— **s. 92**—*Suit against trespasser for possession of trust property, maintainability of*

A suit for possession cannot be maintained under section 92 of Act V of 1908 against a trespasser in possession of trust property.

Budh Singh v *Niradbaran*, 2 C. L. J 431; *Budree Dass* v. *Chooni Lal*, 33 C 789; 10 C. W. N. 681; *Kazi Hassan* v. *Sagun Balkrishna*, 24 B. 170 and *Huseini Begam* v. *Collector of Moradabad*, 20 A. 46, followed.

Ghazaffar Husain Khan v *Yawar Hossein*, 28 A. 112; 2 A. L. J. 591; A. W. N. (1905) 208, referred to.

IMAMI *v* MOHAMMAD YUSAF, 14 O. C. 65; 2 O. L. R. 17

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——— ——— ——— ——— **s. 93** **803**

——— ——— ——— ——— **s. 99** **515, 731**

Civil Procedure Code—(1908)—contd.

——— ——— ——— ——— **s. 100** **325**

——— ——— ——— ——— **s. 102** **412**

——— ——— ——— ——— **s. 104** **211**

——— ——— ——— ——— **s. 104 (1), cl. (f)** **450**

——— ——— ——— ——— **s. 104 (2)** **36, 347**

——— ——— ——— ——— **s. 104 (f, Sch. II, cl. 21 (1) and (2)**—*Appeal—Order filing an award—Decree based thereon—Provisions of the Code, whether antagonistic—Intention of Legislature.*

An appeal lies, under section 104 (*f*) of the Code of Civil Procedure, 908, from an order filing an award made in an arbitration without the intervention of the Court, in spite of the fact that the Court has, under clause 21 (1) of the Second Schedule to the Code, proceeded to pronounce judgment according to the award.

Per *Reid, C. J.*, and *Kensington, J.*—

The language of section 104 (*f*) is very clear and the fact that a later provision of the Code, clause 21 (2), Schedule II, bars an appeal from a decree based on an award does not cancel the earlier provision. The two provisions of the Code are not antagonistic. If the order filing an award is set aside, there is no award on which judgment and decree can be based. The absence of any ground, such as is mentioned or referred to in clause 14 or clause 15 of Schedule II, is a condition precedent to passing an order filing the award.

Janokey Nath Guha v. *Brojo Lal Guha*, 33 C. 757; 3 C. L. J. 450; 10 C. W. N. 609; *In the Matter of Pleader*, 27 P. R. 1910 Cr; 22 P. W. R 1910 Cr; 6 Ind Cas. 736; *Shankar Mal* v. *Nathu Mal*, 1 P. R 1908 (F. B.; 58 P. W. R. 1907, distinguished.

Per *Rattigan, J.*—

The two provisions of the Code are for all practical purposes in direct conflict. The result of allowing an appeal from an order filing an award is tantamount to allowing an appeal from the decree based on the award. The intention of the Legislature expressed in clause 21 (2), Schedule II, is to all intents and purposes nullified by the provision in clause (*f*) of section 104.

The intention of the Legislature is to allow an appeal from the order filing an award merely when such order dealt with the objection that the matter had not been referred to arbitration or that no award had in fact been passed. RAM DITTI *v.* AMAR SINEH, 103 P. W. R. 1911.

512 F. B.

——— ——— ——— **s. 106** **211**

——— ——— ——— ——— **s. 109 (a), (c)** **444**

——— ——— ——— ——— **s. 109, cls. (a) and (c)**—*Final order—Privy Council appeal—Receiver, order appointing—Certificate—Fit case for appeal.*

A "final order" within the meaning of clause (*a*) of section 109 of the Civil Procedure Code means an order which finally decides any matter directly at issue in the case in respect of the rights of the parties.

Secretary of State v. *British India Steam Navigation Co*, 9 Ind Cas. 183; 13 C. L. J. 90, relied upon.

An order appointing a Receiver is not such an order.

Civil Procedure Code-(1908)-contd.

Clause (*c*) of section 109 of the Code is intended to cover special cases, such, for example, as those in which the point in dispute is not measurable by money, though it might be of great public or private importance. To certify that a case is of that kind, though it is left entirely in the discretion of the Court, is a judicial process which cannot be performed without special exercise of that discretion, evinced by a fitting certificate. MAHOMED MUSAJI *v.* AHMED MUSAJI, 13 C. L. J. 507 **439**

——— **S. 110 and O. XLV, r. 4**—*Consideration of suits—Pecuniary valuation—Appeal—Privy Council.*

Where certain cases are tried together and decided by the same judgment, and the fundamental question in the cases, which goes to the root of the matter, is common to all the suits, they should be treated as consolidated for the purposes of pecuniary valuation for appeal to the Privy Council, although a substantial question of law arises in some of the cases only, and not in the others. BANGA CHANDRA DHAR *v.* JAGAT KISHORE, 3 C. L. J. 503 **967**

——— **S. 110**—*Privy Council Appeal—Pecuniary valuation—Foreclosure suit—Subject-matter.*

In a suit to enforce a mortgage security, where the proceedings are entirely *in rem* and it is not sought to make the mortgagor personally liable, the value of the subject-matter in dispute is the amount claimed, when such amount falls short of the value of the mortgaged property, while it is the value of the mortgaged property when the amount due under the mortgage exceeds the value of the property. BENOY LAL ROY *v.* KAMALAPATI BANERJEE, 13 C. L. J. 505 **90**

——— **S. 115** **211, 551**

——— **S. 115** Refusal to exercise jurisdiction—Erroneous interpretation of law **527**

——— **S. 115** *Charter Act (24 and 25 Vict. C. 104), s. 15—High Court—Revisional or superintending power—Where another remedy open—Interlocutory order.*

Where there is another and an adequate remedy which is open to an applicant, the High Court will not have recourse, ordinarily at least, to its revisional or superintending powers under section 115 of the Civil Procedure Code or section 15 of the Charter Act.

Where a Court below refused to amend the pleadings upon an application made to it, the High Court refused to interfere, because there was another and adequate remedy secured for the petitioner in the right of appeal which he would have, should the judgment given in the Court below be eventually against him.

Obiter dictum:—Interlocutory orders do not fall within the purview of section 115 of the Civil Procedure Code, and it has been the general practice of the High Court not to interfere under that section in the case of such orders. CHANDI ROY v. KIRPAL ROY, 15 C. W. N. 682 **308**

——— **S. 138** **794**

——— **S. 141**—*Application for setting aside dismissal of suit for default dismissed for default re-admitted.*

Civil Procedure Code—(1908)-contd.

Where an application to set aside an order dismissing a suit for default is itself dismissed for default, an application for its re-admission can be entertained under the provisions of section 141 of the Civil Procedure Code.

Lakhmi Chand v. *Gatto Bai*, 7 A. 542; *Lallubhai Bhajeram* v. *Bai Magangavri*, 18 B 59, referred to. MANAKJI *v* SURAJMAL, 7 N. L. R. 32 **705**

——— **S. 141, O. XLVI, r. 1**—*Reference to High Court—Competency of subordinate Courts to refer a question to High Court in a proceeding, not a suit or appeal.*

Section 141 of the Code of Civil Procedure, 1908, does not confer any power on subordinate Courts to make reference to the High Court under Order XLVI, rule 1, in any proceeding, not a suit or appeal. Such power must be expressly conferred by statute.

Minakshi v. *Subramanya*, 11 M. 26; 4 I. A. 160, referred to

Thomas Souza v. *Ghulam Moidin Beari*, 26 M. 438; *Parasuramier* v. *Seshier*, 27 M. 504; *Haree Nath Koondoo* v. *Modhoo Soodun Saha*, 9 W. R. 122; *Ningappa* v. *Gangawa* 10 B. 43, referred to. DAMODAR MENON *v.* KITTAPPA MENON, 21 M. L. J. 613; (1911) 2 M. W. N. 13 **879**

——— **SS. 148, 149** **268**

——— **O. I, Rr. 1 (3), 5** **515**

——— **O. I, R. 62** **94**

——— **O. II, R. 2**—*Cause of action of two suits not identical—Whether one suit barred by virtue of the other.*

Where the cause of action of a later suit is not identical with that of a former the later suit is not barred under Order II, rule 2, of the Code of Civil Procedure, 1908. HAZARI LAL *v.* RAM CHANDER **26**

——— **O. II, R. 12** **336**

——— **O. III, R. 1** **740**

——— **O. VI, R. 14, O. XIX, R. 1**—*Plaint Signing and verification—Plaintiff company incorporated in foreign country—Signature and verification by person holding general power-of-attorney—"Principal officer"*

There is nothing in rule , Order XIX, Civil Procedure Code, to exclude from its operation a foreign company which is not incorporated as such in this country.

Singer Manufacturing Company v. *Baij Nath*, 30 C. 03, followed.

A plaint was filed in the Delhi Court on behalf of the Singer Manufacturing Company, which is incorporated in the United States of America and carries on an extensive business in respect of the sale of sewing-machines in various parts of this country. The plaint was signed and verified on behalf of the company by one *M.*, who had been appointed agent for the company at Delhi by *P* who, in his turn, held a general powero-f-attorney from the Company's accredited English Agents authorizing him to act for the Company as their general attorney and agent in British India and to appoint sub-agents therein:

Held, that the plaint was duly signed and verified on behalf of the Company, *M.* being the person having special knowledge of the facts relating to the claim and holding a general power-of-attorney for the Delhi District, by which he was duly authorized to

Civil Procedure Code (1908) – contd.

sign the plaint on behalf of the absent company, and that he was also the 'principal officer' of the Company within the meaning of Order XIX, rule 1, and competent, as such, to sign and verify the plaint. SINGER MANUFACTURING COMPANY, DELHI *v.* YAR MUHAMMAD KHAN 141

——— O. VI, R. 17 731

——— O. VI, R. 17—*Amendment—Pleadings—Alteration in description of property detailed in plaint made beyond limitation—Power of Court to make the amendment—Effect on limitation.*

One *H.* sold the property owned by her in a village and in the sale-deed described the property as being a 24 *biswansis* share. In point of fact the share owned by *H.* amounted to only 17 *biswansis*. The plaintiff brought a suit for pre-emption on the last day of limitation but claimed only 15 *biswansis* share which he alleged *H.* had sold. Later on he discovered that the share of *H.* was 17 *biswansis* and applied to amend the plaint:

Held, that the amendment might be looked upon as a correction in the description of the property as set forth in the plaint. As such, the Court had power to allow the amendment and the amendment would not have the effect of barring the suit by limitation. MUHAMMAD SADIQ *v.* ABDUL MAJID, 8 A L. J. 636 476

——— O. VI, R 17 *Amendment of plaint—Amendment in second appeal—Complicated question of law involved—Authorities as to remedy open to plaintiff conflicting—Plaintiff adhering to his own view—Amendment allowed—Amendment, when to be allowed—General rule.*

Where an amendment is necessitated by the plaintiff's carelessness or mistake, it would ordinarily not be fair to allow him to rectify his error if the amendment would deprive the defendant of an advantage which he can legitimately claim to have gained by the plaintiff's mistake. But it would be hardly proper to apply this test to cases where the plaintiff cannot be charged with not having exercised reasonable care in drafting his plaint.

It cannot be laid down as a general rule that the Court should in no circumstances allow an amendment of the plaint on the ground that the defendant would not be able in consequence to plead limitation as a defence to the suit.

The proposition that a plaintiff will not be allowed to add *fresh causes of action* by way of amendment when if a fresh suit were instituted on those causes of action it would be barred by limitation, is subject to exceptions, *e. g.*, where the cause of action is the same but the plaintiff has made a mistake as to the appropriate remedy which he would be entitled to in law on that cause of action.

The established practice of the Courts both in England and in India is to act with considerable liberality in the matter of granting admendments. The Court ought to correct all kinds of errors or mistakes which are not fraudulent or intended to overreach the Court.

Where there was considerable conflict in the judgments of the High Courts with respect to the remedies open to a plaintiff, and the plaintiff persisted in the Courts below in maintaining his view as to the remedies claimed by him though his error was pointed out to him by the defendant:

Civil Procedure Code—(1908)—contd.

Held, that it would be unreasonable in second appeal to refuse leave to amend on the ground that the plaintiff's advisers adhered in the Courts below to his view with respect to a complicated question of law especially when that view was accepted by both the lower Courts.

Authorities on the question of amendment discussed. MULLA VEETIL *v.* ACHUTAN NAIR, 21 M. L. J. 475; 9 M. L. T. 499 218

——— O. VI, R. 17—*Pleadings, amendment of, when to be allowed Civil Procedure Code (Act XIV of 1882), ss. 234, 244, 248—Execution of decree—Objection that decree was made without jurisdiction, if can be taken in execution proceedings Public Demands Recovery Act (I B C. of 1895), ss. 15, 17 (1)—Limitation—Special period.*

Under rule 17 of Order VI of the Civil Procedure Code of 1908, amendments of pleadings should be allowed when this is necessary for the purpose of determining the real questions in controversy between the parties, but leave to amend ought to be refused where the amendment is merely technical or is immaterial

The action taken in this case by the Court below in favour of the defendant to enable him at a very late stage of the suit to amend the written statement and thus to raise objections in bar to the maintainability of the suit was *held* to be open to criticism.

No Court of execution can entertain the objection that the decree under execution is inoperative in law.

Benode Lal v *Brajendra Kumar*, 29 C. 810; *Hassan Ali* v. *Gauzi Ali*, 31 . . 79; *Nash Behari* v. *Thakur Joynanda*, 4 C. L. J 75: *Debendranath* v. *Prasanna Kumar*, 5 C. L J. 328; *Sundarappa* v. *Sreeramulu*, 17 M. I . J. 288 2 M. . T 36 ; 30 M. 402 *Sadindra* v. *Budan*, 9 M. 80 and *Arunachallam* v. *Murugappa*, 12 M. 503, relied upon

Where a plaintiff asked for a declaration that a certificate which was made by the Revenue authorities against her was entirely without jurisdiction:

Held, that this is not a question within the scope of section 244 of the Civil Procedure Code of 1882 and that the suit was maintainable.

It is doubtful whether section 244 applies to proceedings in execution under the Public Demands Recovery Act.

Barhamdeo Narayan v. *Bibi Rasul Bandi*, 32 C. 691; 1 C. L J 360; *Umed Ali* v. *Raj Laksmi*, 33 C. 84; 1 C. L. J. 538 10 C. W. N. 130; *Hari Charan* v. *Chandra Kumar*, 34 C. 787; 11 C. W. N. 745 and *Raghubans Sahai* v. *Phool Kumari*, 32 C. 1150; 1 C. L. J. 542; referred to.

The plaintiff alleged that a certificate was originally made against certain persons, Mukherjees, to recover a sum due under an instalment-bond executed by them for the payment of the expenses of certain works executed under the Drainage Act; that when their estate vested in the Receiver the name of the latter was improperly substituted in the place of the Mukherjees; that finally, after the purchase by the plaintiff of some of the properties belonging to the Mukherjees from the Receiver, her name was substituted in the place of the Mukherjees and the Receiver: that the procedure adopted was wholly unauthorized, and that the certificate should be declared invalid;

Held, that the special period of limitation provided by section 15 of the Public Demands Recovery A

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had no application to the suit, and that the procedure adopted by the Revenue Authorities in su stituting the name of the plaintiff in the certificate was without jurisdiction. NAGENDRA BALA CHAUDHRANI v. SECRETARY OF STATE, 14 C. L. J. 83 532

— — — — — — — — O. VII, R. 10 980
— — — — — — — — O. VII, R. 14 731
— — — — — — — — O. IX, r. 1, O. XVII, r. 3—*Appearance—Advocate appearing and applying for adjournment and then withdrawing on the application for adjournment being refused*—Ex parte *decree—Application for setting aside—Sufficient reason.*

Where time was given to the defendant to summon his witnesses but he failed to summon them, whereupon his Pleader applied for a postponement of the case and on his application being refused, withdrew his appearance:

Held, that the withdrawal of his appearance by a Pleader, who had represented the defendant in this case continuously for over two years, simply because the Court proceeded under Order XVII, rule 3, to decide the suit forthwith, declining to give further time to the defendant, would not necessarily render the subsequent proceedings *ex parte*.

In every application for setting aside a decree, the petitioner must satisfy the Court that he was prevented by any sufficient cause from appearing when the suit was called on for hearing. PALANIAPPA CHETTY v. MUTHU CHETTY, 4 BUR. L. T. 67 770

— — — — O. XIV, R. 5—*Power of Court to add fresh issue—New plea should not be allowed after remand—Pleadings.*

A party to a suit ought not to be allowed to raise, after remand, a new plea, which was not advanced either in the Court below or in the High Court before remand. Although a Court has power under Order XIV, rule 5, of the Code of Civil Procedure, to add any issue before judgment is pronounced, yet in exercising that power it ought not to allow a new plea to be put forward and add an issue shortly before pronouncing judgment. SOHAN BIBI v. HIRAN BIBI 230

— — — — — — O. XVI, r. 10 and O. XVII. Rr. 2 and 3 *Witnesses cited by a party not appearing—Court's power to issue warrant of arrest—Default in appearance—Power of Court to proceed to decide the case.*

Where the witnesses cited by a party fail to appear without lawful excuse and the party concerned does not apply to the Court to act under Order XVI, rule 10, clauses (2) and 3), but the Court has reason to believe that the evidence of the witnesses is material, the Court would exercise a sound discretion by itself putting in force the powers entrusted to it by the said provisions.

Where the witnesses cited by a party do not appear in Court on the fixed date, the Court ought not to proceed under Order XVII, rule 3, nor should the party be considered to have committed a default in appearance within the meaning of rule 2, Order XVII.

Lulhin Sonraj Kuari v. *Audhan Singh*, A. W. N. (1891) 112; *J. G. Bachman* v. *Lal Beharee Pandey* 13 W. R. 324; *Luchman Singh* v. *Chokowree Singh*, 25 W. R. 54, distinguised. RAM NARAYAN v. JAGDEO MISIR, 8 A. L. J. 839 903

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— — — — O. XVI, R. 14 35
— — — — O. XVII Rr. 2, 3 903
— — — — — — O. XVII, R. 3 770
— — — — — — O. XIX, R. 1 141
— — — — — — O. XXI 473
— — — — O. XXI, R. 33 (1) and (2)—*Restitution of conjugal rights—Detention of wife in prison—Discretion of Court.*

In execution of a decree for restitution of conjugal rights a Court ought, in the exercise of its discretion under Order XXI, rule 33 (1), to decline to enforce the decree by the detention in prison of the wife, especially where the marriage was an unhappy one and the husband has charged the wife with adultery. KARAM ALLAHI v. MARIAM 177

— — — — — — O. XXI. Rr. 58, 62—*Mortgaged property—Mortgagee in possession—Attachment as mortgagee's property—Claim by mortgagor—Position of mortgagee—"On account of or in trust for"—"As his property".*

A claim under rule 58, Order XXI, may be made by a person who has an interest in the property although he is not in possession.

A mortgagee in possession is in possession "on account of or in trust for" the mortgagor, to the extent of the mortgagor's interest. The property is not in the mortgagee's possession "as his own property" but partly on his account and partly on account of the mortgagor.

Nga Kye v. *Po Min*, U. B. R. 1901-06, II, Submortgage 1, referred to.

Where mortgaged property in possession of a mortgagee is attached as his property and the mortgagor prefers a claim against the attachment, the claim should be investigated and the property released from attachment to the extent of the mortgagor's interest.

So far as the interest of the owner and mortgagor is concerned, the property is not liable to attachment.

Monmohiney Dassee v. *Radha Kristo Das*, 29 C. 542; *Hamid Bakhut Mozumdar* v. *Buktear Chand Mahto*, 14 C. 617; *Sheoraj Nandan Singh* v. *Gopal Saran Narain Singh*, 8 C. P. 0, distinguished.

Kumarappa Chetti v. *Nga Pyi*, U. B. R. 1904-06, II, Civ. Pro. 18, relied upon.

Quære: Whether a mortgagee in possession is actually a trustee?

Lall Das v. *Jamal Ally*, 9 W. R. 187; *Jogendronath Mullick* v. *Raj Narain*, 9 W. R. 489; *Kullyan Dass* v. *Sheo Nundun Pershad Singh*, 18 W. R. 45, referred to. NGA TOK v. SUBRAMONIAN CHETTY, U. B. R. (1910 I, 75) 594

— — — — — — O. XXI, R. 89 51
— — — — O. XXI, Rr. 89, 92 and O. XLIII r. 1, cl. (j), and ss. 2 (2), 10 (2) *Appeal from order disallowing application under r. 89—Second appeal, whether lies—Change in law.*

No second appeal lies from an order made on appeal from an order disallowing an application under Order XXI, Rule 89, of the Civil Procedure Code.

Change in the law pointed out. ASIMUDDI SHEIKH v. SUNDARI BIBEE, 38 C. 539; 15 C. W. N. 844; 14 C. L. J. 224 345

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——— ——— ——— ———— **O. XXI, r. 89** *Deposit—Last day—Court leaving earlier—Deposit next day, whether valid—Act of Court not to prejudice party—Conditional deposit—Withdrawal of condition—Deposit by person whose title is not affected by sale, if legal.*

An act of the Court cannot prejudice any party

Therefore, where, on the last day for making a deposit under Order XXI, rule 89, of the Civil Procedure Code, the deposit could not be made as the presiding officer had left the Court earlier than usual and the deposit was made the next day: *Held*, that the deposit was valid and in time.

Mahomed Akbar Jaman Khan v. Sukhdeo Panday, 13 C. L. J. 467; 10 Ind. Cas. 51, referred to

The petition which accompanied the deposit contained a statement that the money was not to be paid out to the decree-holder auction purchaser till the disposal of a suit which had been commenced by the petitioner in another Court; but as soon as objection was taken by the decree-holder, the petitioner withdrew the objection: *Held*, that the deposit was valid.

Shakoli v Jotindra Mohan, 1 C. W. N. 132 and *Hanooman Singh v Luchman Sahoo*, 8 C. W. N. 345, referred to

A person whose title cannot be affected by the sale sought to be reversed, is not entitled to make a deposit under Order XXI, rule 89, of the Code.

Therefore, where the petitioner has carried back her title to a date so far anterior to the sale that she could not possibly be affected thereby: *Held*, that she had no *locus standi* to make an application for reversal of the sale which according to her own case does not concern her in the least. DULHIN MOTHURA KOER *v.* BANSIDHAR SINGH **880**

——— ——— ——— ——— **O. XXI, r. 89**- *Sale in execution of simple money decree—Application to set aside the sale by the mortgagee decree-holder—Person holding an interest in property - Competency to make the application.*

A. held two mortgages against *R* and obtained a decree for sale of certain property. He subsequently obtained a simple money decree against the same judgment-debtor. In execution of his simple money decree he brought the mortgaged property to sale which was purchased by a stranger. *A.* then applied under Order XXI, rule 89, of the Civil Procedure Code, 1908, to have the sale set aside:

Held, that although ordinarily the mortgagee of the property sold was a person who had an interest sufficient to enable him to make an application under Order XXI, rule 89, yet in the case where the holder of the decree for money in execution of which the property was sold, was also the holder of the mortgages, he was not competent to make the application. He would be deemed to have caused the property to be sold either free from the mortgages or subject to the mortgages If it was sold free from the mortgages, he must be deemed to have abandoned his mortgages, and in that case he had no interest in the property sold. If he caused the property to be sold subject to the mortgages, the sale only related to the interest of the mortgagor in which the mortgagee had no interest. DURGA PROSAD *v.* RAM DOYAL CHOWDHRY, 8 A. L. J. 356 **863**

——— ——— ——— ——— **O. XXI, R. 90 625**

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——— ——— **O. XXI, Rr. 90, 92, O XLIII, R. (j)** -*Sale Application to set aside sale—Compromise between decree-holder and judgment-debtor behind back of auction-purchaser, to have sale set aside, if valid—Appeal—Right of auction-purchaser to appeal.*

An execution-sale cannot be set aside without notice to the auction purchaser and if the original Court pass an order setting the sale aside, the auction-purchaser is entitled to appeal.

An execution-sale was concluded on September 20th 1909, but the judgment-debtor applied to set it, aside on the grounds of fraud and irregularity. During the pendency of this proceeding, the decree-holder intimated to the Court that he was willing to accept the decretal amount and to allow the sale to be set aside. The amount was thereupon paid but beyond 30 days from the sale; the Court, however, set it aside. The auction-purchaser appealed to the District Court and the order setting aside the sale was reversed:

Held, that the appeal was competent.

Held, also that the auction-purchaser was not bound by the compromise between the decree-holder and the judgment debtor, and that the sale could not be set aside on such compromise. BIBI SHAROFAN *v.* MAHOMED HABIBUDDIN, 13 C. L. J. 535; 15 C. W. N. 685 **148**

— — — — **O. XXI, R. 92 51, 148, 345**

——— ——— — **O. XXI, Rr. 98, 99, 101, 103**—*Revision—Practice Preliminary order not contested till final orders passed in the case—Final order itself not contested—Preliminary order, whether can be revised.*

The Chief Court will not interfere on the revision side with a preliminary order of a lower Court which is allowed to stand unchallenged at the time it is passed. and which is contested only at a late hour and after the inquiry has been made in accordance therewith and a final order (which itself is really not contested) passed by the lower Court.

A party against whom an order is made under Order XXI, rule 98, rule 99 or rule 101 of the Civil Procedure Code, has the right to proceed under Order XXI, rule 03 and, therefore, cannot be allowed to have the order rectified in revision MATHU MAL *v.* AMBO, 129 P. L. R. 1911 **183**

——— — **O. XXI, Rr. 99, 101, 103** **183**

——— — **O. XXIII, O. XLI, R. 1**—*Withdrawal of suit—Appeal—Competency of Appellate Court to allow withdrawal after presentation of appeal.*

It is beyond the power of an Appellate Court to allow a withdrawal from a suit with leave to file a fresh suit on the same cause of action after the defendant has obtained a decree in his favour. EKNATH RONOJI *v.* RANOJI BAWAJI, 3 BOM. L. R. 237 **813**

——— **XXII, R. 1, sub-rule (2)**—*Withdrawal of suit—Leave to bring fresh suit—Condition that costs be paid before institution of fresh suit—Fresh suit by plaintiff and other persons filed without paying costs Costs paid one month and two days after—Whether suit, validly instituted.*

G brought a suit on a promissory note. Upon his admission that he was a member of a joint family the

Civil Procedure Code—(1908)—contd.

Court held that the other members ought to join as plaintiffs. *G.* then asked for leave to withdraw from the suit with liberty to bring a fresh suit on the same cause of action. The Court permitted him to withdraw from the suit on condition that "he must pay the defendant's costs before bringing a fresh suit or else this suit shall stand dismissed with costs." The suit was withdrawn. Three days later *G.* with *M.* and *S.* instituted the present suit, but the costs of the previous suit were not deposited till after a month:

Held, that the suit was maintai able; that *M.* and *S.* were not bound by the previous order of the Court and they were entitled to ask that *G* should be made a defendant; that the suit might be considered as filed on the day on which the costs were paid

Hare Nath Das v. *Syed Hossain Ali*, 10 C. W. N. 8; 2 C. L. J. 480; distinguished GOPI LAL *v* NAGGU LAL, 14 C. L. J. 105 **6**

——————— O. XXIV, R. 1 393

——————— O. XXX, R. 10—*Suit against person carrying on business in firms' name—High Court Charter, cl. 2—Jurisdiction—Person living outside but carrying on business within jurisdiction of High Court—Contract signed by manager—Authority of manager Power-of-attorney, construction of—Power of re-sale—Non-appropriation of goods to fulfilment of contract—Measure of damages Contract Act (IX of 1872), s. 107.*

A plaintiff is entitled in respect of a firm transaction to sue the defendant under the name in which he traded, by virtue of Order XXX, Rule 10, of the Civil Procedure Code, 1908. There is nothing in that rule which says anything about residence either in or without the jurisdiction of the High Court, and it has not the effect of curtailing the powers which the High Court derives from clause 12 of the Charter, under which it has jurisdiction over persons who carry on business within its local limits.

A contract was signed by the manager of the defendant's business in Calcutta, the defendant himself being a resident of Singapore. The defendant was sued in his firm's name for damages for breach of the contract in the Original Side of the High Court:

Held, that the suit was maintainable in the form in which it had been brought, and the High Court had jurisdiction to try it.

The defendant by a power-of-attorney empowered his manager to contract, superintend and carry on the business of general merchants, as now carried on by the defendant in Singapore. The manager entered into forward contracts with the plaintiff in respect of sugar, and there was evidence that the defendant's firm was accustomed in Calcutta to enter into forward contracts in the sugar trade:

Held, that the manager had authority to enter into the contract sued upon and that the defendant was liable.

By the contract the defendant purchased 750 tons of sugar, the delivery of which was to be made in five equal shipments in August, September, October, November and December 1910. Notice was given of the arrival of the August shipment amounting to 150 tons. The defendant took delivery of 25 tons but failed to take delivery of the balance which was re-sold by the plaintiff at a loss, and he now sued to recover the loss:

Held, that as no goods had been appropriated to the fulfilment of the contract, the plaintiff had no right

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to re-sell and charge the defendant for the difference between the contract price and the price at which he sold the balance of the sugar, but that the measure of damages was the difference between the market price on the date of the breach and the contract price. E. D. SASOON AND CO. *v.* M. S. E. ANGULLIA & Co. **895**

——————— O XXXIV, R. 6 21

——————— O. XXXIV, R. 6, O. II, R. 2 *Mortgage—Suit for sale on mortgage by subsequent mortgagee Subsequent mortgagee paying off the prior mortgagee—Entire debt of subsequent mortgagee not satisfied by sale of the mortgaged property—Simple money decree Limitation—Whether a second suit would lie to recover the balance money.*

J., who owned three properties *A.*, *B.* and *C.*, mortgaged *A* to *S*, in 1882, the debt being re-payable in 1891. In 883 *J.* again mortgaged "*A.*" to *S.* for a second time, debt being re-payable in 1886. In 1885 *J.* executed a third mortgage in favour of *D.* in respect of the same property, *A.*, to be re-paid in 1894. *S.* brought two suits on the basis of the two mortgages of 1878 and 1883 for sale of the property, but *J.*, being unable to pay the debt, compromised the suits and executed another mortgage-deed, dated 31st August, 1888 in order to satisfy the debts due under the two mortgages and the expenses of the litigation. In this mortgage *J.* mortgaged all the three properties *A.*, *B.*, *C.* and promised to pay the debt in 1900. In 1903, *D.* brought a suit on the basis of the mortgage of 1885 and *S* having pleaded priority, *D.* had to pay off the entire sum due to *S.* In execution of the decree in this suit the mortgaged property *A.* was sold but the proceeds of sale did not satisfy the entire debt *D.* then brought another suit for sale of the properties "*B.* and *C.*," comprised in the mortgage of 1888 to recover the balance due:

Held, (*a*) that the suit did not lie;

(*b*) that the balance of the money could not be recovered by sale of the properties "*B.* and *C.*," which had not been mortgaged in the mortgages of 1882 and 1883 by virtue of which *S.* claimed priority against *D.*;

(*c*) that the plaintiff was not entitled to a simple money-decree as the claim for a simple money-decree had become time barred. MOHAMMAD HUSSAIN *v* DHANESHAR RAI, 8 A. L. J. 599 **336**

——————— O. XXXIV, R. 14—*Transfer of Property Act IV of 1882), s. 99—Rule of procedure—Mortgage-decree—Execution—Sale of property mortgaged Sale proceeds insufficient—Balance—Second mortgage between same parties—Redemption decree—Mortgagee applying for sale of second property in respect of the balance of the first mortgage—Sale.*

In the year 1897 a decree was obtained upon a mortgage under which the mortgaged property was sold but the sale proceeds proved insufficient to satisfy the judgment-debt. The mortgagee was also the holder of another mortgage executed by the same mortgagors upon other property. One of the mortgagors after the decree had been passed died, and his mother who was the surviving mortgagor obtained a decree for redemption of the second mortgage and an order for payment of the mortgage-debt by instalments, the mortgagee being entitled to a charge on the property until his claim was satisfied.

Civil Procedure Code-(1908)—contd.

In August 1908, the mortgagee applied for execution against the second property in respect of the unpaid balance under the decree of 1897.

The Subordinate Judge held that an attachment was permissible even though section 99 of the Transfer of Property Act applied. The District Judge, however, ordered attachment in execution.

On appeal to the High Court:

Held, that the Code of Civil Procedure (Act V of 1908), in so far as it repealed section 99 of the Transfer of Property Act and substituted in its place Order XXXIV, rule 14, merely effected a change of procedure in the manner in which mortgaged property has to be realized in execution of money decrees and, therefore, the statutory rule in force for the purpose of the execution of the unsatisfied portion the decree of 1897, was the rule contained in Order XXXIV of the present Procedure Code. BAI GANGA *v.* RAJARAM, 13 BOM. L. R. 245 **815**

— — — — — — — **O. XXXVIII, R. 5 794**

— — — — — — **O. XLI, R. 5 444**

— — — — — — **O. XLI, R. 11 813**

— — — — — **O. XLI, Rr. 11, 21**

—*Appeal heard* ex parte *against defendant No. 2 in lower Appellate Court—Second appeal by defendant No. 1 making plaintiff alone respondent—Re-hearing of appeal, application for, by defendant No. 2—Jurisdiction of lower Appellate Court to entertain application.*

A suit was brought by the plaintiff for recovery of possession of land against defendant No. 5. He obtained a decree for one-fifth of his claim. He appealed against the decree to the lower Appellate Court making all the defendants respondents, but defendant No. 1 alone appeared. The lower Appellate Court gave the plaintiff a decree in full. The defendant No. 1 preferred a second appeal to the High Court which was summarily dismissed under Order XLI, rule 11. The defendant No. 2, against whom the decree of the lower Appellate Court was made *ex parte*, then applied to that Court under Order XLI, rule 21, for a re-hearing of the appeal in that Court as against him, and his application was dismissed on the ground of want of jurisdiction:

Held, that as the defendant No. 2 was no party to the second appeal even in name, the lower Appellate Court had jurisdiction to entertain the application.

Damodar Manna v. *Sarat Chandra Dhal*, 13 C. W. N. 846; 3 Ind. Cas. 468; *Kumudnath Roy Chowdhury* v. *Rai Jatindra Nath Chowdhury*, 9 Ind. Cas 189; 13 C. L. J. 221; 15 C. W. N. 399 and *Dhonai Sardar* v. *Tarak Nath Chowdhuri*, 5 Ind Cas. 525; 12 C. L. J. 53, distinguished. INDU MEAH *v.* DARBAKHSH BHUIYAN, 15 C. W. N. 798; 14 C. L. J. 42 **275**

— — — — — — **O. XLI, R. 21 275**

— — — — — — **O. XLI, R. 22 (4)**—

Appeal dismissed for non-payment of proper Court-fee—Cross-objections, whether can be entertained after such dismissal of appeal—General rule—Exceptions—Court-fee—Appellant not able to pay Court-fee on the whole amount claimed—Abandonment of part of claim, whether permissible.

An Appellate Court has no power to reject cross-objections on the merits without hearing the respondent.

Civil Procedure Code-(1908)—contd.

The general rule that cross-objections cannot be entertained unless the appeal is decided on the merits is subject to only two exceptions, *viz.*, when the appeal is withdrawn or it is dismissed in default.

Therefore, where an appeal is dismissed, without a hearing, upon the ground that the appellant has not paid the Court-fee, the Court has no jurisdiction to hear and determine the cross-objections.

An appellant who has claimed a large amount in an insufficiently stamped memorandum of appeal, is at liberty, on being required by the Court to pay Court-fee for the full amount claimed, to abandon part of his claim and to restrict it to such an amount on which he can afford to pay the Court-fee.

Ram Pershad v. *Bhiman*, 27 A. 151, applied. DUNI CHAND *v.* AZIZ KHAN, 131 P. L. R. 1911 **207**

— — — — — **O. XLI, R. 23**—*Civil Procedure Code (Act XIV of 1882), s. 568—Fresh evidence—Appellate Court, powers of—Unstamped document endorsed as stamped by Collector subsequent to decision of suit—Admissibility in appeal.*

Section 568 of the Civil Procedure Code (Act XIV of 1882) does not prevent an Appellate Court from admitting a document originally insufficiently stamped but endorsed by the Collector as sufficiently stamped subsequent to the disposal of suit by the lower Court. In such a case, the Appellate Court does not admit additional evidence but simply declares that the objection to the admissibility of the document on the ground of insufficiency of stamp has been removed by the endorsement of the Collector.

Kessowji Issur v *G. I. P. Railway Co.*, 31 B. 381 at p. 390; 11 C. W. N. 721; 6 C. L. J. 5; 4 A. L. J. 461; 2 M. L. T. 435; 9 Bom. L. R. 671; 17 M. L. J. 347, referred to.

When the ground on which such evidence is admitted by the Appellate Court has arisen subsequently to the disposal of the suit by the lower Court, such evidence may be admitted under rule 23 or rule 33 of Order XLI of the new Civil Procedure Code. VELLAYAPPA CHETTY v. NELLAYA PILLAY, 9 M. L. T. 317 **675**

— — — — — — **O. XLI, R. 23**—*Remand by lower Appellate Court—Second decision by first Court and lower Appellate Court—Subsequent appeal from remand order without appealing from second decree of lower Appellate Court—Appeal incompetent.*

A suit was remanded by the lower Appellate Court on November 25th, 1909. The suit was decreed by the first Court on January 10th, 1910. The defendant appealed but the appeal was dismissed on July 13th, 1910. In the meantime on February 28th, 1910, the defendant appealed from the order of remand dated November 25th, 1909, but did not appeal from the decree of the lower Appellate Court dated July 13th, 1910:

Held, that the appeal was incompetent and could not proceed.

Madhu Sudan Sen v. *Kamini Kanta Sen*, 32 C. 1023; 9 C. W. N. 895 and *Baikuntha Nath Dey* v. *Nawab Salimulla*, 12 C. W. N. 590; 6 C. L. J. 547, followed.

Uman Kunuari v. *Jarbandhan*, 30 A. 479; 5 A. L. J. 447; A. W. N. (1908) 195; 4 M. L. T. 162, dissented from. JANKI NATH ROY *v.* PROMOTHA NATH ROY, 15 C. W. N. 830 **514**

Civil Procedure COde—(1908)—contd.

——————O. XLI, R. 24—*Power of Appellate Court to decide case on evidence on the record.*

An Appellate Court has full power, under Order XLI, rule 24, of Act V of 1908, to decide with reference to the evidence on the record the issues left undetermined by the lower Court without sending back the case to the Court below. BADLI DAS v. PAJAN 225

—————— O. XLIII, R. 1 (a) 36

——————O. XLIII, R. 1 (j) 148, 345

——————O. XLV, R. 4 967

——————O. XLVI, R. 1 879

——————O. XLVII, R. 1 894

——————O. XLVII, R. 1—*Review—Judgment based on a decision of the Revenue Court—Revenue Court decision upset in appeal—Whether good ground for review.*

Where the judgment of a Civil Court is based on the decision of a Revenue Court and the latter decision is reversed by a Revenue Court of Appeal, there is good ground for review of the Civil Court's judgment.

Waghela Raisangji v. *Sheikh Mushludin*;, 13 B. 330; *Waman Hari* v. *Hari Vithal*, 31 B. 128; 8 Bom. L. R. 932, referred to. RAM LAL v. KALA PRASAD, 8 A. L. J. 584 244

——————O. XLVII, R. 7 725

——————O. VII, R. 10—*Return of plaint for presentation to proper Court—Right of plaintiff to credit of the Court-fee levied in the wrong Court—Cancellation of stamp, effect of—Court Fees Act (VII of 1870), ss. 28, 30—Presidency Small Cause Courts Act (XV of 1882), ss. 71, 75.*

Where Court-fee is paid upon the institution of a suit in a Court which cannot grant the relief sought and consequently, the plaint is returned for presentation to the proper Court, the plaintiff, on filing the plaint in the latter Court, is entitled to take credit for the amount of the Court-fee levied in the Court to which it was first presented, even though the stamp was cancelled before the plaint was returned.

The plaintiff brought a suit in the City Civil Court at Madras affixing a Court-fee of the value of Rs. 75 to the plaint. The City Court Judge after cancelling the stamp returned the plaint for presentation to the Small Cause Court. The plaintiff presented the same plaint to the Small Cause Court to which he affixed a further adhesive stamp of Rs. 9-12-0 to make up the deficiency:

Held, that the plaint presented to the City Court had not lost its force by the cancellation of the stamp and that the plaintiff should not be required to pay a Court-fee of similar value over again in the Small Cause Court.

Prabhakarbhat v. *Vishvambhar Pandit*, 8 B. 313, followed.

In re Bai Amrit, 8 B. 380 at 390, distinguished.

Civil Procedure Code—(1908)—concld.

Per *White, C J.*—Under Court Fees Act the plaint when presented to the Small Cause Court was not unstamped *quoad* the cancelled stamp.

Per *Munro, J.*—A Court when returning a plaint under Order VII, rule 10, Civil Procedure Code, cannot be said to be acting upon it within the meaning of section 30 of the Court Fees Act.

Per *Sankaran Nair, J.*—A document does not cease any the less to be a properly stamped document by the cancellation of the stamp. It continues to be propely stamped. By cancellation the stamp cannot be used again, but when a document, which is the plaint in one Court, is rightly presented in another Court as a plaint in another Court, the stamp is not being used again.

The cancellation in such cases must be taken to be set aside by reason of the subsequent order returning the plaint. VISWESWARA SARMA *v.* DR. T. M. NAIR, 21 M. L. J. 537; 10 M. L. T. 29 201 F. B.

—————— Sch. II, cl. 1 559

——————Sch. II, cl. 21 450

——————Sch. II, cl. 21 (1) (2) 512

Claim petition—Order thereon, effect of—Judgment-debtor not a necessary party 424

Clog on equity of redemption. *See* MORTGAGE.

Co-heirs—Adverse possession 413

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Companies Act (VI of 1882), s. 92 515

——————s. 169—*Appeal—Notice within three weeks not given, effect of.*

An appeal against an order in the matter of the winding-up of a company, is incompetent where the notice, required by section 169 of Companies Act, is not given.

Ramanappa v. *The Official Liquidator Bellary Brucepetta Stock and Loan Transacting Company*, 22 M. 291; *Lakshmi Narasayya Setti* v. *Venkanna Setti*, 25 M. 576; *R. Wall* v. *J. E Howard*, 18 A. 215; *Lallah* v. *Official Liquidator*, 4 C. 704, referred to. GHISU MAL v. W K. PORTER, 8 A. L. J. 719 908

—————— s. 169—*Notice of appeal not given within three weeks, effect of—Extension of time—Sufficient cause—Carelessness of Pleader—Leniency by Court, when to be shown.*

An appeal against the order or decision of a District Court under the Indian Companies Act cannot be heard unless notice of the same has been given within three weeks of the date of such order or decision as required by section 169 of the Companies Act.

The carelessness or ignorance of a Pleader is not sufficient for extending the time fixed by section 169 of the Companies Act

Doulat Ram v. *Woollen Mill's Company, Limited, Delhi*, 95 P R 1908, followed

As leniency in extending time in such cases cannot be shown to one party except at the expense of the other party, Courts should not show it but for sufficient cause

Sant Singh v. *Qaim*, 113 P. R. 1908, relied upon.

HIRA LAL v. HIMALAYA GLASS WORKS CO., 100 P. W. R. 1911; 176 P. L. R. 1911 433

Company *De facto* Directors—Notice to outsiders—Acquiescence—Depriving a man of his legal rights—Must amount to fraud—Its elements **748**

——— —— *Director or manager—Acts* bona fide *done—Liability—Chairman, position of—Suit for damages, against chairman, when lies—Internal management of Company's affairs—Court's power to interfere—Companies Act (VI of* 1882*), s.* 92*—Declaratory suit—Declaration of no practical use to plaintiff - Civil Procedure Code (Act V of* 1908*), s.* 99*, O. I, r.* 5, 10 (3)*—Corporate body cannot be made co-plaintiff without its consent—Right of share-holders to sue in Company's name—Misjoinder of causes of action and parties—Defendants not prejudiced by misjoinder—Practice—Appeal.*

Acts *bona fide* done by a Director or Manager of a Company are valid notwithstanding any defect that may afterwards be discovered in his qualification, and this not only between the Company and outsiders but also between the Company and its members.

A Chairman who presides over a meeting of a Company is neither wholly a ministerial officer nor wholly a judicial officer; his duties are of a "mixed nature," and he is not liable to be mulcted in damages, if, acting *bona fide* according to the best of his judgment and without malice, he erroneously excludes a share-holder from voting and also declares him to be ineligible as a Director of the Company.

A share-holder, who has been wrongfully refused the right of voting or of election as a Director, cannot maintain an action for damages against the Chairman of a Company without alleging and proving that the latter was actuated by malice in ruling against him. In such cases, the mere deprivation of a man's legal right does not entitle him to damages.

Whether a certain person was or was not a qualified Director, whether or not a certain person was qualified to act as Chairman of a general meeting, and whether certain persons were or were not duly elected as Directors of a Company, are matters which relate exclusively to the internal management of a Company's affairs. With such matters the Court declines to deal at the instance of any person other than the Company itself, unless there be something illegal, oppressive, fraudulent or *ultra vires* on the part of the Company *qua* Company, or on the part of the majority of the Company, so that they were not fit persons to determine it. People ought as far as possible to be allowed to manage their own affairs without interference by a Court of law.

A declaration which is of no practical use to plaintiff ought not to be granted.

Under rule 10 (3) of Order II, Civil Procedure Code, no person (including a corporate body) can be made a plaintiff without his (or its) consent which means, *consent expressly given.*

It is a general rule that an individual share-holder of a Company is not competent to make use of the name of the Company as plaintiff in an action and the rule is similar with regard to a number of share-holders. If they institute a suit in the name of the Company they must show that they have been authorised by a majority at a general meeting of the Company to do so, or that they have exhausted all reasonable means of obtaining the institution of the suit by the Company or that the case is one of urgency, in which latter event they institute the suit at their peril and subject to their being able to satisfy the Court that they have the support of the majority.

Company—concld.

Therefore, where a share-holder used the Company's name without its authority as a co-plaintiff and there was no urgency or justification for his so doing, the Court struck out the name of the Company as a co-plaintiff.

The mere fact that the relief prayed for does not affect each defendant equally does not render the frame of a suit bad on the ground of misjoinder. But even where a suit is bad for misjoinder but there is no material prejudice to the defendants on the merits, an Appellate Court will not reverse the decree of the lower Court on this technical ground. RAM NARAIN *v.* RAM KISHEN, 108 P. W. R. 1911 **515**

Compromise. *See* HINDU LAW—FAMILY SETTLEMENT.

——— ——— —— Construction—Widow—"Absolutely" **982**

——— —— —— ——Decree on alleged compromise—Allegation by one party that he did not consent—Application for review—Court's power to review and re-call order **894**

——— ——— —— Family arrangement for settlement of disputes—Compromise by Hindu widow—Reversioners, whether bound **477**

——— ——— ——— Minor interested—Leave of Court not obtained—Compromise voidable **909**

——— — Withdrawing complaint of a compoundable offence **189**

Condition restraining alienation—Condition that lessor shall not be able to sell by auction land leased to pay a debt other than arrears of rent—Whether void—No covenant for re-entry—Condition not for benefit of lessor and hence void **374**

Conditional sale—Non-possessory hypothecation of moveables **869**

Confession of co-accused—Retracted confession **582**

——— ——— not relevant against the maker, whether relevant against a co-accused—Statement **340**

——— ——— *of one accused, retracted—Admissibility of retracted confession against co-accused—Evidence Act (I of* 1872*), s.* 30.

A retracted confession may be taken into consideration under section 30 of the Evidence Act as against persons tried jointly with the confessing accused for the same offence, but as a general rule such a confession should not be considered as supplying sufficient evidence for the conviction of the co-accused unless it is corroborated by independent testimony in material particulars affecting such co-accused.

Emperor v. *Kehri*, 29 A. 434; A. W. N. (1907) 140; 4 A. L. J. 310; 5 Cr. L. J. 360, followed.

Chet Singh v. *Emperor*, 28 P. W. R. 1907 Cr.; 7 Cr. L. J. 227, referred to.

No inflexible rule can be laid down in regard to the weight to be attached to such a confession; the rule must vary in each case with special reference to its particular facts and to the intrinsic value of the confession. ATAYA *v.* EMPEROR, 5 P. R. 1911 Cr.; 91 P. L. R. 1911 **857**

Consent decree, effect of **982**

——— — *Reversal—Excess of Pleader's authority—Set aside by same Court—Revival of original suit.*

When a consent decree made by a Court is set aside by the same Court in a separate suit on the ground

Consent decree—concld.

that the decree was passed an a compromise in excess of the authority of the Pleaders of the parties, the effect is to revive the original suit which was terminated by the compromise decree.

Kshetra Mohan Barik v. *Man Gobinda Pal*, 6 Ind. Cas. 12; 14 C. W. N. 558, distinguished.

Soloman v. *Abdul Azeez*, 6 C. 687; 8 C. L. R. 169; *Sarbesh Chandra Basu* v. *Hari Doyal Singh Rai*, 5 Ind. C. 236; 14 C. W. N. 451; 11 C. L. J. 246; and *Sharat Chunder Ghose* v. *Kartick Chundur Mitter*, 9 C. 810; 12 C. L. R. 455, relied upon. RAJ KUMAR ROY v. HARA KRISHNA CHAKRAVARTI **355**

Consideration—Agreement to pay intending purchaser for not competing for purchase of property **627**

———————Distinct promises for the same consideration—One of them illegal **465**

———————Suit for possession by mortgagee not brought until last day of limitation—Execution of mortgage admitted—Consideration denied—Presumption—*Onus* on plaintiff to prove consideration **927**

Conspiracy, meaning of **582**

———————to wage war. *See* PENAL CODE, s. 121A.

Construction of contract. *See* CONTRACT—CONSTRUCTION.

——————— of decree. *See* DECREE—CONSTRUCTION.

——————— of document—Use of technical terms of Hindu Law **967**

——————— of gift. *See* WILL.

——————— of lease. *See* LEASE; LANDLORD AND TENANT.

——————— of partition-deed **385**

——————— of Statutes. *See* INTERPRETATION OF STATUTES.

——————— of *Wajib-ul-arz*. *See* PRE-EMPTION.

——————— of Will. *See* WILL.

Contract—Construction—Lender and borrower—Conduct of parties **250**

——————— by manager—Authority of manager—Power of re-sale—Measure of damages **595**

——————— *Interest, high rate of—Unconscionable bargain—Mortgag—Peurchaser of equity of redemption—Whether entitled to plead unconscionable bargain in a suit by mortgagee—Pleadings.*

The mere fact that the rate of interest stipulated for in a mortgage-deed is high is not sufficient to justify the conclusion that the bargain was unconscionable.

Dhanipal Das v. *Maneshar Bukhsh Singh*, 28 A. 570; 4 C. L. J. 1; 1 M. L. T. 205; 3 A. L. J. 495; 9 O. C. 188; 8 Bom. L. R. 491; 10 C. W. N. 849. 6 M. L. J. 292; *Meghraj* v. *Hargayan*, 7 A. L. J. 655; 7 Ind. Cas. 261, referred to.

A purchaser at an auction sale of the equity of redemption is entitled to plead that the stipulation as to interest is hard and unconscionable. SRI CHAND v. NIADAR SINGH, 8 A. L. J. 407 **14**

Contract Act (IX of 1872), s. 11—*Sale by father in favour of his minor son, validity of—Transfer of Property Act (IV of 1882), s. 53—Sale by father to his minor son—No consideration—Fraudulent transfer.*

The sale of property by a father to his own minor son is invalid if no one but the father himself acted for the minor or settled the terms of the contract on his behalf.

Navakotti Narayana Chetty v. *Logalinga Chetty*, 33 M. 312; 4 Ind. Cas. 382; 19 M. L. J. 752; 7 M. L. T. 233, followed.

Mohori Bibee v. *Dharmodas Ghose*, 30 C. 539, referred to.

But if the father be presumed to have represented his minor son as his natural guardian and the sale is without consideration, the transaction is voidable under section 53 of the Transfer of Property Act. MOHAMMAD OBAID ULLAH KHAN v. MOHAMMAD IBRAHIM ALI KHAN **906**

——————— **ss. 16, 19A**—*Exorbitant interest—Power of Court to reduce—Undue influence—Proof—Urgent need of money.*

In order to obtain a reduction of the rate of interest agreed upon in a promissory-note, the defendant must plead and prove that the contract was induced by undue influence.

Mere urgent need of money by itself is no proof, that the obligee was in a position to dominate the will of the obligor.

Sundar Koer v. *Rai Sham Krishen*, 34 I. A. 9; 34 C. 150; 4 A. L. J. 109; 11 C. W. N. 249; 5 C. L. J. 106; 17 M. L. J. 43; 9 Bom. L. R. 704; 2 M. L. T. 75, followed. NARAINDAS v. H. W. DECRAUS, 4 S. L. R. 276 **984**

——————— **s. 16**—*Helpless condition of the borrower—Interest—High rate—Compound interest—Unconscionable bargain—Undue influence.*

A mortgagor was in a condition of helplessness and was compelled by circumstances to borrow money from the mortgagee at the rate of Rs. 18-12 per cent. per annum payable yearly, it being stipulated in the mortgage-deed that if the interest was not paid as agreed upon compound interest at the same rate would be charged:

Held, that the mortgagee was at the time of the contract of mortgage in a position to dominate the will of the mortgagor within the meaning of section 16 of the Contract Act, and as the charging of compound interest at the rate of Rs. 1-9 per cent. per mensem was unconscionable, the mortgagee used that position to obtain an undue advantage over the mortgagor, and hence the contract of mortgage was induced by undue influence.

Maneshar Bakhsh Singh v. *Shadi Lal*, 31 A. 386; 10 C. L. J. 76; 6 A. L. J. 707; 13 C. W. N. 1069; 6 M. L. T. 71; 11 Bom. L. R. 864; 12 O. C. 300; 3 Ind. Cas. 885 (P. C.), followed. HABNAM v. RAJA RAM **37**

——————— **ss. 16, 19**—*Unconscionable bargain—Presumption—Undue influence—Excessive rate of interest, whether sufficient to render a contract unconscionable—Interest.*

The power of a Court to interfere with contracts alleged to be unconscionable is limited by the provisions of sections 16 and 9 of the Indian Contract Act of 1872, and the fact that an excessive rate of interest is charged in a contract is not alone sufficient to establish that the making thereof was induced by undue influence. In order to justify a Court in

Contract Act—contd.

interfering with a contract of the kind, it must be found that the lender was in a position to dominate the will of the borrower when the contract was entered into, before any presumption can arise that the contract was induced by undue influence. GANESH LAL *v.* MANDE LAL 249

——— s. 19 249

——— s. 19A 984

——— s. 22—*Mistake of facts—Voidable contract*—Kabuliat *entered into under mistake of fact but acted upon by executant—Absence of fraud or misrpresentation, effect of.*

A contract entered into under a mistake of fact is only voidable and is binding until it is avoided.

A *kabuliat* undertaking payment of rent at enhanced rate, was executed under a mistake of fact as to the title of the executant. The executant acted upon it put it forward in the Revenue Court and on the basis of it successfully resisted a claim for ejectment:

Held, that if there was any mistake at all it was a case of innocent mistake and as there was no fraud or misrepresentation the *kabuliat* was binding upon the heir of the executant.

Sahiban Bibi v. *Madho Lal*, 4 A. L. J. 475, referred to. KHUDA BUX *v.* FATEH CHAND 343

——— s. 23—Contract forbidden by law—Public policy 126

——— s. 23—*Compromise—Withdrawing complaint of a compoundable offence—Consideration, legality of.*

A. and *B.* entered into a compromise whereby *A.* agreed to permit *B.* to continue in possession of a certain house in consideration whereof *B.* withdrew a complaint which he had filed in a Criminal Court against *A.* in respect of a compoundable offence:

Held, that the compromise was lawful and was binding upon the parties.

Amir Khan v. *Amir Jan*, 3 C. W. N. 5, referred to. BADRI BHAR *v.* RAM SARAN PANDE 189

——— s. 23—*Consideration—Compromise of a compoundable offence in Criminal Court, whether valid consideration.*

An agreement, the consideration for which is a compromise of criminal proceedings in connection with a compoundable offence, is valid and enforceable.

Amir Khan v. *Amir Jan*, 3 C. W. N. 5, referred to.

Shriranga Chariar v. *Ramsami Ayyangar*, 18 M. 189, not approved of. CHETAN DAS *v.* HARI RAM, 8 A. L. J. 498 216

——— s. 23—*Illegal purpose—Contract to accomplish illegal or immoral purpose—Contract void on account of object being unlawful—Recovery of money paid under illegal agreement.*

Where plaintiff paid a sum of money to defendant for an illegal purpose, *viz.*, that he should give false evidence and so obtain the conviction of a person whom the plaintiff was prosecuting, and then after some time sued to recover the money so paid:

Held, that the plaintiff was debarred from recovering the money from the defendant.

The law refuses to lend its aid in enforcing agreements in which immorality forms an ingredient.

Nga Te v. *King-Emperor*, 2 L. B. R. 216; 10 Bur. L. R. 249; 1 Cr. L. J. 730, distinguised.

Maung Tun Myat v. *Maung On Galing*, L. B. P. J. 77, followed. MAUNG KYAUK GYI *v.* MAUNG LU NYO, BUR. L. T. 95 801

Contract Act—contd.

——— s. 39 320

——— s. 39—*Default in performance—Right of rescission.*

Section 39 of the Indian Contract Act confers on a party to a contract the right to put an end to it where the other party to the contract fails to perform his promise in its entirety; in such a case the person aggrieved may choose not to avail himself of the right and if he does not do so, there is no provision of law which requires the contract to be treated as having been cancelled.

Motichand v. *Sayun*, 29 B. 46 and *Bajrangi Sahai* v. *Udit Narain Singh*, 10 C. W. N. 932, followed.

Subba Row v. *Devur Chetty*, 18 M. 126, referred to. SUBBARAYA REDDI *v.* MANIKKA KOUNDAN, 2 M. W. N. 265; 9 M. L. T. 479 258

——— ss. 39, 49 and 93—*Refusal to take delivery of all the goods, effect of—Failure to perform one's own part of contract—Damages, liability to pay in case where one party does not perform his part.*

In September 1907 the appellant agreed to purchase from the respondent certain flour, the terms of the contract being "Ready delivery within one week". No delivery was taken within one week nor did the appellant ask for the same. In October 1907 the respondent telegraphed to the appellant asking where to despatch the goods to. The appellant in reply asked only for half the goods. The respondent refused to supply and cancelled the contract. The appellant then insisted upon the delivery of the whole. On respondent's refusing to comply, the appellant brought a suit for damages against him:

Held, that the appellant was not entitled to any damages inasmuch as by not asking delivery of all the goods within one week, he had not performed his part of the promise and could not, therefore, call upon the respondent to perform his.

Soltan Chund v. *Schiller*, 4 C. 252; 3 C. L. R. 287, *Simson* v. *Virayya*, 9 M. 359; *Rash Behary Shaha* v. *Nrittya Goval Nundy*, 33 C. 477; 3 C. L. J. 249, referred to. TOTA RAM *v.* JOHN'S FLOUR MILL, DELHI 18

——— s. 49 18,320

——— ss. 59, 60—*Appropriation of payment to specified debt—Amount credited to another debt by creditor without consent of debtor, if valid—Revenue sale—Payment of specified arrear—Appropriation to other arrear by Collector, if legal—Sale for specified arrears, if valid.*

Where money is expressly paid by a debtor to satisfy a specified debt, and it is received and acknowledged on that account, it is not in the power of one of the parties to the transaction, without the assent of the others, to vary the effect of the transaction by altering the appropriation in which both originally concurred.

A proprietor of a certain *mehal* paid into the treasury a sum of money appropriating that payment to the revenue for the *kist* of January, 1902, and the payment was received and accepted on that account. Subsequently, the officers of the treasury appropriated the sum paid, in the first place, to the satisfaction of the *kist* of September 1901, and then, as far as the money would go, towards the January 1902 *kist*, and afterwards the Collector put up the property for sale in respect of the balance of the January *kist*:

Contract Act—contd.

Held, that the amount of the January *kist* was not really due at the time of the sale, and the sale was illegal.

Ganga Bishan Singh v. *Mahomed Jan*, 33 C. 1193; 10 C. W. N. 948, reversed MAHOMED JAN *v.* GANGA BISHUN SINGH, 15 C. W. N. 443; 9 M. L. T. 446; 8 A. L. J. 480; 13 C. L. J. 525; 13 BOM. L. R. 413; 38 C. 537 **272 P. C.**

——— **s. 60** **272**

——— **s. 69**—One of the judgment-debtors depositing money to set aside sale—Right of re-imbursement **458**

——— **s. 74** **572**

——— **s. 74**—*Penalty—Debt payable by instalments—Condition that whole debt would be payable at once on default of certain instalments—Future interest payable in lump sum.*

When a debt is payable by instalments carrying no interest, a provision that on default in the payment of one or more instalments the whole debt would be payable at once is not one against which relief should be given under section 74 of the Conrtact Act. Such a provision, even if technically a penalty, should be enforced.

A stipulation that future interest shall become payable in a lump sum on a default occurring in the payment of an instalment, can be relieved against under section 74 of the Contract Act, but not when the amount of interest payable in default does not give more than moderate interest on the principal from the date of the bond. SAMPAT *v.* CHANGO, 7 N. L. R 46 **738**

——— **s. 93** **18**

——— **s. 107** **895**

——— **s. 108** **859**

ss. 182, 239, 240—*Agency—Partnership—Lender and borrower—Contract—Construction—Conduct of parties—Suit for recovery of debt—Amendment of plaint into a suit for partnership accounts not permissible—Limitation Act (XV of 1877), Sch. II, Art. 106—Partner agent of firm and not of a partner—Court-fee—In a partnership case defendant entitled to get what is due to him without payment of any Court-fee.*

Under a contract between the plaintiff and defendant opium was to be procured from the Jubal State, near Simla, and was to be exported for sale to the plains. The contract which was signed by the defendant alone was not very clearly worded but it indicated as follows:

(*i*) that profits and losses alike were to be shared equally;

(*ii*) that the expenses of the venture were to be borne in equal shares;

(*iii*) that the opium became the joint property of the parties, though the responsibility for it should rest with plaintiff so long as it was in his custody, and upon defendant, when it was entrusted to his care.

The business determined in 1902 and after more than six years the plaintiff sued defendant for the price of opium alleged to have been supplied to and sold by the defendant:

Held, (1) that the Courts are not at liberty to adopt a view inconsistent with the terms of the written

Contract Act—concld.

contract, though they can refer to subsequent conduct of the parties for the purpose of making clear what the document was intended to mean;

(2) that the contract indicated a partnership between the parties, and the case fell under section 239 and not under section 182 or section 240 of the Contract Act.

Bhaggu Lal v. *DeGruyther*, 4 A. 74, distinguished.

(3) that supposing the suit was for accounts of a dissolved partnership it was not in proper form and should be dismissed on that ground;

(4) that the suit cannot be altered into a suit for accounts by amending the plaint, as such a suit is one of a wholly different character;

(5) that if the suit were altered into one for accounts it would be barred under Article 106 of the Limitation Act.

A partner who does an act for the firm is an agent for the firm but he is not an agent for his partner, and the law applicable is the law of partnership and not that of agency.

In a partnership case a defendant may get a decree for whatever is found due to him without being called upon to pay Court-fee on what he alleges himself entitled to. BERAGI RAM *v.* BAJA RAM, 163 P. L. R. 1911 **250**

——— **ss. 208, 209** **888**

——— **ss. 239, 240** **250**

Contribution—One of the judgment-debtors depositing money to set aside sale—Right of re-imbursement **458**

——— ——Res judicata—*Question left open by Court—Limitation—Starting point of limitation—Limitation Act (XV of 1877), Sch. II, Art. 49.*

In a suit for contribution, the plaintiffs alleged that in execution of a decree they were made to pay to a creditor whom they and the defendants owed money jointly not only what was due by them but also the share which the defendants were liable to contribute. In the suit in which the decree was obtained against all the parties to the present suit, the creditor had stated that the present defendants had made certain payments to him on their own account. But the present plaintiffs denied this and urged that the creditor was in collusion with the present defendants and the Court, without deciding the point, passed a decree for the balance that was admitted to be due to him. The defendants pleaded in the present suit that the former judgment operated as *res judicata*, and the present suit was barred by limitation:

Held, that the pleas had no force for,—

(1) the Court in the former suit had left the question of liability of the parties *inter se* open, and

(2) the limitation began to run against the present plaintiffs from the date on which, having paid off the whole of their own share, they began to pay the share of the defendants. TAJA KHAN *v.* MUHAMMAD KHAN, 71 P. L. R. 1911; 66 P. W. R. 1911 **839**

Contribution suit—Mortgage—Payment to first mortgagee by second mortgagee for releasing property from second mortgage—Sale of the property—Failure of consideration for the payment **570**

Contributory negligence—Flow of water through natural channel obstructed—Obstruction caused by silting up of a river—Riparian owner, whether bound to clean the natural channel—Damages **564**

Conversion of house into *Dharmsala* subsequent to date of sale—Character of property at date of sale—Punjab Pre-emption Act (II of 1905), section 13 (2) **848**

Conveyance—Agreement to supply funds for litigation, in consideration of receiving share of property **179**

Conviction based on circumstantial evidence **929**

Co-operative Credit Societies Act (X of 1904), s. 6 (2)—*Suit by Society—In whose name suit to be brought.*

The Chairman of a Co-operative Credit Society has no right to institute a suit against a member of the Society under the Co-operative Credit Societies Act, in his own name. The suit should be one by the Society itself under section 6, clause (2), of the Act.

A suit in the name of the Chairman must fail. MIRANDA *v.* MOHENDRA KUMAR ROY **570**

Costs—All costs of process—Whether includes costs of execution **899**

——— Conduct of parties—Matters leading up to litigation **90**

——— Disallowance without reasonable grounds **847**

——— Inconsistency in pleadings **285**

——— in maintenance suits **110**

———*Adjournment—Revision—Criminal Procedure Code (Act V of 1898), ss. 344, 439, 526.*

The order of a Criminal Court directing an accused person to pay costs of adjournment under section 344 of the Criminal Procedure Code, 1898, on an application made by the former under section 526 of the said Code, is obviously improper and unjustifiable and, though not appealable, is liable to be set aside on revision by the High Court.

Browne v. *Chandi Singh*, 6 P. R. 1906 Cr: 4 Cr. L. J. 78, followed FATTA *v.* EMPEROR, 8 P. W. R. 1911 Cr. **851**

Court-fee. *See* COURT FEES ACT; SUITS VALUATION ACT.

——— Appellant not able to pay Court-fee on the whole amount claimed—Abandonment of part of claim, whether permissible **207**

——— In a partnership case defendant entitled to get what is due to him without payment of any Court-fee **230**

——— Return of plaint for presentation to proper Court—Right of plaintiff to credit of the Court-fee levied in the wrong Court—Cancellation of stamp, effect of **201**

———*Decree absolute for redemption—Appeal on the ground that money deposited too late—Court Fees Act (VII of 1870), Sch. II, art. 17 (vi)—Civil Procedure Code (Act V of 1908), s. 2 (2)—"Decree", meaning of.*

An absolute decree for redemption, foreclosure or sale is a final decree within the terms of section 2 (2), Civil Procedure Code, 1908. A memorandum of appeal against a decree absolute for redemption on the ground that the mortgage-money has been desposited by the mortgagor after the period fixed for its payment and should not have been received, requires a stamp of Rs. 10, under Article 17 (vi), Schedule II, of the Court Fees Act, as the relief

Court-fee—concld.

sought in appeal cannot be exactly valued. Such an appeal does not require a stamp on the amount of the principal mortgage-money.

Onkar v. *Lakmichand*, 5 N. L. R. 130; 3 Ind. Cas. 920; *Dhirajsingh* v. *Rajaram*, 6 N. L. R. 164; 8 Ind. Cas. 1125, referred to. DADNOO *v.* SOMNATH, 7 N. L. R. 41 **736**

———*Extension of time originally fixed for payment of Court fees—Power of Court—Mesne profits, assessment of—Court Fees Act (VII of 1870), s. 11—Civil Procedure Code (Act V of 1908), ss. 148, 149.*

A Court has power under section 11 of the Court Fees Act to enlarge the time originally fixed for the payment of Court-fees, even when application to enlarge the time is made after the expiry of the time within which the Court-fees were ordered to be paid. GOLAB CHAND *v.* BAHURIA RAM MURAT KOER, 13 C. L. J. 432 **268**

Court Fees Act (VII of 1870), s. 7 (4), cls. (a) and (b) **865**

——— ——— ss. 28, 30 **201**

——— ——— Sch. II, art. 17 **463**

——— ——— art. 17 (vi) **736**

Covenant *to re-purchase—Mortgage or sale—Time not limited—The covenant purely personal.*

The material portion of a document ran as follows: "I have given the land into your possession; if perhaps at any time I require back the land, I will pay to you the aforesaid Rs. 600, and any money you may have spent on bringing the land into good condition and purchase back the land":

Held, that this was not a mortgage, for no debt existed between the parties to it, but that the transaction was a sale with the option of re-purchase:

Held, also, that the covenant to re-purchase was purely personal. GURUNATH BALAJI *v.* YAMANAVA NALARAO, 13 BOM. L. R. 240 **814**

Criminal Law Amendment Act (XIV of 1908), object of **582**

Criminal Procedure Code (Act V of 1893), s. 4 (p)—*Officer in charge of Police Station—Constable.*

Section 4 (*p*) of the Criminal Procedure Code enacts that "Officer in charge of a police station" includes, when the officer in such charge is absent at the station-house, the police Officer present at the station who is next in rank to such officer and is above the rank of a constable, or, when the Local Government so directs, any other police Officer so present. Under the powers conferred by section 6, the Local Government has directed that the senior constable present at any such station shall be deemed to be the Officer in charge of the police station for the time being during the absence of the Officer in charge. PUBLIC PROSECUTOR *v.* KUPPA KAVUNDAN, 2 M. W. N. 231; 9 M. L. T. 414 **667**

——— ——— ——— ss. 35, 190, 196, 197, 200, 233, 239, 527 (a)—*Distinct offences—Concurrent sentences—Separate trial—Complaint against public official duly signed by Public Prosecutor—Erroneous impression of Magistrate, effect of—Cognizance—Failure to examine complainant, effect of—Irregularity—Sanction under section 197—*

Criminal Procedure Code—contd.

Sanction to prosecute under section 161, or any other section of Penal Code—Valid—Charge framed under s. 165, Indian Penal Code—Subsequent addition of charge under s. 161—Prejudice—Misjoinder of charges or offences—Illegal gratification—Receipt of lump sum collected from different persons—Penal Code (Act XLV of 1860), ss. 161, 165—Punishment—Revision—Finding of fact.

A direction that punishments inflicted in respect of distinct offences shall run concurrently can be made only when the accused is convicted *at one trial* of two or more distinct offences.

Where a complaint under section 161, Indian Penal Code, against a Government official is duly signed by the Public Prosecutor and proceedings thereon are taken, the mere fact that the Magistrate subsequently, by oversight, thought that he was taking cognizance of the offence on a police report would not render him incompetent to take cognizance of the offence.

A failure to comply with the provisions of section 200, Criminal Procedure Code, does not necessarily and in every case invalidate all subsequent proceedings.

Where a complaint, preferred against a Government servant by a responsible public official, was reduced to writing and signed by him and was accompanied with the formal sanction by the Local Government authorising the prosecution, and the accused was actually convicted of the offence charged:

Held, that the Magistrate's failure to observe the strict requirements of section 200, Criminal Procedure Code, had in no way prejudiced the accused or caused a failure or miscarriage of justice, and that the irregularity was sufficiently covered by the provision of section 527 (*a*) of the Code.

Empress v. *Murphy*, 9 A. 66; *Empress* v. *Monu*, 11 M. 443; *Gurmukh Singh* v. *Musammat Mirza Nur*, 63 P. R. 190'; followed.

The Local Government granted sanction for the prosecution of one of its servants of an offence under section 161, Indian Penal Code, "or any other section of the Code that may be found to be applicable to the offence in respect of the offence briefly described in the schedule annexed." In the schedule the alleged facts of the offence were briefly set forth:

Held, that the sanction was not vague or indefinite. The Local Government had not delegated its function under section 197, Criminal Procedure Code, to any other person or body. It sanctioned the prosecution of one of its servants upon a given set of facts; and while the Government was itself of opinion that the said facts constituted an offence under section 161, Indian Penal Code, it left it to the Court (which alone could decide the matter) to determine whether upon these facts the offence fell under section 161 or any other section of the Penal Code.

Empress v. *Samaviar*, 16 M, 468; *Barindra Kumar Ghose* v. *Emperor*, 37 C. 467: 14 C. W. N. 1114; 7 Ind. Cas. 359; 11 Cr. L. J. 453; *Empress* v. *Bal Gangadhar* 22 B. 112, distinguished.

The considerations which arise in a case to which section 197 is applicable are essentially different from those considerations of policy which underlie the grant of sanction under section 196, Criminal Procedure Code.

In the trial of a charge of bribery, the Magistrate at first framed a charge under section 165, Indian Penal Code, but at a subsequent and much later stage added a charge under section 161. On the addition of the charge, the accused was given an opportunity of re-calling the witnesses and he actually did re-call some of them:

Held, that the accused was in no way prejudiced by the addition of the charge and that the proceedings of the Magistrate were in no sense void or without jurisdiction.

Certain sums of money were collected from landholders of various villages and were paid in a lump sum by the persons who had collected them to the accused, a *zilladar* in the Irrigation Department, with the object of inducing him to show favour in his official capacity to their village as a whole. The accused was charged at the trial with having received a lump sum:

Held, that the charge as framed was legal and correct. It was not necessary to charge the accused with an offence under section 161, Indian Penal Code, in respect of every item contributed by the various landholders, and consequently there was no misjoindor of offences or charges.

Girwardhari Lal v. *King-Emperor*, 13 C. W. N, 1062; 4 Ind. Cas. 13; 10 Cr. L J. 463, followed.

Emperor v. *Nand Lal*, A. W. N. (1904) 223; distinguished.

The orders of Criminal Courts should not be interfered with in revision upon facts save in rare cases and for very exceptional reasons. GIRDHARI LAL v. EMPEROR, 11 P. W. R. 1911 CR. **155**

——— ——— ——— **ss. 35, 397**—*Separate trials on one and the same day—Concurrent sentences.*

The accused was tried and convicted separately for two offences of cheating. The trials took place on one and the same day and one after the other:

Held, that for all practical purposes the trial was one and under section 35, Criminal Procedure Code, the sentences could have been legally ordered to run concurrently. EMPEROR v. MAHOMED ISAF HABIB, 13 BOM. L. R. 200 **769**

——— ——— ——— ——— **s. 103**—Ward headman and block elders not qualified to be witnesses **796**

——— ——— ——— **ss. 107, 119, 437**—*"Accused person"—Whether a person from whom security has been demanded under s. 107 is an accused person—Further inquiry, whether can be ordered of a person released under s. 119.*

A person from whom security has been demanded under section 107, Criminal Procedure Code, is not an accused person so as to permit a District Magistrate or Sessions Judge, as the case may be, to take action under section 437 of the Code and order further inquiry, should that person have been released or discharged under section 119.

Mohammad Khan v. *Emperor*, 42 P. R. 1905 Cr; 131 P. L. R. 1905; 2 Cr. L. J. 637, approved.

Manna v. *Emperor*, 24 P. R. 1903 Cr.; 20 P. L R. 1904; 1 Cr. L. J. 96; *Chetu* v. *Gokha Singh*, 33 P. R. 1905 Cr 149 P. L. R. 1905; 2 Cr. L. J. 716, overruled.

Velu Taji Ammal v. *Chidambaravela Pillai*, 33 M. 85, 4 Ind. Cas. 1037; 20 M. L. J. 137; 6 M. L. T. 13; 11 Cr. L J. 162, referred to. NARAIN DAS v. DURGA DEVI, 6 P. R. 1911 CR; 30 P. W. R. 1911 CR. **178 F. B.**

Criminal Procedure Code—contd.

ss. 108 (b), 451—*Security for good behaviour—Penal Code (Act XLV of 1860), s. 153A—Intention to provoke feelings of enmity between Christians and Buddhists—Rights and duties of religious preachers.*

Section 451 of the Criminal Procedure Code applies only to trials and an inquiry under section 108 (*b*) is not a trial. A Magistrate, who is a European British subject and a Justice of the Peace, is competent to hold an inquiry under section 108 against a European British subject.

In order to sustain an order under section 108 (*b*) of the Criminal Procedure Code, it is not sufficient to prove that the language used was highly offensive to a community but it must be shown that the applicant intend to provoke feelings of enmity or hatred between two communities. It is not necessary, however, that he should have succeeded in exciting such feelings if deliberate intention to do so can be inferred.

Preachers are at liberty to descant on the errors of other religions and to extol their own faith to the skies. But they may not consciously inflame the minds of their hearers by holding up the ministers and followers of other religions to public execration.

What may be harmless when merely printed in an English book may be highly inflammatory when translated into an Oriental language and served out with spicy comments to an audience of Orientals in a public address.

In estimating the intention and probable effect of a man's public utterances, it is proper to consider not only the personality of the speaker but the tone and spirit of the speeches and also the circumstances in which he spoke. DHAMMALOKA *v.* EMPEROR, 4 BUR. L. T. 84 **789**

s. 110—*Habitual offender—No conviction for an offence against property recently committed—Evidence—Security for good behaviour.*

Where the only evidence against a person was that he was found hiding himself in a bush and when his person was searched certain articles, not claimed by him to be his own, were found upon him, there is no presumption that he was there with a view to commit an offence, so that he may be deemed to be a "habitual offender" within the meaning of section 110 of the Code of Criminal Procedure. MADIRA NAGADU *v.* EMPEROR, 2 M. W. N. 355 **959**

s. 110—*Security proceedings—Demanding security from a person trying to reform himself.*

Where it is found that an accused person is trying to reform himself and has for a fortnight lead an honest life security should not be demanded from him under section 110, Criminal Procedure Code, on the ground that there was no guarantee that he had mended his ways.

Section 110 of the Criminal Procedure Code, 1898, is preventive, and not punitive. Its object is to protect society against persons who are so likely to commit offences that it is not advisable to leave them at large unchecked. It is very undesirable to proceed under that section against a person who is trying to reform himself and to live an honest life. *In re* BILLA APPAYYA **624**

s. 119 **178**

Criminal Procedure Code—contd.

s. 123 (3)—*Powers of Sessions Judges and High Courts, their duties—S. 406 inapplicable.*

The words of clause 3 of section 123 of the Criminal Procedure Code are wide enough to give discretionary power to a Sessions Judge or High Court, as the case may be, to deal with a case on the merits, and, after giving an accused an opportunity of being heard, to pass such order as the circumstances of the case may require.

An order passed by a Sessions Judge under section 123 of the Criminal Procedure Code cannot be the subject of an appeal to a District Magistrate under section 406 of the Code. EMPEROR *v.* AMIR BALA, 13 BOM. L. R. 203. **802**

ss. 145, 146—*Attachment of property by Magistrate—Appointment of Collector as Receiver—Suit for declaration of title—Consequential relief—Specific Relief Act (I of 1877), s. 42.*

A Deputy Magistrate attached the property in suit, under section 146 of the Criminal Procedure Code, in a proceeding under section 145 between the plaintiff and the defendant, and appointed the Collector as Receiver of the property. The plaintiff instituted a suit for a declaration of his title:

Held, that the suit was properly framed, for, as the possession of the property was not with the defendant, the plaintiff could not be compelled to demand possession from the defendant. ADMINISTRATOR-GENERAL OF BENGAL *v.* BHAGABAN CHANDRA ROY, 15 C. W. N. 758 **531**

s. 146 **531**

ss. 147, 148—*Local investigation, how to be made—Easements, whether s. 147 confined to—Order for costs, when to be made—Direction to Police to assist—Party to remove obstruction, whether illegal.*

The rule that in criminal cases, Courts are only justified in holding a local inspection in order to explain the facts appearing in evidence, does not apply to cases under section 147 of the Criminal Procedure Code: nor is there anything in the law to prevent the presiding Magistrate from making a local investigation himself, provided he records what he saw and does not act upon hearsay evidence.

Section 147 is not confined to mere easements.

The right which the first party claimed in this case the natural right of every landholder to the use and enjoyment of his own land, and among the necessary incidents to such an enjoyment is the right to let off water by the natural course in which it has always flowed and would always flow, so as to prevent inundation of his own land. The second party erected a *bund* on the boundary of the first party's village:

Held, that the erection of the *bund* was an infringement of that natural right, and that the case was a fit one for the exercise of jurisdiction under section 147.

An order for costs in a case under section 147 need not be made at the time judgment is delivered.

The order to the Police to assist the first party in removing the obstruction was legal and was made within juirsdiction,

Criminal Procedure Code—contd.

Pasupatinath Bose v. *Nando Lal Bose*, 5 C. W. N 67 and *Lalit Chandra Neogi* v. *Tarini Prasad Gupta*, 5 C. W. N. 335, followed.

Dalmir Puri v. *Khodadad Khan*, 36 C. 923; 4 Ind. Cas. 415; 14 C. W. N. 179; 10 Cr. L. J. 579, distinguished. DOWLAT KOER *v.* SIVA PERSHAD 615

——— ——— ——— s. 148 615

——— ——— ——— s. 188 959

——— ——— ——— s. 188—Meaning of the word 'Territory' in the first proviso to section—Whether Indian or English law applicable for the trial and punishment of such offences 205

——— ——— ——— s. 188—*Illegal arrest, effect of.*

Where a man is charged in India with an offence under the Indian Penal Code, it will not avail him to say that he was brought there illegally from a foreign country.

Muhammad Yusufuddin v. *Queen Empress*, 24 I. A. 137, distinguished. EMPEROR *v.* VINAYAK DAMODAR, 13 BOM. L. R. 296 956

——— ——— ——— s. 190—Complaint against public official duly signed by public prosecutor—Erroneous impression of Magistrate 156

——— ——— ——— s. 195 840

——— ——— ——— s. 195—Sanction to prosecute for fraudulent execution of decree 646

——— ——— ——— ss. 195, 476—*Magistrate directing prosecution of witness of his own motion—Effect of order—Revision—Perjury—Contradictory statements explainable—Penal Code (Act XLV of* 1860), *s.* 193.

The Chief Court has power to revise orders passed under section 476, Criminal Procedure Code.

Bishen Singh v. *Amritsaria*, 5 P. R. 1908 Cr.; 7 P. W. R. 1908 Cr.; 103 P. L. R. 1908; 7 Cr. L. J. 281, followed.

Where a Magistrate of his own motion directs the prosecution of a witness for perjury, he acts under section 476, Criminal Procedure Code.

B. purchased certain property from *A.* who subsequently sold it to *C.* *C.* brought a complaint of cheating against *A.* In the course of proceedings in the case, *B.* appeared as a witness. In his examinaton-in-chief he stated that no other bargain took place in his presence. In cross-examination he stated that *A.* and *C.* were bargaining in his presence:

Held, that the statement in cross-examination did not necessarily imply that *B.* knew that another bargain had been duly made, and that his explanation, that no bargain was actually effected, though negotiations were going on, was *per se* plausible; his prosecution, therefore, for perjury was not admissible. EMPEROR *v.* BARKAT RAM, 158 P. L. R. 1911 121

——— ——— ——— ss. 195, 215, 476, 537—*Penal Code (Act XLV of* 1860), *ss.* 196, 471—*Sanction to prosecute given to the* serishtadar—*No application for sanction—Effect of sanction Application of s.* 537—*Defect in procedure—Sanction granted in respect of one offence—Framing charge in respect of another offence disclosed by facts.*

Where there is no application for sanction the proceeding is virtually a complaint and the procedure enjoined by section 476, Criminal Procedure Code, should be followed.

Where sanction to prosecute was granted to a *serishtedar* without any application and the procedure laid down in section 476, Criminal Procedure Code, was not followed but the complaint against the petitioner was heard and a preliminary inquiry held which showed that there was a *prima facie* case against the petitioners:

Held, that the defect in the procedure in granting sanction was cured by section 537.

Though section 537 applies in terms to orders made in appeal or revision, the principles contained therein should guide Courts in dealing with applications under section 215

Where the inquiry in a case has proceeded far enough to enable the test required by section 476 to be applied, section 537 will cure any defect not prejudicing the accused.

Where sanction to prosecute has been granted in respect of an offence and thus the bar to the Magistrate taking cognizance of the case has been removed by the sanction, the Magistrate may frame a charge in respect of any other offence referred to in section 195 and which is disclosed by the facts. EMPEROR *v.* JHAMANDAS 616

——— ——— ——— ss. 196, 197—Considerations for granting sanction 156

——— ——— ——— s. 200—Effect of failure to examine complainant 156

——— ——— ——— s. 202—*Preliminary inquiry—"Watching proceedings," meaning of.*

If any person interested in any legal proceeding is admitted to watch or applies to watch such a proceeding, the term "watch" does not mean that of a mere on-looker for idle curiosity, but it means instructing of legal practitioners to watch the case on behalf of the alleged offender and with the leave of the Court to assist the Court in making its preliminary investigation.

Therefore, a person with regard to whom a preliminary inquiry is being held under section 202 of the Criminal Procedure Code should be admitted to watch the proceedings, and his representative, if an Advocate or Pleader, should be allowed to act as *amicus curiæ*.

Sheikh Chand v. *Mahomed Hanif*, 8 Cr. L. J. 20; 4 N. L. R. 81, referred to. SHEIKH AKBAR *v.* PRANCE 33

——— ——— ——— ss. 202, 476—*Prosecution ordered under s.* 476 *on evidence taken under s.* 202—*Whether valid—Dismissal of complaint under s.* 202—*Further inquiry ordered by Sessions Judge—Sessions Judge's order silent as to order for prosecution by lower Court under s.* 476—*Whether amounts to a quashing of the order.*

Per *Sundara Aiyar, J.*—Where a Magistrate dismisses a complaint as the result of an inquiry under section 202, Criminal Procedure Code, and at the same time orders the prosecution of the complainant under section 476, and the Sessions Judge in revision directs further inquiry without saying anything as to the order under section 476, the latter order does not cease to be operative without being quashed.

Kannullah v. *Emperor*, 12 C. W. N 1; 6 C. L. J. 603; 6 Cr. L. J. 354; explained and distinguished.

Criminal Procedure Code—contd.

Per *Sundara Aiyar, J.* (*Ayling, J., dissenting*).—An order passed under section 476, Criminal Procedure Code, based on evidence taken under section 202 which is not legal evidence, is illegal. *Contra*, if the order was passed on the sworn statement of the complainant alone.

Queen-Empress v. *Venkatramanna*, 23, M. 223; *Asmatulia* v. *Emperor* 4 C. W. N. 366; *In re Chotalal Mathuradas*, 22 B. 926; referred to.

Obiter.—If the order were passed on the sworn statement of the complainant alone it would be open to the objection that the complainant was not allowed to adduce all his evidence in support of the complaint.

Laljee Gope v. *Giridhari Chaudhri*, C W. N. 10; *Queen-Empress* v *Shamlal*, 14 C. 07, referred to

Per *Ayling, J.*—An order may be passed under section 476 of the Criminal Procedure Code as the result of an inquiry under section 202. The wording of section 476 is wide enough to cover the consideration of other than strictly legal evidence. *In re* KACHI MADAR LABHAI, 10 M. L. T. 47; (1911) 2 M. W. N. 9

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—— —— —— s. 215 616

—— —— —— —— ss. 215, 347—*Order of committal, convenient or indiscreet, cannot be quashed —Except on point of law.*

An order of committal can only be quashed on a point of law The order may be convenient or it may be indiscreet, but the High Court will not interfere unless it is illegal. EMPEROR *v.* SULEMAN IBRAHIM NAKHUDA, 13 BOM. L. R. 201

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— —— s. 227 959

—— — s. 233 156

— —— —— — — ss. 234, 239—*Two accused tried jointly for three offences—Validity of trial.*

Section 234, Criminal Procedure Code, refers only to the case of a single accused and is not applicable where more persons than one are tried jointly under section 239 of the Code. *Budhai Sheikh* v *Emperor*, 33 C. 292; 10 C. W. N 32; 3 Cr. L. J. 129, followed.

Section 239, Criminal Procedure Code, is not inapplicable to a case in which each of two accused persons, tried jointly, throws the blame and responsibility on the other. MAHBUB ALI *v.* EMPEROR, 168 P. L. R. 19 1

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—— ss. 234, 239—*Three persons tried jointly for cheating—Cheating committed by each against different persons on different dates—Legality of trial.*

Three persons were tried jointly for cheating. The charges against them were that each of them had cheated a different person on a different date:

Held, that the trial was illegal, because the three acts of cheating were wholly distinct, and there was no continuity between the three acts, each act being a completed act in itself, and the original design was accomplished, so far as that act was concerned, before the next succeeding act was embarked upon.

Charagudi Venkatadari v. *Emperor*, 33 M. 502; 1 M. W. N 63; 7 M L. T. 299; 20 M. L J. 220; 5 Ind. Cas. 847, 10 Cr. L. J. 258; *Budhai Sheikh* v. *Emperor*, 33 C. 292; 10 C. W. N. 32; 3 Cr. L. J. 126, followed.

Section 234, Criminal Procedure Code, can only be applied in the case of a single accused. KARM SINGH *v.* EMPEROR, 122 P. L. R. 1911; 28 P. W. R. 1911

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Criminal Procedure Code—contd.

—— —— —— —— s. 236—*Alternative charges—Charges in the alternative, difference between —Alternative charges for offences under the Penal Code and Special Laws not permissible—Nature of offences for which alternative charges are permissible —Application of s. 236, Criminal Procedure Code.*

The accused, a postal peon, was entrusted with certain bearing letters which it was his duty to deliver and recover the amount of the postage due. He returned bringing neither letters nor money and gave no explanation. At his trial he was charged in the alternative under section 409, Indian Penal Code, or section 52 of the Post Office Act, in that he either dishonestly converted to his own use the amount recovered on account of the bearing letters entrusted to him or that he threw the letters away:

Held, that the charge in the alternative was bad in law. Section 367 (3) of the Criminal Procedure Code and sections 40 and 72 of the Penal Code refer only to offences under the Penal Code. Consequently, an alternative charge cannot be framed in respect of an offence under the Penal Code and an offence under a Special Law, nor can a Court inflict any sentence on a person found guilty in the alternative of an offence under the Penal Code and another under a Special Act.

Per *Pratt, J. C.*, (*Crouch, A. J. C.*, dissenting)—An alternative charge under section 236, Criminal Procedure Code, cannot be framed in respect of distinct offences, nor even in respect of cognate offences when the difference is one of degree, *i.e.*, as to the intention imputed to the accused or as to some circumstance of aggravation.

Section 236, Criminal Procedure Code, applies to those cases only in which the prosecution cannot establish exclusively any one offence, but is able, on the facts which can be proved, to exclude the innocence of the accused and to show that he must have committed one of two or more offences.

Offences charged in the alternative arise out of the same *delictum* and are, therefore, necessarily cognate offences.

The doubt referred to in section 236, Criminal Procedure Code, can only arise when the legal character of the acts of the accused might be considered ambiguous, and the section authorizes a charge in the alternative when it is doubtful which of several offences the facts which can be proved will constitute, and not in a case where there may be doubt as to the facts which constitute one of the elements of the offence, that is, the *corpus delicti*.

The criminal intention imputed to the accused must be specifically determined and not allowed to remain a subject of doubt in an alternative charge.

Section 236, Criminal Procedure Code, contemplate a state of facts constituting a single offence, but it is doubtful whether the act or acts involved may amount to one or other of several cognate offences.

Per *Crouch, A J. C.*—Section 236, Criminal Procedure Code, provides for those doubts which may arise as to inferences which may be drawn by the Court from the prosecution evidence, if believed.

The essential difference between (1) cumulative charges (2) alternative charges and (3) charges in the alternative is, that under the *first* the Court is asked to convict of two or more offences, under the *second* of any one specified offence, and under the

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third of one or other of two offences without specifying which.

The alternative offences need not necessarily be offences dealt with under the same Chapter of the Penal Code or "cognate" in any other technical sense, but they must, from the nature of the case, be such that the commission of each can reasonably be inferred from the same facts. GANESH KRISHNA *v.* EMPEROR, 5 S. L. R. 16 **168**

——— **ss. 237, 238 372**

——— **s. 239 63, 156**

——— **s. 239**—Joint trial—Same transaction **833**

——— **s. 239**—Two accused tried jointly for three offences **331**

——— **s. 269**—*Penal Code (Act XLV of 1860), ss. 147, 395—Joint trial of Jury and non-jury cases—Assessors selected for the non-jury case from out of the Jury—Illegality.*

Accused were charged under sections 147 and 395, Indian Penal Code. Five gentlemen were selected to form a Jury to try the charge under section 395. Two of these were chosen as assessors to help the Judge in the trial of the non-jury case.

The trial of the accused on the charges was joint. The Jury acquitted the accused of the charge under section 395, Indian Penal Code. The Judge, differing from the Jury, convicted them of rioting:

Held, that the procedure adopted was illegal and that the Judge was bound to constitute all the members of the Jury as assessors for trying the non-jury offence.

Ramakrishna Reddi v. *Emperor*, 10 M. 598; applied. PANJARI PAKEERAPPA *v.* EMPEROR, 21 M. L. J. 520; 10 M. L. T. 22 **281**

——— **s. 339**—*Pardon, forfeiture of—Commitment of approver for offence in respect of which pardon tendered—No order revoking pardon necessary—Duty of Court trying approver.*

Where it is intended to prosecute an approver for the offence in respect of which a pardon was tendered to, and accepted by him, an order revoking the pardon is not necessary.

The question whether a pardon has in fact been forfeited by an approver having, by either wilfully concealing anything essential or by giving false evidence, failed to comply with the condition on which the tender of pardon was made, is to be decided by the Court that is asked to try him for the offence in respect of which the pardon was tendered.

Emperor v. *Kothia*, 30 B. 611: 8 Bom. L. R. 740; 4 Cr. L. J. 346, followed. EMPEROR *v.* KACHRI, 7 N. L. R. 65 **622**

——— **ss. 340, 476**—*Inquiry—Accused person—Pleader—Right to be heard—Practice—Civil Procedure Code (Act V of 1908), O. III, r. 1.*

A Civil Court making a preliminary inquiry under section 476 of the Code of Criminal Procedure is not a Criminal Court and the person against whom the inquiry is made is not an accused person.

Therefore, a Pleader has no right under section 340, Criminal Procedure Code, to appear for such a person.

The general practice is to hear Pleaders on behalf of persons in civil or criminal matters, and to secure their assistance as *amicus curiæ* even where parties have no right to be heard either personally or by Pleader.

Quære:—Whether in an inquiry under section 476, Criminal Procedure Code, by a Civil Court, a Pleader has a right to appear on behalf of the person against whom the inquiry is being made under rule 1, Order III, Civil Procedure Code, 1908. RAM NIHORE UMAR *v.* EMPEROR, 8 A. L. J. 237 **740**

——— **s. 344 851**

——— **s. 347 802**

——— **s. 397 769**

——— **s. 406 802**

——— **s. 408 278**

——— **s. 423 (b) 372**

——— **ss. 428, 537**—*Irregularity—No record of reasons for remanding case—Call for findings instead of for evidence—Curative effect of s. 537—Practice*

An irregularity committed by a Magistrate in omitting to state his reasons for ordering fresh evidence under section 428, Criminal Procedure Code, is cured by section 537. Section 428 empowers a Magistrate to only call for evidence and not for a finding. Where he calls for a finding instead of merely calling for evidence, his order should be set aside and he should be directed to restore the case to his file and dispose of it according to law. EMPEROR *v.* KARNAN BENU PATNAIK, 9 M. L. T. 406 **290**

——— **s. 437**—Whether further inquiry can be ordered of a person released under section 190 **178**

——— **s. 439 851**

——— **s. 451** does not apply to an inquiry under section 108B **789**

——— **s. 476 121, 616**

——— **s. 476**—Prosecution ordered on evidence taken under section 202—Further inquiy ordered by Sessions Judge—Whether order of prosecution quashed **619**

——— **s. 476**—Right of Pleader to appear **740**

——— **s. 476**—*Judicial proceeding—Transfer application—Examination of witnesses after disposal—Prosecution of witnesses not legal.*

During the pendency of a case of riot before a Magistrate, some of the accused applied to the Sub-Divisional Magistrate for transfer of the case on the ground *inter alia* that the Magistrate had received a bribe in the presence of *A.* and *B.*

The Sub-Divisional Magistrate made an order transferring the case and thereafter recorded the statements of *A.* and *B.* on oath. He then made an order under section 476, Criminal Procedure Code, directing their prosecution for an offence under section 193, Indian Penal Code:

Held, that the proceeding before the Sub-Divisional Magistrate was clearly not a judicial proceeding, as there was no case pending in his Court for he had already disposed of the application for transfer.

Reg. v. Venkatachelam Pehary, 2 M. H. C. R. 43, relied upon.

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Held, further, that the statements of *A.* and *B.* having been made *coram non judice* were not evidence. The act of the Magistrate was not a Magisterial act, consequently he had no jurisdiction to administer the oath.

Hari Charan v. *Queen*, 27 C. 455, relied upon.

In the circumstances the Magistrate's order under section 476, Criminal Procedure Code, was made without jurisdiction. EMPEROR *v.* BAKSHO **622**

——— ——— **s. 476**—*Order for prosecution—Successor of Judge who had heard evidence—Preliminary investigation, whether necessary—Omission to hold investigation—Accused, whether prejudiced or not—Question may be considered by High Court.*

The phraseology of section 476 of the Criminal Procedure Code shows that a preliminary inquiry is not obligatory. An order under that section may be made by a Judge who had not heard the evidence at the original trial, and without an independent investigation, as the power to direct prosecution is conferred on the Court and not on the individual officer who fills the judicial office at a particular time.

What has to be borne in mind in each individual case is whether in the interests of justice a preliminary investigation is necessary.

Whether the person against whom an order under section 476 has been made without a preliminary investigation, has been prejudiced by reason of the omission to make such investigation, is a matter which may be considered by the High Court when the propriety of the order is called in question.

Choudhuri Mahomad Azharul Huq v. *Queen-Empress*, 20 C. 349; referred to. DARPA NARAYAN BERA *v.* BIPIN BEHARI MITRA, 15 C. W. N. 691; 14 C. L. J. 123 **66**

——— ——— ——— ——— **s. 476**—*Postponement of proceedings under this section till termination of original case, whether legal.*

Proceedings under section 476, Criminal Procedure Code, should not be postponed till after the disposal of the original case.

Where, at the request of the petitioner, the Joint Magistrate transferred a criminal case pending against him from the file of the Salur to that of the Bobbili Magistrate, but by an order, under section 476, Criminal Procedure Code, deferred taking action against him till the disposal of the case by the Bobbili Magistrate:

Held, that the delay was fatal to the legality of the order.

Ayyakannu Pillai v. *Emperor*, 32 M. 49; 1 Ind. Cas. 597; 19 M. L. J. 42; 4 M. L. T. 404; 9 Cr. L. J. 41, referred to. CHEDULURU BANGARAYA *v.* EMPEROR **623**

——— ——— ——— **ss. 497 and 498**—*Bail—Re-arrest of accused persons who are granted bail—Under what sections it would be legal—Effect of setting aside an illegal order for such re-arrest.*

A District Magistrate ordered the re-arrest of the applicants who were accused of an offence under section 304, Indian Penal Code, and had been released on bail by the Sub-Divisional Magistrate:

Held, that such an order was illegal and must be set aside.

The District Magistrate's order having been set aside, the applicants, by virtue of the Sub-Divisional Magistrate's previous order, must be released on bail

Criminal Procedure Code—contd.

as before and there will be no reason for them to apply under section 497 or section 498, Criminal Procedure Code, that they be so released. MAUNG BA CHIT *v.* EMPEROR, 4 BUR. L. T. 70 **774**

——— ——— ——— ——— **s. 498** **774**

——— ——— ——— ——— **s. 512**—*Evidence Act (I of 1872), s. 145—Statements previously made by witness and recorded in the absence of accused—Admissibility.*

Statements previously made by a witness to Magistrates, and recorded in the absence of the accused, cannot be treated as evidence in the Sessions Court if the witness is living and can be procured.

Section 512 of the Criminal Procedure Code will apply only where the witness is dead or cannot be procured.

Although section 145 of the Evidence Act admits of previous statements being referred to for purposes of cross-examination it does not authorise a Court to treat such statements as evidence against an accused. RAKHIA *v.* EMPEROR, 157 P. L. R. 1911 **119**

——— ——— ——— ——— **s. 526** **851**

——— ——— ——— **s. 526 (8)**—*Sessions trial—Application for adjournment—Application made after reading the charge—'Before the commencement of the hearing,' meaning of.*

For the purposes of section 526 (8), Criminal Procedure Code, the hearing or trial must be taken to include all the proceedings taken to determine a case and the first step in the hearing at a Sessions trial is the reading and explaining of the charge to the accused.

Where, at a Sessions trial, the accused applied for an adjournment under section 526 (8), Criminal Procedure Code, to enable him to apply for a transfer of the case after the charge was read out and explained to him:

Held, that this was not an application made before the commencement of the hearing and that the Court was not bound to grant the adjournment.

Surat Lall Chowdury v. *Emperor*, 29 C. 211, not approved. KALI MUDALY *v.* EMPEROR **380**

——— ——— **s. 527 (a)**—Effect of failure to examine complainant. **156**

——— ——— ——— **s. 531** **921**

——— ——— ——— ——— **s. 537** **290, 616**

——— ——— ——— ——— **s. 562**—*Penal Code (Act XLV of 1860), s. 420—S. 562 inapplicable to conviction under s 420—Practice—Magistrate dealing with accused under s. 562 on conviction under s. 420—Re-trial not necessary—Remand of case for passing lawful sentence—Appellate or Revisional Court not competent to pass sentence.*

Section 562 of the Criminal Procedure Code covers only the form of cheating punishable under section 417, Indian Penal Code, with one year's imprisonment and not the more serious form punishable under section 420 with seven years.

Crown v. *Neki Ram*, 23 P. W. R. 1908 Cr.; 8 Cr. L. J. 455; *Emperor* v. *Nga Pyi*, 3 L. B. R. 95; 12 Bur. L. R. 91; 3 Cr. L. J. 21 and *Emperor* v. *Bapu Rao*, 4 N. L. R. 18; 7 Cr. L. J. 319, followed.

Consequently, section 562, Criminal Procedure Code, cannot be used upon a conviction under section 420, Indian Penal Code.

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Where a Magistrate convicts a person of an offence under section 420 but deals with him under section 562, Criminal Procedure Code, the proper course for the Appellate or Revisional Court is not to direct a re-trial but to set aside the order under section 562 and remand the case to the Magistrate to pass a lawful sentence.

Emperor v. *Bapu Rao*, 4 N. L. R. 18; 7 Cr. L. J. 319; *King-Emperor* v. *Manchar Das*, 24 P. R. 1904 Cr.: *Narayanaswami* v. *Emperor*, 29 M. 567; 5 Cr. L. J. 136 followed.

An Appellate or Revisional Court itself cannot pass the proper sentence. HARNAM SINGH *v.* EMPEROR **114**

——— ——— **s. 562**—*Petty squabbles of young persons—Sentence of imprisonment without choice of fine inappropriate.*

In a petty case arising out of a squabble between two girls of 16 and 14 the younger girl was convicted of slapping the elder's cheek and pulling her hair and was sentenced to 7 days' rigorous imprisonment:

Held, that the sentence of imprisonment without the option of a fine was inappropriate. MA KYWE *v.* EMPEROR, 4 BUR. L. T. 68 **772**

Cross-examination, scope of **917**

Cross-objection—Appeal dismissed for non-payment of proper Court-fee—Cross-objections, whether can be entertained after such dismissal of appeal—General rule—Exceptions **207**

Culpable homicide. *See* PENAL CODE, s. 299.

——— ——— ——— *Murder—Riot—Unlawful assembly armed with* dangs—*Intention—Penal Code (Act XLV of 1860), ss.* 141, 146, 149, 300, 302, 304, 325.

Where five or more persons assemble together armed with *lathies* and some of them attack their opponents while the others, who at first kept in the background, proceed to assault their opponents' helpers, the legal consequence would necessarily be:

(1) that they constituted an unlawful assembly within the meaning of section 141, Indian Penal Code,

(2) that every one of them was guilty of rioting under section 146 as soon as one or more of them used violence in prosecution of their common object,

(3) that all members of the assembly would be guilty of an offence committed in prosecution of their common object by any member of such assembly, and that

(4) on account of their being armed with *lathies* they knew that they were likely to commit an offence of at least grievous hurt.

The first part of section 304 of the said Code is intended to include only those cases in which the act of the accused would be culpable homicide not amounting to murder, but for the fact that it was committed in circumstances which render one or other of the exceptions to section 300 applicable. MASTI *v.* EMPEROR, 9 P. W. R. 1911 Cr; 3 P. R. 1911 Cr.; 87 P. L. R. 1911 **852**

Custom—Ponna Community—Burial ground—Observances of Ponnas—Sanctity of burial ground—Consecration Removal of dead body **780**

——— **Adoption**—Collateral succession **822**

Custom—contd.

Adoption—Arains *of Jullundur City—Step-son, not of adoptor's* got, *cannot be adopted.*

A sonless *Arain* of Jullundur City cannot adopt a step-son who does not belong to the same *got* as himself. AZIM *v.* ISMAIL, 135 P. L. R. 1911; 115 P. R. 1911; 105 P. W. R. 1911 **416**

——— ——— ——— Khokar Rajputs *of Ferozepore District—Adoption of wife's relations or a stranger invalid—Pleadings—Concurrent findings—Limitation Act (IX of 1908), Sch. I, Arts* 118, 144—*Suit for possession—Suit for declaration of invalidity of adoption—Limitation.*

A Musalman *Khokhar Rajput* of the Ferozepore District cannot validly adopt one of his wife's relations or a stranger. According to the *Riwaj-i-am* the power of adoption is limited to *yak jaddis* or to a *nawasa* who is also a *yak jaddi*.

A suit for possession of property and not for a declaration of the invalidity of an adoption is not governed by Article 118 but by Article 144 of the Limitation Act.

Suraj Singh v. *Khark Singh*, 96 P. R. 1908; 79 P. W. R. 1908, followed.

Concurrent findings of fact can only be disturbed in second appeal for cogent reasons. NIAMAT *v.* NURA, 95 P. W. R. 1911; 169 P. L. R. 1911 **338**

——**Alienation**—Awans *of Talagang Tahsil, Attock District*—Onus.

Among *Awans* of the Talagang *Tahsil* of the Attock District a proprietor is competent to alienate ancestral property in the presence of a son.

The burden of proving want of power to alienate lies on the person who alleges the contrary.

The *onus* of proving that a sale, which took place many years ago in payment of antecedent debts, was made without legal necessity rests upon the person contesting the sale.

Bakhsha v. *Mir Baz*, 79 P. R. 1896; *Devi Das* v. *Bhakra* 73 P. R. 1899 *Nura* v. *Tera*, 46 P. R. 1900 and *Khudayar* v. *Fatteh* 8 P. R. 1906; 66 P. L. R. 1906; followed KHUDA BAKHSH *v.* WAHAM ALI, 116 P. W. R. 1911 **36**

——— ——— ——— *Gift in favour of daughter's son*—Kalon Jats *of Shakargarh* Tahsil, *District Gurdaspur.*

Among *Kalon Jats* of Tahsil Shakargarh, District Gurdaspur, an oral gift followed by mutation of ancestral land by a sonless proprietor in favour of his daughter's sons, whose father was his *ghar-jawai* or resident son-in-law, is valid by custom.

Allah Ditta v. *Allah Bakhsh*, 89 P. R. 1900; *Nizam Din* v. *Shahab ud-Din*, 108 P. R. 1900, *Musammat Lakhan* v. *Rahmat Khan*, 101 P. R. 1895, distinguished. HARNAM SINGH *v.* LACHMAN SINGH, 16 P. R. 1911; 38 P. W. R. 1911; 90 P. L. R. 1911 **857**

——— ——— ——— *Gift of portion of ancestral land to daughter*—Ghar-jawai—Arains *of Dholewala*, Tahsil *Zira, District Ferozepur.*

Among *Arains* of *Mauza* Dholewala in the Zira *Tahsil* of the Ferozepur District, a sonless proprietor has, by custom, the power to make a gift of a portion of his ancestral land in favour of his daughter whose husband is the donor's *ghar-jawai* or resident son-in-law KARM DIN *v.* JIO. 13 P. R. 1911; 86 P. L. R. 1911; 111 P. W. R. 1911 **854**

Custom—contd.

— — **Alienation**—*Inheritance—Gift of ancestral land by widow in favour of her husband's near collateral who is also his daughter's son*—Narn Rajputs *of* Tahsil *Phillour in Jullundur District—Exclusion of daughter—Burden of proof—Limitation—Estoppel—Mutation of names on consent by minor's mother—Acquiescence—Limitation Act (XV of* 1877*), Sch. II, Art.* 141.

Among *Narn Rajputs* of *tahsil* Phillour in the District of Jullundur, daughters are excluded from inheriting ancestral property by collaterals related in the fifth degree. A gift by a widow of her husband's land in favour of his daughter's son is not valid without the consent of the collaterals, even if the donee be also a near collateral of her husband.

Ranjhi Khan v. *Musammat Kamun*, 179 P. R. 1889; *Musammat Sahibjan* v. *Karm Bakhsh*, 80 P. R. 1875; *Musammat Jiwi* v *Ganhiya*, 98 P. R. 1891; *Musammat Rubia* v. *Muhammad Bakhsh*, 69 P. R. 1878; *Mussammat Fatima* v. *Ghulam Muhammad Shah*, 172 P. R. 1889 and *Mansa Ram* v. *Punnu*, 38 P. R. 1870, referred to.

The assent to such a gift by the mother of a minor collateral does not bind him. A collateral, by acting as a *sarbarah lambardar* of the minor donee who has got the *lambardari* in virtue of such gift, is not estopped from contesting its validity. But the collaterals who, before or after the death of the widow, agree that the mutation of names as regards the gifted property should be effected in favour of the donee, cannot be allowed to challenge the gift.

The collaterals can recover the gifted property within 12 years from the date of the widow's death under Article 141 of the Indian Limitation Act, XV of 1877, and the donee's possession does not become adverse as long as she is alive.

Though it is a correct principle that persons carry their own customs with them wherever they go, it does not necessarily follow that they retain those customs unchanged after long residence amongst other tribes holding different customs.

The burden of proving that a daughter succeeds in the presence of near collaterals lies on the person asserting such a custom. KHAIRE KHAN *v.* GULAM GHAUS, 46 P. W. R. 1911; 32 P. R. 1911 **387**

——— ——— ——— *Sale by childless proprietor*—Brahmins *of Musapur*, Tahsil *Nawashahr, District Jullundur—Limitation—Right of distant collaterals to contest alienation—Declaratory decree—Discretion.*

Collaterals cannot challenge an alienation of ancestral property in presence of the alienor's sons.

Where a declaratory suit challenging an alienation by a childless male proprietor of ancestral holding is barred, so far as near collaterals are concerned, minor distant collaterals cannot be put forward as a means of bringing the suit within time

A declaratory decree is always a matter of discretion.

Semble:—*Brahmins* of *mauza* Musapur, *Tahsil* Nawashahr, District Jullundur, do not follw Hindu Law but probably agricultural custom. BHANA RAM *v.* HAKIM SINGH, 36 P. W. R. 1911; 178 P. L R. 1911 **725**

——— — — ——— *Sale Suit by reversioner contesting sale for want of necessity—Consideration consisting mainly of debts due on mortgage not assailable on account of law of limitation—Conversion of sale into mortgage.*

Custom—contd.

The plaintiffs, reversioners, sued for a declaration that a sale for Rs. 850 effected on the 21st March 1896 was null and void, having been made without necessity. The consideration for the sale was Rs. 800, due on a previous mortgage of 3rd October 1892, and Rs. 50 cash. It was pleaded that the suit was barred by limitation and the sale was binding on the reversioners as there was necessity for the sale and the consideration was wholly paid. The claim was decreed and the decree was upheld on appeal by the lower Appellate Court:

Held, that the sale as such could be impugned, the plaintiffs' suit being so far in time, but they were not entitled to a decree in full. The sale being set aside, the defendants were entitled to fall back on the previous mortgage in respect of which mutation took place in January 1893 more than 12 years before suit. A declaratory suit was time-barred as regards the mortgage under Punjab Act I of 1900. The mortgage must stand, however, questionable the consideration may have been.

Khiali Ram v. *Gulab Khan*, 70 P. W. R. 1908; *Muhammad Azim* v. *Muhammad Ji*, 7 P. R. 1898, referred to.

Held, also, that although the consideration to the extent of Rs. 800 could not be objected to, the sale was liable to be converted into a mortgage for Rs 800. GOKUL CHAND *v.* RAJI, 73 P. L. R. 1911; 67 P. W. R. 1911. **841**

——— **Alienation**—Sodhis *of* mauza *Bhamipura*, Tahsil *Jagraon, District Ludhiana—Succession—Custom or Hindu Law—Collaterals in the fourth degree, whether exclude daughters—Initial presumption in case of* Khatris, *especially of* Sodhis *—Presumption, how rebutted—Proper test in such cases.*

Sodhis of *Mauza* Bhamipura, *Tahsil* Jagraon, District Ludhiana, do not follow agricultural custom in connection with alienations of, or succession to, ancestral immoveable property but follow Hindu Law, and collaterals in the fourth degree do not exclude daughters.

The *initial* presumption in the case of *Khatris*, and especially of *Sodhis*, is that they follow Hindu Law. They are not essentially agriculturists, and they have, as a rule and as a tribe, a priestly *status*. This presumption can be rebutted by proof of a special custom, or of special incidents and circumstances calculated, according to the authorities, to shift the burden of proof.

In cases in which it is presumed that persons, not essentially agriculturists by race, follow agricultural custom, the question always is, whether they form a compact village community, or at least a compact and considerable body of landowners in a more or less homogeneous village. If they do, and if they have been agriculturists for generations, the presumption aforesaid is made.

But while the *absence* of the adoption of agriculture as a means of livelihood for several generations is fatal to the plea that custom is followed, it must not be supposed that in all cases the existence of this incident is sufficient in itself to prove that custom is necessarily followed. HARNAM SINGH *v.* HARDEVI, 137 P. L. R. 1911; 86 P. W. R. 1911; 43 P. R. 1911 **365**

Custom—contd.

——**Alienation**—*Widow inheriting house property from her husband—Right of husband's brother to contest alienation—Sayads of Sialkot City—Muhammadan Law.*

The initial presumption in the case of non-agriculturist Sayads dwelling in cities must always be that they follow Muhammadan Law. So where, in defiance of Muhammadan Law, it is found that widows take the whole of their husband's immoveable estate, there is a natural presumption that they do so as life-holders only subject to control by male reversioners.

Muhammad Anwar-ul-Haq v. *Habib-ul-Rahman*, 74 P. R. 1902; *Abdul Hassan* v. *Habibullah*, 18 P. R. 1906, followed.

Among Sayads of Sialkot City, alienations by a widow of house property inherited from her husband are liable to be contested by the husband's brother. MIR HAIDAR *v.* MUHAMMAD ALI, 14 P. R. 1911; 44 P. W. R. 1911; 88 P. L. R. 1911 **855**

——**Gift**—*Reversion of property to donor and his descendants on donee's death—No reversion if donee leaves male or female descendants—Donee's descendants pass on succession to their own children*—"Lawald," *meaning of.*

In the absence of a special custom, the donor and his descendants are not entitled, on the donee's death, to oust the female descendants of the donee in the direct line.

Gurdit Singh v *Musammat Prem Koer*, 84 P. R. 1909; 76 P. L. R. 1909; 118 P. W. R. 1909; 3 Ind. Cas. 604, followed.

The daughters and sons, in other words, both the male and female descendants of a donee hold not only for their own life-time but also pass the succession to their children, and it is only in the event of the total extinction of the donee's descendants that the property reverts to the donor's line.

The word "*lawald*" is often used of a man who has no sons. LACHHMAN *v.* BHAGWAN SAHAI, 160 P. L. R. 1911 **277**

——Khudi kamini—*Right of* Brahmans *of* mauza *Sangal*, tahsil *Kaithal, to ¼th of* khudi kamini *or hearth tax—Revision—Punjab Land Revenue Act (XVII of* 1887*)*, *s.* 16.

Brahmans of *mauza* Sangal, *tahsil* Kaithal, are entitled to receive from the *Lambardars* of that place ¼th of the *khudi kamini* or hearth tax collected by them.

An order of a Revenue Court re-opening a question which is *res judicata* between the parties is liable to be set aside on revision under section 16 of Act XVII of 1887. BODHA RAM *v.* NET RAM, 4 P. W. R. 1911 **299**

——**Marriage**—*Hindu Law—Legitimacy—* Jhabra Rajputs *not* Kshattriyas—Karewa *marriage between* Jhabra Rajput *and a* Tarkhani *woman is valid—Burden of proof—Marriage between* Kshattriya *and a* Tarkhani *woman.*

Jhabra Rajputs of the Hoshiarpur District are not really *Rajputs*, they do not belong to the *Kshattriya* caste. They are not essentially above *Sudras* A marriage between a *Jhabra Rajput* and a *Tarkhani* woman is not a marriage between a higher main caste and a lower.

Such a marriage is valid in the Punjab and the issue of such marriage is legitimate.

Khairu v. *Fakir Chand*, 57 P. R. 1909; 150 P. L. R. 1908; 114 P. W. R. 1908; 2 Ind. Cas. 944; *Haria* v. *Kanhya*, 72 P. R. 1908; 64 P. L. R. 1908; 47 P. W. R. 1908, followed.

Custom—contd.

The burden of proving that such a marriage is invalid by a special custom lies on the person contesting the marriage.

Haria v. *Kanhya*, 72 P. R. 1908; 64 P. L. R. 1908; 47 P. W. R. 1908, followed.

A, a *Jhabra Rajput*, contracted a *karewa* marriage with *B.*, a *Tarkhani* woman. They lived as husband and wife for nearly 40 years. The issue of the marriage was a son, *P.*, who was treated by his father and the *baradari* as the son of *A*. *P.* was married in a *Rajput* family. One of the reversioners of *A* had admitted *P.* as *A's* son and *P.* was allowed to do *A.'s kirya-karm*:

Held, that the marriage of *A.* and *B.* was valid and consequently *P.* was the legitimate son of *A.*

Lachman Kaur v. *Mardan Singh*, 8 A. 143; *Mangal Singh* v. *Chandi*, 51 P. R. 1900; P. L. R. 1900 p. 412; *Inderum Valungypooly* v. *Ramaswamy Paudia*, 13 M. I. A. 141; 12 W. R. 42 3 B. L. R. 1, referred to.

Obiter dicta.—In the absence of a special local custom, a girl cannot now be taken into a different caste by marriage under the Hindu Law. It is more than doubtful whether in the Punjab, a marriage between a *Kshattriya* and a *Tarkhani* woman is really opposed to law. HAR DIAL *v.* KALI RAM **152**

——*'Shade right'—Right running with the land cannot be dissociated from the land.*

A 'shade-right,' or the customary right of the owner or occupier of land to compensation for the damage done to his crops by the shade of adjacent trees, runs with the land, and cannot be transferred independently of the land. APPAJI *v.* KHUSHAL, 7 N. L. R. 1 **689**

——**Succession**—Daughter—Self-acquired property **819**

—— —— —— Heirless land in a village owned by heterogeneous proprietary body—Government entitled to succeed—Principles applicable in such cases—Proprietary body, right of **294**

—— —— —— to *Mahantship*—Burden of proof **824**

—— —— —— *Naru Rajputs* of Tahsil Phillour **387**

—— —— —— *Sodhis* of Bhamipore **365**

—— —— —— Arains *of Nakodar* tahsil, *District Jullundur—Collaterals exclude daughters from inheriting self-acquired property.*

Among the *Arains* of Nakodar *tahsil* in the District of Jullundur collaterals exclude daughters from inheriting their father's self-acquired landed property. FAJJE *v.* SHER MUHAMMAD, 29 P. W. R. 1911 **681**

—— —— —— *Muhammadan* Jats *of Lahore District—Gift by a female in possession*—Locus standi *of donor's paternal aunt's son to contest the gift—What the plaintiff must prove to contest an alienation Inheritance—Presumption.*

Ordinarily, among agricultural tribes in the Punjab the last male holder's father's sister's son has no right of inheritance in the absence of agnatic heirs and, therefore, he has no right to contest alienations made by the person, whether male or female, in possession of the property. Where such a right is claimed by custom it must be proved.

Custom—concld.

Unless the custom of a tribe recognizes a female and her issue as heirs, the right of controlling even a female's alienations does not extend beyond the line of agnatic heirs.

Nur-ul-nissa v. *Gauhar-ul-nissa*, 61 P. R. 1906; *Natha Singh* v. *Mohan Singh*, 93 P. R. 1906; *Makhan* v. *Lali*, P. L. R. 1900 p 301, followed.

Even a trespasser cannot be ousted unless the plaintiff proves that he is entitled by law or custom to eject him.

Therefore, where among Muhamadan *Jats* in the Lahore District, the last male holder's mother succeeded to the estate and while in possession gifted the property to the son of one of her husband's sisters and placed him in possession, and the son of the other sister sought to set aside the gift and oust the donee:

Held, that the plaintiff must have proved two things, *first*, that by the custom of the tribe he is an heir to the property as the son of the last male holder's paternal aunt, and, *secondly*, that as such heir he has a *locus standi* by the custom of the tribe to contest the alienation, there being no presumption in favour of such a power except in the case of near male agnates of the last male holder.

Nur-ul-nissa v. *Gauhar-ul-nissa*, 61 P R. 1906, followed.

Maqsud-ul-nissa v. *Kaniz Zohra*, 135 P. R. 1908; *Chiragh Bibi* v *Hasan*, 19 P. R. 1906, referred to.

Bandu Khan v. *Umri*, 63 P R. 1903, distinguished. ALI MOHAMMAD *v.* SURAJ-UD-DIN, 162 P. L. R. 911 **236**

——— **Widow**—Sikh Jats *of* Mouza *Butaheri*, Tahsil *and District Ludhiana—Widow remarrying her deceased husband's brother. effect of, on her life-estate—Widow, whether forfeits her life-interest in her deceased husband's property by such re-marriage.*

Among *Sikh Jats* of *Mauza* Butaheri, *Tahsil* and District Ludhiana, a widow does not forfeit her life-estate in her deceased husband's property by reason of her re-marriage in *karewa* form with the latter's brother whether he is the sole surviving brother or there are other brothers as well of the deceased. But if she re-marries a collateral, however near, other than the brother of her deceased husband, she must surrender her life-estate to the latter's own brother, as in that case she steps out of the proper family circle and different considerations come into play.

Musammat Indi v. *Bhanga Singh*, 115 P. R. 1900; 29 P. L R. 1901, relied upon.

Punjab Singh v. *Musammat Chandi*, 83 P. R. 1900, referred to. BASANTI *v.* PARTAPA **885**

Dacoity—*Charge against eight persons—Four of whom acquitted Whether charge sustainable—Penal Code* (*Act XLV of* 1860), *s.* 396.

When a certain number of persons are charged with having committed a dacoity and half of them are acquitted, the charge of dacoity does not necessarily fail.

The charge need not specify that there were other persons accused of the offence besides those convicted and acquitted.

The mere fact that the evidence is not sufficient to convict all those actually charged would not in any way affect the question of the number of persons engaged. RASHIDAZZAMAN *v.* EMPEROR, 13 C. W. N. 434 **684**

Dakhila, how to be proved **489**

Damages for catching fish--Immediate right of possession—Plaintiff not in possession **117**

——— —— caused by vicious animals—Elephants, whether *feræ naturæ*—Liability of both owner and servant entrusted with keep of animals **108**

——— Flow of water through natural channel obstructed—Obstruction caused by silting up of a river—Riparian owner, whether bound to clean the natural channel—Contributory negligence **564**

——— , liability to pay in case where one party does not perform his part **18**

———— , measure of—Special damage **312**

———— Power of re-sale—Non-appropriation of goods to fulfilment of contract—Measure of damages **895**

Debt, assignment of. *See* ASSIGNMENT OF DEBT.

Debutter property. *See* HINDU LAW—DEBUTTER

——— ——— ——. acquisition of—Investment of compensation-money—Allowance of portion of money for repairs absolutely necessary—Ordinary repairs—Land Acquisition Judge—Jurisdiction to entertain application—Separate suit not necessary **491**

Dekkhan Agriculturists' Relief Act (XVII of 1879)—*Agriculturist*—Inamdar—*Assignee of Government revenue.*

The income derived from tenants by an *Inamdar* as assignee of Government revenue cannot be taken into consideration in estimating whether or not he earns his livelihood wholly or principally by agriculture and, therefore, is an agriculturist within the meaning of the Dekkhan Agriculturists' Relief Act. KASHINATH *v.* VINAYAK GANGADHAR, 13 BOM. L. R. 242 **814**

——— ——— ——— **s. 11**—*Civil Procedure Code* (*Act V of* 1908), *ss.* 15, 20, 21, *O. VII, r.* 10—*Jurisdiction—Suit instituted in Court of Judicial Commissioner—Defendant agriculturist and residing within the jurisdiction of another Court—Objection raised late—Return of plaint.*

A suit for maintenance and deferred dower was brought in the Court of the Judicial Commissioner, Sind. At a late stage of the proceeding, the defendant pleaded that he was an agriculturist residing within the jurisdiction of the Sub-Judge, Kotri, and that, therefore, the case was only triable in the latter Court. Plaintiff replied that notwithstanding the provisions of section 11 of the Dekkhan Agriculturists' Relief Act, the suit should be tried in the Court of the Judicial Commissioner as a Court of concurrent jurisdiction:

Held, that in view of the imperative wording of section 15 of the Civil Procedure Code and of section 11 of the Dekkhan Agriculturists' Relief Act, the suit must be instituted and tried in the Court of the Sub-Judge, Kotri.

Nidhilal v. *Mazhar Husain*, 7 A. 230, dissented from.

H. H Mir Husseinali Khan v. *H. H. Mir Abdul Hussein Khan*, 1 S. L. R. 121 at p. 123, followed.

When it is discovered at any stage in the original proceedings that the suit ought to have been instituted in a different Court, the plaint should be returned for presentation to that Court under Order VII, rule 10, Civil Procedure Code.

The discovery at a late stage is a matter for consideration only on appeal or revision under section 21, Civil Procedure Code. HAYATU *v.* GHULAM HUSSAIN SHAH, 4 S. L. R. 261 **980**

——— ——— ——— **s. 48** **910**

Declaration—Purchase of share in permanent transferable tenure—Declaration of right of purchaser by setting aside sale in execution of decree to which he was no party **382**

Declaratory decree—Decree capable of execution, even though no time fixed for payment **187**

——— **suit** Declaration of no practical use to plaintiff **515**

——— Discretion **725**

———, limitation for—Cause of action for a suit for declaration—Entry in revenue records, effect of—Order passed by Partition Officer for seeking declaration in Civil Court **11**

——— *Stanam*—Suit for mere dignity **110**

Decree for foreclosure. *See* MORTGAGE.

——, construction of **632**

——— Lessor and lessee—Payment of premium—Possession to lessee—Conditional decree **392**

——— Order directing amendment of decree **850**

——— *on alleged compromise—Allegation by one party that he did not consent—Application for review—Court's power to review and re-call order—Civil Procedure Code (Act V of 1908), O. XLVII, r. 1.*

In the course of certain execution proceedings, an order was obtained from the Court on the allegation that both parties had assented thereto. Subsequently, it was asserted by one of the parties that he never consented to the order in question:

Held, that it was open to the Court to review the order and re-call it upon an application by the aggrieved party under rule 1 of Order XLVII of the Civil Procedure Code, and that it was not obligatory upon the party to bring a suit to set aside the consent order.

Golab Koer v. *Badshah Bahadur*, 2 Ind Cas. 129, 10 C. L. J. 420; 13 C. W. N. 1197, referred to HAKIM GIR v. BASDEO SAHI **894**

——, *amendment of—Dismissal of appeal—Right of Appellate Court to amend decree of lower Court.*

An Appellate Court has power to amend the decree of a lower Court, when there is a patent variance between it and the judgment, even though it dismisses the appeal for default.

Pichuvayyangar v. *Seshayyar*, 18 M. 214 and *Asma Bibi* v. *Ahmad Husain*, 30 A. 290; A. W. N. (1908) 109; 5 A. L. J. 584, referred to. PAKRAM HAJI *v.* KOVILIATH PANOLI CHERIA THARUVAI **96**

——— *Construction—Charge—Order for sale of property—Mortgage.*

One *K. S.* executed a sale-deed in respect of the property in dispute in favour of one *B. S.* for Rs. 500. The purchase-money was paid to the vendor but possession of the property was not delivered to the vendee, who consequently brought a suit to obtain possession. The suit was compromised in the following terms: "The plaintiff consents to give up his right as vendee in the property in dispute. The defendant agrees to return the purchase-money Rs. 500 with Rs. 100, the costs of the suit, total Rs. 600, to the plaintiff vendee within two years, for which payment this share (*i. e.*, the property

Decree—contd.

which was sold) as well as the person of the defendant shall be liable, and until this money is paid the property in dispute cannot be alienated" Upon this compromise the Court passed a decree as follows: "Plaintiffs' claim is decreed for Rs. 600 as per compromise against the defendant and hypothecated property with interest at 1 per cent. per mensem payable in two years:"

Held, (*Banerji, J.*, dissenting), that the decree did not direct the sale of the property, but merely operated to create a charge upon it.

Per *Stanley, C. J.*—The meaning of the compromise was that there should be a decree against the defendant-vendor for payment of the amount of the decree, and until payment thereof was made, the property, which was the subject-matter of the suit, should stand charged with the payment of this amount. There was nothing to indicate that the parties agreed that if the money were not paid within two years, the property would be sold forthwith. It was in fact a simple money-decree with a super-added charge of property as collateral security for the payment of the amount of the decree.

Per *Banerji, J.*—The intention of the parties to the compromise was that the amount agreed to be paid should be realized by sale of the property in execution of the decree and the decree gave effect to the intention.

Fazil Howladar v. *Krishna Bundhoo Roy*, 25 C. 580; 2 C. W. N 118; *Lal Behary Singh* v. *Habibur Rahman*, 26 C. 166; 3 C.W N. 8; *Gobind Chandra Pal* v. *Dwarka Nath Pal*, 35 C. 837; 12 C W. N. 849; 7 C. L. J. 492, *Baldeo Bharthi* v. *Hushiar Singh*, A. W. N. (1894) 45; referred to.

Per *Richards, J.*—A decree for sale under the Transfer of Property Act always pre-supposes the existence of a mortgage. Parties entering into an agreement for a mortgage cannot contract themselves out of the provisions of the Act. and a decree for sale cannot be obtained without complying with the formalities prescribed by the Transfer of Property Act.

If the Court which passed the decree in question intended to decree that the mortgaged property should be sold without any further suit after default in payment within two years, the Court would be passing an illegal decree. RAMESHAR *v.* SUBBKARAN, 8 A. L. J. 418 **481**

——— *Consent-decree, effect of—Construction—Compromise—Widow—"Absolutely".*

When the parties to a suit agree to certain terms and these terms are embodied in a consent decree by a Court having jurisdiction to deal with the matters in suit, the decree, until it is set aside, is binding on the parties thereto and cannot be objected to on the ground that, if the matter had been contested, the Court would not have passed it.

Kherajmal v. *Daim*, 34 C. 296; 2 A. L J 71; 1 C. L. J 584; 7 Bom. L. R. 1; 9 C. W. N. 201, followed.

In a compromise for partition between co-parceners, a widow was allowed certain property absolutely in the same manner as if the property had been partitioned under a decree of Court:

Held, that the widow took an absolute interest in the property. AMIBAI *v.* MOOSO RAHMITOOLA, 4 S. L. R. 271 **982**

Decree—contd.

——— ———, *construction of—Mortgage-decree based on award—Decree giving personal remedy as well as remedy against mortgaged property—Personal remedy not postponed—Duty of execution Court in interpreting decree—Mortgagee's right to personal remedy.*

A mortgage-decree based on an arbitration award provided that a certain sum of money be paid to the decree-holder in instalments and that on default in the payment of any two consecutive instalments, the decree-holder would be entitled to recover the whole sum at once out of the properties mortgaged and from the judgment-debtor personally. There was no express provision postponing the personal remedy to the remedies against the mortgaged property. Default was made in the payment of the instalments and the decree-holder then sought execution against moveable property other than the mortgaged properties. The judgment-debtor objected that the personal remedy must be postponed to the remedies against the mortgaged properties:

Held, that the decree-holder was entitled to enforce the personal remedy before applying for enforcement of the decree against the mortgaged properties.

Obiter Dicta.—

Per *Hayward, J. C.*

There is no absolute rule preventing a mortgagee from obtaining a decree comprising both an independent personal remedy and remedies against the mortgaged property.

Ram Baran Singh v *Gobind Singh*, 28 A. 245; A. W. N. (1906) 7; 3 A. L. J. 95, referred to.

The general principle of English Law is that a mortgagee has, in default of express agreement to the contrary, a personal remedy for the recovery of the mortgage-debt independently of his remedies against the mortgaged property; this general principle of English Law is applicable in proceedings according to justice, equity and good conscience in default of usage or Acts of the Legislature.

Dada Hanaji v *Babaji Jagushet*, 2 Bom. H. C. R. 36 and *William Webbs* v. *William Lester*, 2 Bom. H. C. R. 52, referred to.

Per *Waley Cohen, A. J. C.*

As long as a decree stands, on an execution application the Court can only construe the decree and cannot consider its merits.

Sheikh Budan v. *Ramchandra Bhunjaya*, 11 B. 537; *Grish Chunder Lahiri* v. *Shikhareswar Roy*, 27 C. 951 at p. 967; 27 I. A. 110 4 C. W. N. 631; *Udwantsingh* v. *Tokhansingh*, 28 C. 353; 28 I. A. 57, relied upon.

On an application in execution a Court cannot read into a decree a provision which it does not contain merely because such an opinion might be expected.

Sri Raja Papamma Rao v. *Sri Vira Pratapa*, 19 M. 249; 23 I. A. 32, relied upon.

If a decree is ambiguous, an interpretation of it consistent with law will be preferred to one contrary to law. TOTALDAS *v.* UTUMAL, 4 S. L. R. 244 **975**

———*Contents of decree—Costs to be stated.*

A decree ought to be drawn in due course by the Court deciding a case, and it must show all the costs incurred by both the parties. SAGAR CHANDRA MANDAL *v.* DIGAMBAR MANDAL, 38 C. 125 **858**

——— *Suit to set aside decree on ground of fraud—What plaintiff should prove—Fraud practised upon Court—Dishonesty of claim.*

Decree—concld.

In a suit to set aside a decree on the ground of fraud, the plaintiff must prove that the decree was obtained by some fraud practised upon the Court. The dishonesty of a claim on which a plaintiff obtains a decree, after following strictly and honestly the procedure laid down for the trial of suits, cannot justify the setting aside of the decree in a subsequent suit.

Therefore, if the plaintiff cannot prove that a decree was fraudulently obtained, he cannot succeed whether the original claim against him was true or false. MAROCHIN *v.* PARSURAM MAHARAJ **905**

——— ——— *in which no time is fixed for payment, effect of—Application for execution of decree—Declaratory decree—Decree capable of execution even though no time fixed for payment—Civil Procedure Code (Act V of 1908), s. 47, cl. (2).*

The plaintiff sued for possession of immoveable property and for mesne profits. A compromise was arrived at in pursuance of which a decree was passed for possession of the property subject to the payment by the plaintiff of a certain sum stated in the compromise. The compromise, however, did not mention the time during which the money was to be paid. Several years after, the plaintiff deposited the money in Court and prayed for delivery of possession of the property in suit. The defendant objected that, as money had not been deposited within three years, the execution of the decree was barred by limitation and delivery of possession could not be allowed. The plaintiff contended that the decree was not capable of execution until the money was paid into Court and the application for execution having been made within three years of that payment was within time. He also contended that the decree was purely declaratory and the application for execution may and should be treated as a suit with reference to section 47, clause (2), of the Code of Civil Procedure:

Held, that the decree was intended to be executed and not to merely declare the rights of the parties to be enforced in a subsequent suit:

Held, further, that if no time for payment of the money was fixed by the decree, the decree-holder had three years within which to execute the decree and as in the present case the money had not been deposited within three years from the date of the decree, the application was time-barred.

Raja Partab Bahadur Singh v. *Raja Surat Singh*, 8 O.C. 361; *Jogeshur Singh* v. *Bhagwan Baksh*, 9 Ind. Cas. 337; 14 O. C. 10; *Etyati Pooparambhi Beva* v. *Matalakat Krishna Menon*, 28 M. 211; *Maloji* v. *Sagaji*, 13 B. 567; *Narayan Govind* v. *Ananda Ram Koji Ram*, 16 B. 480 and *Maruti* v. *Krishna*, 23 B. 592, referred to.

Chedi v. *Lalu*, 24 A. 300; *Mohammad Suleman Khan* v. *Muhammad Yar Khan*, 17 A. 39, not followed. AJUDHIA SINGH *v.* DRIGPAL SINGH, 14 O. C. 100 **187**

———**by consent.** *See* CONSENT-DECREE.

Defamation—*Liability of a party or witness for making defamatory statement in a judicial proceeding—Penal Code (Act XLV of 1860), ss. 499, 500—Revision.*

A person making a statement as a party or witness in a judicial proceeding, which is *prima facie* defamatory, is liable to be charged with defamation under section 500, Indian Penal Code, irrespective of his liability to be prosecuted for perjury. Such

Defamation –concld.

person would be protected if he could show that any of the exceptions to section 449, Indian Penal Code, apply to him.

Fateh Muhammad v. *Crown*, 34 P. R. 1889 Cr.; and *Maya Das* v. *Crown*, 14 P. R. 1893 Cr., followed. PHUNDI RAM *v.* EMPEROR, 7 P. W. R. 1911 CR. **682**

Delivery order—*Jute trade in Calcutta—Custom—Title—Unpaid vendor—Estoppel—Contract Act (IX of 1872), s. 108—Transfer of Property Act (IV of 1882), s. 137.*

In India there is now statutory recognition of a delivery order as a document of title (see section 108 of the Contract Act and section 137 of the Transfer of Property Act) and under it the transferee acquires a title to the goods to which it relates.

These delivery orders pass from hand to hand by endorsement and are sold and dealt with in the market: and according to the invariable course of dealing in the Calcutta Jute Trade, delivery orders are only issued on cash payment and are dealt with in the market as absolutely representing the goods to which they relate.

On March 1st, 1900, the defendant sold certain Hessian cloth to *J.*, on condition that payments were to be made in cash in exchange for delivery orders. On March 2nd, three delivery orders were issued by the defendant to *J.*, by whom they were pledged on March 4th to the plaintiff. The plaintiff subsequently purchased the delivery orders from *J.*, who on March 4th had given a cheque in payment of the goods to the defendant. On March 8th, the cheque was dishonoured. Then the plaintiff demanded the goods from the defendant who refused to give delivery of them to the plaintiff. This action was then brought for delivery of the goods or their value or damages for conversion:

Held, that the defendant intentionally caused the plaintiff to believe that the cash payable in respect of the goods to which the delivery orders related had in fact been paid, that the plaintiff acted on that belief, and that the defendant cannot be allowed to deny that such cash was paid and, therefore, cannot claim to be entitled to a lien as against the plaintiffs. ANGLO-INDIA JUTE MILLS CO. *v.* OMADEMULL, 38 C. 127 **859**

Discharge—Power of one of two joint decree-holders to give a valid discharge **464**

Discharge of debt - Joint family consisting of father and son—Payment of debt made to son **838**

Discretion of Court, what it means **503**

Divorce Act (IV of 1869), s. 3 (1)—*Jurisdiction—Suit for dissolution of marriage—Parties residing within jurisdiction but separately—"Reside or last resided together"—Punctuation, inference from—English law.*

The Chief Court has jurisdiction to entertain a petition for divorce where the parties at the date of filing the petition reside within the jurisdiction of the Court, though they reside separately.

Durand v. *Durand*, 14 W. R. 416: *Wingrove* v. *Wingrove*, 14 W. R. 416, followed.

Per *Reid, C. J., and Kensington, J.*—

The word "together" in section 3 1) of the Divorce Act must be read with "last resided" only. Had the intention of the Legislature been to make "together" apply to "reside" also, there would have been a comma after "reside" and after "resided".

Per *Rattigan, J.*—

Legal documents in strictness should not be punctuated and this rule applies equally to Acts of the Legislature.

Jurisdiction to grant dissolution of marriage ordinarily depends upon the domicil of the parties, but the Legislature of this country has made it depend on residence alone. It is doubtful whether the intention of the Legislature was not to require something in the nature of a "matrimonial house" as a substitute for domicil.

In England, Courts previously assumed jurisdiction to dissolve a marriage if the "matrimonial home" of the parties was in England. As the law now stands the English Courts have no jurisdiction in such cases even though the matrimonial home is in England, unless the parties are domiciled in England.

Le Mesurier v. *Le Mesurier*, (1895) A C. 517; 64 L. J. P. C. 97; 11 R. 527; 72 L. T. 873; *Niboyet* v. *Niboyet*, 4 P. D. C. A. 1; 48 L. J. P. 1; 39 L. T. 486; 27 W. R. 203; referred to. HENRIETTA ALEXANDRA GALE *v.* JAMES FRANK HONDURAS GALE, 17 P. L. R. 1911; 47 P. R. 1911; 122 P. W. R. 1911 **487 F.B.**

Document, construction of. *See* CONSTRUCTION OF DOCUMENT.

——— —, construction of—English rules not applicable **641**

Earnest money, forfeiture of **525**

Ejectment. *See* AGRA TENANCY ACT; BENGAL TENANCY ACT.

——— — of under-*raiyat* **164**

——— —— **suit**—Defective frame of suit **105**

Elephants, whether *feræ naturæ* **108**

Escheat—*Heirless land in a village owned by heterogeneous proprietary body—Government entitled to succeed Principles applicable in such cases—Proprietary body, right of.*

The right of the Crown to claim escheat does not rest on customary law or on Hindu Law, but is based on grounds of general or universal law.

Such right arises only where there is no person entitled by law or by custom to inherit.

The right of the proprietary body as a whole to succeed in cases in which the right of escheat exists, is primarily based on real or assumed relationship to the holder of the land, or to the member of the proprietary body from whom his title was derived.

Such a right should be assumed in the case of homogeneous estates or sub-divisions of estates, where the owners are all or nearly all of the same tribe as the last holder of the land or the member of the proprietary body from whom he derived his title.

The right of escheat should not be assumed in the case of heterogeneous estates or sub-divisions of estates held by persons of different tribes or different *gots* of the same tribe. The presumption in such cases is that the State has a right of escheat.

When the property in the land was originally derived by gift from a member of the tribe of the original proprietary body, the right of that body should be recognized on failure of the donor's and donee's lines,

Escheat—concld.

In any case in which the *wajib-ul-arz* declares the right of the proprietary body to succeed to the land of heirless owners, Government should set up no claim.

Bhupia v. *Jamna Das*, 80 P. R. 1885; *Lehna* v. *Kishan*, 78 P. R. 1888; *Kirpa Ram* v. *Ude Ram*, 77 P. R. 1896; *Shaman* v. *Sardha*, 61 P. R. 1898; and *Harnam Singh* v. *Partab Singh*, 102 P. R. 1906; 129 P. L. R. 1906, relied upon. WAZIRA *v.* MANGAL, 3 P. W. R. 1911; 2 P. R. 1911 Rev.; 188 P. L. R. 1911 **294**

Estoppel—Alienation—Widow—Consent—Next reversioner at date of alienation—Next reversioner at date of widow's death—Impeaching alienation **21**

——— Amending plaint according to decision of Appellate Court—Appeal from order—Acquiescence—Conduct—Right to file appeal **463**

——— Defendant producing false *pattah*, whether entitled to benefit of presumption—Re-entry by landlord—Tenant surrendering—Ejectment of under-*raiyat* **164**

——— Delivery order—Jute trade in Calcutta—Custom—Title—Unpaid vendor **859**

——— Execution of decree—Construction **632**

——— Mortgage decree by landlord—Purchase by third party in execution—Rent decree by landlord—Purchase by landlord in execution of rent-decree—Priority of title **54**

——— Mortgage—Purchase of property by mortgagee—Liability of mortgagee to prevent redemption by mortgagor **359**

——— Mutation of names on consent by minor's mother—Acquiescence **387**

——— Occupancy-holding not transferable—Purchase—Title of purchaser Subsequent sale of holding in execution of rent-decree obtained by some of co-sharer landlords **928**

——— Pre-emptor denying *locus standi* of deceased vendee's sons to appeal—Whether he can give them a *locus standi* to execute his decree **405**

——— Suit for compensation against Railway Company for non-delivery of goods—Notice of claim, proof of—Offer by Railway Company to pay—Waiver **122**

——— Tenant, right of, to build on his '*sahan*'—Estoppel against the landlord if building not objected to in time—Minority of landlord at the time of building, effect of **186**

——— *Estoppel against Act of Legislature*—Kabulyat *executed to landlord—Subsequent payment of rent to registered proprietor—Whether there is estoppel—Bengal Tenancy Act (VIII of 1885), s. 60—Land Registration Act (VII of 1876) B. C., ss. 78, 81 Evidence Act (I of 1872), s. 116.*

There can be no estoppel against an Act of the Legislature.

Madras Hindu Mutual Benefit Permanent Fund v. *Ragava Chetti*, 19 M. 200 and *Jagabandhu* v. *Radha Krishan*, 4 Ind Cas. 414; 36 C. 920 referred to.

Consequently, the principle of estoppel cannot override the provisions of either section 78 of the Land Registration Act or section 60 of the Bengal Tenancy Act; and a tenant who has executed a *kabulyat* in favour of a landlord may resist a claim by the latter for rent, on the ground that his name has not been

Estoppel—concld.

registered under section 78 of the Land Registration Act, and that he (the tenant) has paid rent to the registered proprietor.

The restrictions imposed by section 81 upon section 78 of the Land Registration Act, to the effect that the disability imposed upon the proprietor who has failed to register his name to realise rents ceases when that proprietor sues to recover rent under a written contract, cannot be incorporated by implication into section 60 of the Bengal Tenancy Act.

Therefore, an unregistered proprietor cannot sue for rent even upon a *kabulyat* executed by the tenant and it is open to the defendant to prove payment of rent to the registered proprietor and to plead that the plaintiff has no enforceable right as against him. ABDUL AZIZ *v.* KANTHU MULLICK, 13 C. L. J. 693, 38 C. 512 **467**

——— *Mortgagor and mortgagee Transferor and transferee of non-transferable holding—Question of transferability of holding—Mortgagee-purchaser and private purchaser.*

A mortgagor is estopped from denying his mortgagee's title and the existence of the lien which he has created or from defeating its enforcement against the property upon which it was placed.

Debendra Nath v *Mirza Abdul*, 1 Ind. Cas. 264; 10 C. L. J. 150, relied upon.

When a non-transferable holding is sold or mortgaged by a tenant he is, as between himself and the transferee, estopped from setting up that such sale or mortgage is invalid.

The question of transferability of the holding does not arise between the mortgagee-purchaser of the interest of the tenant and the private purchaser from the same person. SHYAMA CHARAN BHATTACHARYYA *v.* MOKHODA SUNDARI DEBI, 14 C. L. J. 487 **49**

Evidence—Conviction based on circumstantial evidence **929**

——— Fact, question of—Weight to be attached to opinion of Trial Judge—Srtong case of plaintiff—Not rebutted—Personal testimony of defendants **963**

——— *Witness required by Court but not wanted by party—Civil Procedure Code (Act V of 1908), O. XVI, r. 14.*

Where a Court desires to have the evidence of a particular witness, whom the defendant does not desire to call, the Court is not justified in insisting on the defendant paying the amount necessary to secure the attendance or evidence of the witness, and, on defendant's refusal to do so, declining to issue summonses for the attendance of his witnesses. In such a case the correct procedure is to take action under Order XVI, rule 14, of the Code of Civil Procedure BILLA *v.* CHHUTA, 159 P. L. R. 1911 **35**

Evidence Act (I of 1872), s. 13—Value of instances **240**

——— **ss. 13, 32, cls. (3) and (5)**—*Admissibility of proceedings of another litigation—Statement made by a woman as to her marriage with another person, admissibility of—Finding of fact,*

Evidence Act—contd.

how far it can be challenged in second appeal—Parctice—Whole cannot be challenged.

The question for decision was whether the appellant was the legitimate daughter of one *K.* and *R.* The respondent contended that *R.* was not the legally married wife of *K.* and in proof of it produced a compromise and a decree between *R.* and another person by which *R.* obtained only a small amount as maintenance. He also relied upon a statement made by *R.* on a certain occasion admitting that she was the concubine and not the married wife of *K.* The question before the Court was whether the compromise and the decree passed in the other suit as well as the statement of *R.* were admissible in evidence. In second appeal it was also urged that the statement of *R.* had not been proved by the best available evidence:

Held, that the compromise and the decree passed in the other case were relevant facts under section 13 of the Evidence Act:

Held, also, that the statement of *R.* was admissible in evidence under section 32, clauses (3) and (5), of the same Act:

Held, further, that it was not for a Court in second appeal to consider the precise degree of weight to be attached to the different parts of evidence. If a finding of fact had been arrived at after a careful consideration as a whole, no valid objection in law could be made in second appeal with respect to this finding. PARBATI *v.* MAHARAJ SINGH **188**

——— ——— **ss. 24, 30, 133**—*Confession not relevant against the maker, whether relevant against a co-accused Statement Confession Accomplice.*

A house was broken into at night and certain property stolen. During the police investigation one *K.* stated that he and *U.* had committed the burglary. On search some stolen property was recovered from *U.*'s possession. *U.* alone was sent up for trial and *K.* appeared as a witness for the prosecution. *K.* in his evidence gave the same story implicating himself and *U.* On this the Magistrate transferred *K.* from the witness box to the dock and trying them jointly convicted both of them. It was found on appeal that *K.*'s statement, which amounted to a confession, had been induced in one of the manners specified in section 24 of the Evidence Act:

Held, that as *K.*'s confession could not be used against himself, as being irrelevant under section 24 of the Evidence Act, it could not be taken into consideration against *U.*, a co-accused.

Held, also, that *K.* was not an accused person when he made his statement as a witness before the Magistrate but *K.* was an accused person with *U.* when his statement was used against both and consequently it was a confession.

Held, further, that as an accomplice is a witness and not an accused person, section 133 of the Evidence Act did not affect the question in the case. EMPEROR *v.* UMADA, 9 P. R. 1911 Cr.; 166 P. L. R. 1911; 22 P. W. R. 1911 Cr. **340**

——— ——— **s. 30** **340, 582**

——— ——— **s. 30**—Retracted confession of co-accused **857**

——— ——— **s. 32**—Admissibility of a statement in a Will **967**

Evidence Act—concld.

——— ——— **s. 32, cls. 3 5**—Statement made by a woman about her marriage with another person, admissibility of **188**

——— ——— **s. 32, cl. 5**—Proof of pedigree table **199**

——— ——— **s. 35**—Register of births and deaths **713**

——— ——— **ss. 41, 110** - *Succession Act (X of 1865), s 242—Civil Procedure Code (Act XIV of 1882), s. 13—Question of status decided by Probate Court—Power of Civil Court to go into question in regular suit—Burden of proof—Regular suit against administratrix—Person in lawful possession.*

A question of status decided in proceedings under the Probate and Administration Act can be gone into again in a regular suit.

A judgment of a Probate Court is conclusive proof that the person to whom Letters of Administration or Probate have been granted have been clothed with the powers and the responsibilities of the deceased and of nothing else.

Barrs v *Jackson*, 1 Ch. 582; 14 L. J. Ch. 433; 9 Jur. 609; 65 R. R. 457; *Kanhya* v. *Radhachurn*, 7 W. R. 338; *Ma Hnyin* v. *On Gaing*, U. B. R. 1902-03, II Prob. & Ad. p. 1, relied upon.

Ma Gaung v. *Nyun*, Civ. App No. 227 of 1904; followed.

Where a person is in lawful possession of an estate it is for any one who disputes his right to prove that he is not the owner.

A, as the widow of *B*, applied for Letters of Administration to his estate. Her status was denied by his relation *C.*, but the Probate Court held that *A.* was *B.*'s widow and granted her Letters of Administration. *C.* then brought a civil suit for the property of *B.* on the ground that *A.* was not *B.*'s widow:

Held, that the burden of proving that *A.* was not the widow of *B.*, was on *C.* *A.* had by virtue of the Letters of Administration granted to her as administratrix delivered to herself claiming as sole heir the residue of the estate. She was, therefore, in lawful possession. MI NGWE ZAN *v.* MI SHWE TAIK, U. B. R. (1910) I, 61 **987**

——— ——— **s. 63**—*Secondary evidence—Whether newspaper is secondary evidence of a letter not found and not proved to have been written by accused.*

Secondary evidence cannot be given of a document which has not been proved to have been written by the accused or even to have existed.

A copy of a newspaper publishing a defamatory letter cannot be used secondary evidence to prove a letter which has not been found and has not even been proved to have been written by the accused. RAMLAL BALARAM *v.* EMPEROR, 8 A. L. J. 302 **832**

——— ——— **s. 68**—*Sale-deed—Proof—Attestation.*

In order to prove a sale-deed it is not necessary, under section 68 of the Evidence Act, to examine a marginal witness, as the sale-deed is not a document which is required by law to be attested. GOPAL *v.* BISHUNNATH **64**

——— ——— **s. 74**—*Chitta* **287**

——— ——— **s. 83** **376**

Evidence Act—contd.

——— **s. 83**—*Maps and plans prepared by Government—Admissibility in evidence.*

Maps and surveys made in India for revenue purposes are official documents prepared by competent persons and with such publicity and notice to persons interested as to be admissible, and are valuable evidence of the state of things at the time they were made. They are not conclusive and may be shown to be wrong; but in the absence of evidence to the contrary, they may be properly received in evidence as correct *when made.*

Jugadindranath Roy v. *Secretary of State for India*, 30 C. 291, followed. MURTI SANKARAN *v.* MANAVIKRAMAN, 2 M. W. N. 213; 9 M. L. T. 415 **653**

——— ——— **s. 90** **376**

——— ——— **ss. 91, 92** **718**

——— ——— **s. 92, cl. 4**—What amounts to verification on modification of the terms of contract **196**

——— ——— **s. 92, proviso 2**—Oral agreement regarding interest when pro note silent about interest **315**

——— **s. 92**—*Oral agreement—Admissibility—Subsequent conduct of parties, when admissible.*

Evidence of any oral agreement or statement as between the parties to a document cannot be admitted for the purpose of contradicting, varying, adding to, or subtracting from its terms.

But evidence of the conduct of the parties subsequent to the execution of the document is admissible to show what the real meaning of the contract was. Such conduct is also admissible if it may operate as an estoppel when it amounts to part performance of the contract.

Baksu Lakshman v. *Govinda Kanji*, 4 B 594; *Abdul Ghafur* v. *Abdul Kadir*, 72 P. R 1901: 114 P L. R. 1901; *Karshi Nath Chatterjee* v *Chandi Charn Banerjee*, 5 W. R. 68; L. R. Sup. Vol. 383, followed.

Balkisen v. *W. F. Legge*, 22 A. 149; 27 I. A. 58, referred to BULAKI MAL *v.* C. J. FLOYD, 27 P. R. 1911; 118 P. W. R. 1911 **1004**

——— ——— **s. 103** **456**

——— ——— ——— **s. 110** **937**

——— ——— **s. 112**—*Legitimacy—Burden of proof—Non-access—Proof of illegitimacy.*

A. sued *B.*, his father, and *C.*, the adopted son of *B.*, for partition. *B.* disowned *A*'s paternity, and stated that his mother *D.* lived separately from him for a long time and that he had no access to *D.* during the period when *A* could have been conceived by her. *B.* married a first wife, and again married *D* as he had no son by the former. They both quarrelled; subsequently, *D.* sued *B* for maintenance, and *B.* in reply brought a suit for restitution of conjugal rights, whereupon they became reconciled to each other. Though *D.* lived in her mother's house she constantly visited *B.* in his house without the knowledge of the first wife. When *D.* was *enciente B.* executed a deed of settlement in favour of *C* in which he did not disown the legitimacy of *D*:

Held, that under these circumstances, the onus of proving non-access within the meaning of section 112 of the Evidence Act lay on *B.* and the fact that he believed *D.* to be guilty of infidelity and produced witnesses to prove it, did not discharge the onus.

Evidence Act—concld.

A.'s legitimacy must, in these circumstances, be presumed. VENKAYYA *v.* CHIGURUPATI PEDDA NAGANNA, 2 M. W. N. 312 **389**

——— ——— ——— **s. 114**—Presumption of constructive possession in favour of trespasser **742**

——— ——— ——— **s. 115** **928**

——— ——— ——— **s. 116** **467**

——— ——— **ss. 121, 123, 124, 125, 126** **917**

——— ——— **s. 133** **340**

——— ——— **s. 138** **917**

——— ——— **s 145**—Statements previously made by witness and recorded in the absence of accused **119**

Excise Act (XII of 1896), ss. 20, 21, 49—*Sale of* charas *in bond in the hands of the Excise Authorities to an unlicensed person—Sale defined for the purpose of the Act.*

For the purposes of the Excise Act XII of 1896 the sale of an intoxicating drug is not complete until delivery thereof to the purchaser or some one on his behalf, consequently a licensed vendor who holds a "sale-in-bond" *charas* license and sells the *charas*-in-bond in the hands of the Excise Authorities to an unlicensed person, who cannot take delivery until he takes out a license, does not break, under section 21 of the Excise Act, the condition of his license and is not liable to be prosecuted under section 49. DHANPAT *v.* EMPEROR, 5 P. W. R. 1911 CR.; 4 P. R. 19:1 CR; 89 P. L R. 1911 **682**

ss. 21, 49 **682**

Execution—*Attachment—Application for execution dismissed—Attachment still subsisting.*

Where property is once attached in execution, an order merely dismissing the application for execution which does not contain specific words withdrawing the attachment and which is not an order declaring the decree incapable of execution, will not have the effect of raising the attachment. So long as such attachment subsists, an alienation of the property by the judgment-detor is invalid.

Bank of Upper India v. *Sheo Prashad* 19 A. 482, followed.

Puddomonee v *Roy Muthoora Nath Chaudhry*, 12 B. L. R. 411; 20 W. R. 133, distinguished. IMTIAZ ALI *v.* BISHAMBHAR DAS, 8 A. L. J. 619 **245**

Execution of decree—Limitation. *See* LIMITATION ACT, 1877, SCH II, ART. 179, AND LIMITATION ACT, 1908, SCH. I, ART. 182.

——— ——— ——— Application in execution—Regular suit—Decree for trees—Excess trees in possession of decree-holder—Suit for recovery of excess trees not barred **991**

——— ——— ——— *Ex parte* decree—Sale—*Ex parte* decree set aside after sale—Title of purchaser for value **361**

——— ——— ——— ——— Mortgage-decree based on award—Decree giving personal remedy as well as remedy against mortgaged property—Personal remedy not postponed—Duty of execution Court in interpreting decree—Mortgagee's right to personal remedy **975**

——— ——— ——— ——— Objection that decree was made without jurisdiction, if can be taken in execution proceedings **532**

Execution of decree—contd.

——— ——— ——— ——— Sale of mortgaged property in execution of simple money-decree—Purchaser at auction-sale, whether representative of judgment-debtor—Subsequent sale in execution of decree for sale passed on mortgage—Auction-purchasers at the two sales, respective rights of **722**

——— ——— Sale, setting aside of, by payment—Deposit within thirty days—Court closed on thirtieth day—Deposit on re-opening day, validity of **51**

——— ——— ——— ——— No time fixed for payment in the decree **187**

——— ——— ——— *Application for execution—Dismissal for default, effect of—Whether takes away effect of previous order—Order for attachment.*

The mere circumstance that an application for execution has been dismissed for default, does not take away the effect of any previous order which might have been made.

Kamini Debi v. *Aghore Nath Mookerjee*, 4 Ind. Cas. 402; 11 C. L. J. 91; 14 C. W. N 357, relied upon.

An application for execution of a decree was made on August 5th, 1904. Then another application was made on October 5th, 1907. Notice of that application was duly served under section 248 of the Code of 1882 on the judgment-debtor who asked for time to prefer his objections. Time was granted, but he failed to appear on the date fixed. On that date the Court passed this order: "Decree-holder is to take further steps on or before January 7th, 1908". On this day the application for execution was dismissed for default. The present application was presented on August 6th, 1908:

Held, that the order necessarily implied an adjudication that the decree at the time was capable of execution and that consequently no question could be raised in the present proceeding that the application of October 5th, 1907, was barred by limitation.

Mungul Pershad Dichit v. *Grija Kant Lahiri*, 8 C. 51, 11 C. L. R. 13; 8 I A. 23, relied upon.

The principle of the decision in *Mungul Pershad Dichit's* case is applicable whenever there is an adjudication by the Court upon the rights of the parties to an execution proceeding: it is not essential that there should be an order for attachment.

Mazzem Hossain v. *Sarat Kumari Debi*, 5 Ind. Cas. 89; 14 C. W. N. 433; 11 C. L. J. 857; referred to. MURLIDHAR SUPAL *v.* NARSINGA DAS **359**

Application pending—Appeal—Intermediate application barred—Res judicata.

An application for execution of a decree was made in 1903. The Court ordered execution to proceed. The judgment-debtor appealed against the order, which, however, was upheld on the 2nd of August 1905. In the meanwhile, the decree-holder made a fresh application for execution of the same decree in 1904 and this was rejected by the first Court as time barred.

After the order of the Appellate Court on the 2nd August 1905, the decree-holder applied in 1906 for the proceedings in execution to be continued on the application of 1903 The Court ordered a fresh application for execution to be filed, and so, in 1907, a fresh application for execution was made. It was rejected by the Court on the ground that it was barred as *res judicata* by the order of rejection on the application of 1904.

On appeal to the High Court:

Execution of decree—contd.

Held, that the application for execution must be allowed. The right of the decree-holder to proceed in execution on the strength of the Appellate Court's order in his favour could not be effected by the order of the first Court passed in the *darkhast* of 1904; because the latter was the order of a lower Court and it was passed in a *darkhast* which could not have legal validity so long as the *darkhast* of 1903 was kept alive by proceedings. BALKRISHNA WAMNAJI *v.* SHIVA CHINA MHATRA, 13 BOM. L. R. 230; 35 B. 245 **811**

——— ——— ——— ——— *Construction of decree—Estoppel*—Res judicata.

In execution of a maintenance decree the decree-holder made applications for sale of certain properties alleging that they were liable to be sold under the decree. The judgment-debtor had notice of these applications but did not object to the sale. In a subsequent application for sale it was contended that the decree did not authorise the sale of property:

Held, that the plea was untenable.

Subrama Iyyar v. *Nagammal*, 24 M. 683, referred to. KONDAMA NAIDU *v* VENKALAKSHMI **632**

——— ——— ——— *Decree obtained in Sonthal Parganahs—No arrest in execution—Transfer of decree to Court outside Sonthal Parganahs—Whether decree may be executed by arrest of judgment-debtor.*

A decree which was obtained in the Court of the Deputy Collector of Deoghur in the Sonthal Parganahs and which could not have been executed by the arrest of the judgment-debtor if it had been executed in any of the Courts in the Sonthal Parganahs, may be executed by his arrest, when it is transferred to any Court for execution outside the Sonthal Parganahs. DEOSARAN LAL SINGH *v.* PRAYAG RAM **538**

——— ——— ——— *Deliberate under-valuation in sale proclamation—Material irregularity—Substantial injury—Civil Procedure Code Act XIV of 1882, ss. 287, 311.*

Deliberate under-valuation of property in a sale proclamation is a material irregularity in publishing the sale within the meaning of section 311 of the Civil Procedure Code, 1882, and if the properties have been sold below their proper value the sale should be set aside.

Sadatmand Khan v *Phul Kuar*, 20 A. 412; 25 I. A. 146; 2 C W. N. 550;, relied upon. SIVADURGA DEBI *v.* RAJMOHAN PODDAR, 15 C. W. N. 577 **475**

——— ——— *Landlord and tenant Agreement embodied in decree of Court Relief against, forfeiture—Granted in execution proceedings.*

The rule that Courts of equity will not forego their power to grant relief against forfeiture in the case of non-payment of rent where the relations of the parties are those of landlord and tenant, merely on the ground that the agreement between them is embodied in a decree of Court, applies alike to a suit to enforce a decree and to a proceeding in execution.

Karishnabai v. *Hari Govind*, 31 B. 15; 8 Bom. L. R. 813; 1 M. L. T. 370 (F. B.), followed. BALAMBHAT RAVJIBHAT *v.* VINAYAK GANPATRAO, 13 BOM. L. R. 54; 35 B. 239 **746**

Execution of decree—contd.

——— ——— ——— ——— ——— *Limitation for application —"Step-in-aid of execution of a decree," meaning of—Process-fee, effect of depositing—Limitation Act (IX of 1908), Sch. I, Art.* 182.

In execution of a decree dated 15th November 1906 the decree-holder's last application was made on the 19th March 1907. In it the decree-holder prayed for the issue of a warrant for the arrest of the judgment-debtor. After several notices, issued to the judgment-debtor, had returned unserved, the Court ordered the issue of a warrant. On the date of the last order the decree-holder's agent was present in Court and pressed for the issue of a warrant. The present application for execution was made within three years from the date when the order for the issue of warrant was made in the presence of the agent of the decree-holder but more than three years from the date of the last application for execution. The judgment-debtor objected that the execution of decree was barred. The decree-holder contended that his agent's request to the Court to issue a warrant of arrest was an application to the Court to take a step-in-aid of execution and having been made less than three years before the present application there was no bar of limitation:

Held, that the fact that the decree-holder's agent pressed the Court could not be considered as an application to the Court to take a step-in-aid of execution.

Raja Dalip Singh v. *Thakur Durga Bakhsh*, Select Case No. 185, followed. JUGGI LAL *v.* GANGA PRASAD, 14 O. C. 124 **182**

——— ——— ——— *Mesne profits—Godown — Letting-value—Profits of business carried therein—Correct principle for assessment of mesne profits—Measure of damages—Special damage—Claim in suit.*

The measure of compensation which a decree-holder can claim as mesne profits in respect of a godown is the annual income from the property during the time the judgment-debtor withheld possession, and the income is to be measured by the value of the use of the property, that is, the letting value of the godown as a whole, and not by what the judgment-debtor received or might have obtained by the business he carried on in the premises. KAMINI KUMAR RAI *v.* KRISHNA CHANDRA SAHA **312**

——— ——— ——— ——— *Objection that decree invalid, if can be taken in execution—Mortgage-decree by consent—Instalment-decree—Order absolute—Waiver by judgment-debtor—Transfer of Property Act (IV of 1882), ss.* 88, 89.

It is not open to a Court of execution to consider the validity of the decree of which execution is sought.

And a judgment-debtor cannot in execution proceedings object that the decree has not been passed by a Court of competent jurisdiction.

Nagandra Bala Chowdhurani v. *Secretary of State*, 10 Ind. Cas. 532, relied upon.

A mortgage-decree was passed by consent in these terms: "The judgment-debtor is to pay Rs. 1,200 to the decree-holder by instalments of Rs. 15 a month, upon failure to pay three instalments, the decree-holder is to become entitled to take out execution without any order absolute":

Held, that as the mortgage-decree was payable by instalments, it was not a decree in the terms of section 88 of the Transfer of Property Act and, therefore, porvisions of section 89 were inapplicable.

Execution of decree—concld.

Bechoo Singh v. *Bechharam Sahu*, 1 Ind. Cas. 677 10 C. L. J. 91, referred to.

An order absolute is entirely for the benefit of the mortgagor, and if he deliberately waives his right in this behalf, it is not open to him subsequently to turn round and contend that the decree-holder is not entitled to execute the decree without an order absolute. BISWA NATH PROSAD *v.* BHAGWANDIN **536**

——— ——— ——— ——— *Objection by judgment-debtor that the auction-purchaser has taken possession of property to which he was not entitled, maintainability of—Necessity of separate suit—Civil Procedure Code (Act V of 1908), s.* 47.

Where a judgment-debtor objected that the auction-purchaser had taken possession of property to which his sale certificate gave him no title: *Held*, that the question in dispute should be decided by a separate suit and could not be decided under section 47, Civil Procedure Code.

Bhagwati v. *Banwari Lal*, 31 A. 82; 6 A. L. J. 71; 5 M. L. T. 185; 1 Ind. Cas. 416, followed. MAHARAJ SINGH *v.* JAGAN NATH, 14 O. C. 70 **714**

——— ——— ——— ——— *Payment out of Court—Omission by decree-holder to certify—Payment of the amount by judgment-debtor to third party—Suit for recovery of amount from decree-holder—Limitation.*

Where a decree-holder failed to certify to Court a payment made towards the decree out of Court and the judgment-debtor was compelled to pay the amount in consequence to a third party: *Held*, that time began to run against the judgment-debtor for the recovery of the amount from the decree-holder from the date when he had to pay the amount a second time.

Quære:—Whether, in ordinary cases, limitation runs against the judgment-debtor on the expiration of 90 days from the date of the payment. MARAPPA CHETTY *v.* SHUNMOOGAPPA CHETTY, 21 M. L. J. 518 **462**

——— ——— ——— *Soldier's pay—Liability for attachment—Warrant officers—Assistant Surgeons in the Indian Subordinate Medical Department—Army Act of 1881, s.* 144.

The question was whether the whole or any portion of the pay of Military Assistant Surgeons in the Indian Subordinate Medical Department was liable to attachment in execution of decree:

Held, that the respondents being Warrant Officers were 'soldiers' as defined by the Army Act and, therefore, their pay was exempt altogether from attachment under the proviso to section 144 of the Act.

Watson v. *Lloyd*, 25 M. 402; and *Calcutta Trades Association* v. *Rayland*, 24 C. 102; 1 C. W. N. 138, distinguished. MURRAY & CO., LTD. *v.* PRINS, E. G. A., 14 O. C. 82 **719**

Executor—Decree for rent—Sale of tenure—Suit for rent for intermediate period—Personal liability of tenant—Estate in the hands of executor—Executor's pesonal liability—Personal liability of beneficiaries **560**

Ex parte decree—Appearance—Advocate appearing and applying for adjournment and then withdrawing on the application for adjournment being refused—Application for setting aside—Sufficient cause **770**

——— ——— ——— ——— Application to set aside—Applicability of new Act **823**

Ex parte decree—concld.

——— ——— Sale—*Ex parte* decree set aside after sale—Title of purchaser for value **361**

Expert testimony—Government expert not cited and not cross-examined—Opinion not admissible. **965**

Extradition Act (XXI of 1879), s. 14, *inquiry under—High Court—Power to transfer—Power to control procedure.*

The High Court has no power to order the transfer of an inquiry under the Extradition Act, section 14, because the competency of a Magistrate to hold an inquiry under that section depends on the authorization of the Executive Government.

There is no provision of law which empowers the High Court to request the Government to appoint another Magistrate to whom, if appointed, the High Court could transfer the inquiry.

As the High Court does not possess any power to control or interfere in the conduct of an inquiry held under section 14 of the Extradition Act, it cannot declare by what procedure the Magistrate should be guided in the further conduct of the inquiry. *Mohunt* DEV DAS, *In re*, 15 C. W. N. 735 **946**

Extradition Act (XV of 1903)—*High Courts Charter Act* (24 *&* 25 *Vict. C.* 104), *s.* 15—*High Court—Power of supervision—Appellate jurisdiction.*

A Magistrate acting under the Extradition Act is not subject to any appellate jurisdiction: he makes inquiry and reports the result to Government. Consequently, the High Court cannot interfere with his order. RUDOLF STALLMAN *v.* EMPEROR, 15 C. W. N. 737 **618**

——— ——— ———**s. 3**—*Bail—High Court's power.*

The Extradition Act provides for bail to be furnished by persons accused of certain crimes, and the matter is one which must be regulated by the provisions of the Criminal Procedure Code. The High Court has the fullest discretion in the matter but regard must be had to the provisions of section 496 and the circumstances of the case. RUDOLF STALLMAN *v.* EMPEROR, 15 C. W. N. 736; 38 C. 547 **958**

Fact, *question of—Weight to be attached to opinion of Trial Judge—Strong case of plaintiff—Not rebutted—Personal testimony of defendants.*

The plaintiff sued to recover certain jewellery, or its value, alleged by her to have been deposited with the defendants (who were husband and wife) for safe custody. She produced receipts purporting to be signed on behalf of the defendants by their son for the jewels but the defendants alleged these were forgeries. The defendants denied the deposit and said that the only jewels they had received from the plaintiff had been deposited with them by way of security for two loans Rs. 2,500 and Rs. 1,000 respectively they had made to her. In support of this story they produced promissory notes for those amounts purporting to be signed by the plaintiff, which she in her turn denounced as forgeries:

Held, that the dispute being one of fact, great weight naturally attached to the finding of the Trial Judge, that the evidence as to the notes did not suffice to displace the case of the plaintiff in regard to the jewellery, especially in the absence of any denial by the defendants and their son, and that the case of the plaintiff had not been rebutted. DURGA KUNWAR *v.* MATHURA KUNWAR, 15 C. W. N. 717 **963 P. C.**

Family arrangement—Will—Immediate operation—Final and irrevocable—Whether document is Will **285**

——— ——— **settlement.** *See* HINDU LAW.

Final Order—Privy Council Appeal—Receiver, order appointing—Certificate—Fit case for appeal **439**

Foreclosure. *See* MORTGAGE.

——— ——— Conditional sale—Non-possessory hypothecation of moveables **869**

Forfeiture of pardon. *See* CRIMINAL PROCEDURE CODE s. 339.

——— ——— ———**of rights** on non-payment of revenue—Re-grant—Improvement—Co-sharers—Rights *inter se* **694**

Fraud. *See* LIMITATION ACT, 1877, s. 18.

——— Decree—Suit to set aside decree on ground of fraud—What plaintiff should prove—Fraud practised upon Court—Dishonesty of claim **905**

——— ——— Payment to decree-holder before date of sale—Fraud in conduct or publication of sale—Second appeal, whether lies **625**

——— Plaint and written statement both defective—Proper course—Fraud must be pleaded specially **922**

——— *Suit for declaration that decree is void for fraud practised on the Court—Ponna burial ground—Suppression of existence of Hindu Temple on land—Effect of such suppression on the validity of the decree—What constitutes fraud—Setting aside whole or part of decree—Consent of the Ponna community—Custom—Observances of Ponnas—Sanctity of burial ground—Consecration—Removal of dead body.*

Two contractors purchased from the Trustees of the Ponna community a burial ground, promising to give the Ponnas another piece of land for burying purposes and to pay for the removal of the remains of the dead buried at the old cemetery to the new place, and the Court in a suit at the instance of four members of the community settled a scheme for carrying out the said transfer. After this, some Ponnas sued for a declaration that the decree in the above suit was void, making the trustees, the plaintiffs in the first suit and the contractors, all defendants. On the date fixed for the hearing of this second case, some Madrasi Hindus were also made parties as the decree and transfer would affect a temple of theirs on the land.

It was contended that the decree was obtained by practising a fraud on the Court when it was led to believe that the exchange of the burial ground with the contractors was made known to, explained to and accepted by, the whole Ponna community:

Held, that on the evidence, it was proved that the scheme was duly explained to the community and the minutes of the meeting of the community properly represented what occurred.

It was further contended that the Court was not informed of the existence of a Madrasi temple on part of the land and of the fact that the Madrasis had an interest in it and that the facts material for the Court to know were kept deliberately from the Court:

Held, that if the Court had been informed of the temple it must have issued notice to the Madrasis, who would have strenuously opposed the scheme and then the Court would have either declined to entertain the

Fraud—concld.

scheme at all or might have sanctioned the scheme except in so far as it affected the Madrasis, or would at any rate have called upon the trustees to prove that they had the right to have the temple removed at will.

Held, further, that as there was a suppression of material facts which it was essential that the Court should have before it and which might, and probably would, have caused it to arrive at a different decision, the decree passed in the previous suit for settling the scheme must be set aside so far as it affected the land occupied by and for the Madrasi temple.

Boswell v. *Cooks*, 27 L. R. Ch. D. 424; *Brook* v. *Lord Mootsqre*, 46 Eng. Rep. Ch. 419; *Pasupati Nath Bose* v. *Nando Lal*, 30 C. 718 relied upon.

Among Ponnas, cremation is considered the better way of disposing of their dead, and even if the dead are buried, no sign is maintained of where the graves are. No custom exists requiring the relatives to go to the cemetery to invite their dead to feasts, nor does any peculiar reverence attach to the graves or the remains. The cemetery is not consecrated and a body once interred can be disinterred and then cremated or removed to another place.

Ramrao Narayan v. *Rustamkhan*, 26 B. 198; *In re Plumstead 'Burial ground'* L. R. Pro. Div. (1895) 225 at p. 234; *The Queen* v. *Twiss*, L. R. 4 Q. B. 407; 10 B. and S. 298; 38 L. J Q. B. 228; 20 L T. 522; 17 W. R. 765; *The Rector of St. Georges Hanouer Square* v *Stuart*, 93 Eng. Rep. 1077, *Queen* v. *Dr. Tristram*, 15 T. L. R. 214, distinguished. MAUNG AUNG MYAT *v.* MA YWET, 4 BUR L. T. 76 **780**

——— ,*what is—Execution of decree* - Ex parte *decree* —*Sale* - Ex parte *decree set aside after sale—Title of purchaser for value.*

The word "fraud" is very loosely used in cases for setting aside of sales: every irregularity is taken to be fraud with the consequence that such a finding involves. A finding of fraud should be reserved for that which is dishonest and morally wrong; a vague general finding of fraud is not sufficient; actual fraud must be established.

In an execution sale under an *ex parte* decree, to all appearances in order, a person became a purchaser for value. Subsequently, the *ex parte* decree was set aside as it was proved that summons had not been duly served:

Held, that the sale was valid and the purchaser could not be deprived of the benefit of his purchase.

It is the policy of the Court, and a very wise policy, to protect its purchasers, for although in an individual case there may be some hardship, it would be far more prejudicial to the general body of judgment-debtors that any doubts should be thrown upon titles acquired by purchasers in execution under decrees which are to all appearances in order and free from objection. PARESH NATH MULLIK *v.* HARI CHARAN DEY, 15 C. W. N. 875; 38 C. 622 **361**

Fraudulent Transfer—Intent to defeat or delay creditors—*Mala fide* sale **922**

——— ——— ——— ——— Sale by father to his minor son—No consideration **906**

——— ——— ——— ——Settlement in favour of mother—Will by mother—*Benami* transaction **647**

Freedom of Religion Act (XXI of 1850) **477**

General Clauses Act (X of 1897), s. 3 (26)—*Civil Procedure Code (Act V of 1908), O. XXI—Central Provinces Revenue Manual, Vol. III, Revenue Book Circular No. IV-9—Land, definition of —Trees—Jurisdiction of Civil Court to attach and sell trees.*

Trees of all kinds, standing on an agricultural holding, are part and parcel of land used for agricultural purposes, at least in those cases where the property in them has not been expressly severed from the property in the soil on which they stand. Therefore, the jurisdiction of a Civil Court to attach and sell such trees in execution of a decree is ousted by Appendix C, to Revenue Book Circular No. IV-9 (Central Provinces Revenue Manual, Volume III, p.76.)

The definition, which must be applied to the word 'land' as used in the Civil Procedure Code, is that given in section 3 (26) of the General Clauses Act, 1897, which includes trees. SUKHNANDAN *v.* MANAKCHAND, 7 N. L. R. 63 **473**

Gift, construction of. *See* WILL. **565**

Grant of Land Revenue, meaning of **353**

Guardian—Widow—Re-marriage—Children by first husband—Removal from guardianship—Discretion of Court—Welfare of minor **69**

Guardians and Wards Act (VIII of 1890), s. 8—*Order appointing guardian—Substantive application, whether necessary*—Pardanashin *ladies.*

A Court has no power to make an order appointing a guardian of minors except on a substantive application

The mere fact of the mother of a minor being a *pardanashin* lady is no obstacle to her being appointed guardian of the minor. JAIWANTI KUMARI *v.* GAJADHAR UPADHYA, 15 C. W. N. 675; 14 C. L. J. 226 **334**

——— ——— ——— **s. 17**—*Guardianship of the person of a minor—Unfitness of the presumptive heir—Mother-in-law and father-in-law, priority as between, for guardianship of a minor widowed daughter-in-law—Hindu Law.*

Usually, it is undesirable to appoint any one guardian of the person of a minor, who is the presumptive heir to the minor's property.

Sami Row Jagadeb v. Eliavatha Row Gayabavadhu, 16 M. L. J. 357, referred to.

Under the Hindu Law, the father-in-law has a minor right to the mother-in-law for the custody of a minor widowed daughter-in-law. KRISHNASWAMI CHETTY *v.* COTTAH MANGAMMAH, 2 M. W. N. 365 **283**

——— ——— ——— **s. 34**—*Inventory—Sum to be allowed for minor's maintenance.*

When appointing a guardian for the estate of a minor the Court should direct the guardian to file an inventory or list of the minor's property in Court, and should allow a maximum sum for the maintenance, education and advancement of the minor, which sum should never be exceeded without the leave of the Court. LACHMANDAS *v.* RAMDEI **243**

Guardianship—Mother's right to be guardian of minor children—How defeated **904**

Gujarat Talukdars Act (VI of 1888), s. 29 E—Talukdari *Settlement Officer—Notice—Decree-holder submitting his claim—Exclusion of time—Limitation—Application for execution.*

A. obtained a decree for money against *B.*, a *Talukdar*, on the 22nd of February 1903 and presented his first *darkhast* for execution on the 8th of December 1903. From the 21st of September 1905, the *Talukdari* estate of *B.* came by notice to be in the management of the Settlement Officer under section 29 *B.* of the Gujarat Talukdars Act, and as required by that section, *A.* submitted his claim under the decree for the consideration of the officer on the 7th of March 1906. The officer rejected the claim on the 12th of August 1908. *A.* then applied to the Civil Court to execute the decree and claimed in computation of the period of limitation to exclude the whole of the time taken up by the Settlement Officer in considering his rights under the decree:

Held, that *A.* was not entitled to exclude the whole of the period taken up by the officer and, therefore, his application for execution was barred by time.

Section 29 *E.* of the Gujarat Talukdars Act places no absolute bar upon the right of a decree-holder to apply to the Court for execution by reason of the submission of his claim to the Settlement Officer.

Under that section a decree-holder has to do one of two things before he can ask the Court to execute his decree. He has either to produce a certificate from the officer that the claim has been duly submitted or to apply in writing to the officer for such certificate accompanied by a certified copy of the decree and wait for the expiry of one month from the date of receipt by the officer of the application. If the officer gives no certificate within that month, the decree-holder's right to apply to the Court for execution revives. GANPATSINGH *v.* BAJIBHAI, 13 Bom L. R. 292 **912**

Handwriting—Government expert not cited and not cross-examined—Opinion not admissible **965**

Haqiat, *meaning of—House property included.*

The word *haqiyat* means rights in immoveable property and though it is as a rule used in connection with landed property, there is nothing to prevent its application to house property also. BAWA SINGH *v.* LACHMAN SINGH, 24 P. R. 1911; 186 P. L. R. 1911 **850**

High Court—Jurisdiction—Person living outside but carrying on business within jurisdiction of High Court **895**

——— ——— Power to grant bail in extradition cases **958**

——— ——— ———Power of supervision—Appellate jurisdiction—Magistrate acting under Extradition Act **618**

——— ——— ———Power to transfer—Power to control procedure **946**

Hindu Law—*Change of religion—Effect of conversion of member of Hindu joint family to Muhammadanism—Regulation VII of* 1832, *s.* 9—*Act XXI of* 1850—*Compromise—Family arrangement for settlement of disputes—Compromise by Hindu widow—Reversioners, whether bound.*

The intention of the Legislature in both the enactments, Regulation VII of 1832 and Act XXI of 1850, is perfectly clear: by declaring that the Hindu or Mahammadan Law shall not be permitted to deprive any party not belonging to either of those persuasions of a right to property, or that any law or usage which inflicts forfeiture of rights or property by reason of any person renouncing his or her religion shall not be enforced, the Legislature virtually set aside the provisions of the Hindu Law which penalises renunciation of religion or exclusion from caste.

Therefore, where in a joint Hindu family consisting of a father and a son, the father was converted to Muhammadansim in 1845, the effect of such conversion was not to make the son the sole owner of the property of the joint family.

On the death of the son and subsequently that of the father, the daughters of the son sued a daughter's son of the father who had taken possession of the property as heir, for recovery of possession, and the suit was compromised by the parties dividing the property between them:

Held, that the compromise was a family arrangement for the settlement of disputes and was binding upon the reversiones. KHUNNI LAL *v.* GOBIND KRISHNA NARAIN, 15 C. W. N. 545; 8 A. L. J. 552; 13 C. L. J. 575; 13 BOM. L. R. 427; 10 M. L. T. 25; 2 M. W. N. 432; 21 M. L. J. 645; 33 A. 356 **477 P. C.**

——— ———*Religious ceremonies, performance of—Choosing of priest—Exclusive title to officiate, if tenable.*

Parties who require religious ceremonies to be performed for their benefit are at liberty to choose the priest by whom those ceremonies shall be performed.

Gour Moni Debi v. *Chairman of Panihati Municipality*, 6 Ind. Cas. 864; 12 C. L. J. 74; 14 C. W. N. 1057, relied upon.

Therefore, when pilgrims on their way to Gya perform the *sradh* ceremony of their ancestors on the bank of the Punpun, no one is entitled to a declaration that he is exclusively entitled to officiate as the priest.

But a declaration may be obtained that a person is entitled to officiate as priest for such pilgrims as may choose to employ him and that he cannot be prevented from exercising his calling. DWARKA MISSER *v.* RAM PROTAB MISSER, 13 C. L. J. 449 **41**

——— ——— ———**Adoption**—*Adoption not valid—Claim by reversioner to property of adoptee—Relationship of plaintiff as* sapinda *to adoptee's natural family—Recognition of adoption—Estoppel—Whether bars right to claim as reversioner—Mistaken impression of law as to validity of adoption, effect of—Title by prescription.*

Plaintiff sued for a declaration that certain alienations by 1st defendant were not binding on him as reversioner to her deceased husband *R.* It was found and conceded by plaintiff that *R.* was adopted into another family, but that the adoption was not valid. The lower Court found, however, that plaintiff had treated *R.* all along as an adopted son, that, therefore, he was estopped from disputing the validity of the adoption, that *R.* ceased to belong to his natural family, and that plaintiff's claim to the reversion as a member of *R.*'s natural family could not be upheld:

Held, (1) that the result of the estoppel would only be to prevent the plaintiff from disputing *R.*'s title to the property of his adoptive father as adopted son,

Hindu Law– contd.

and that it could not give *R.* the status of an adopted son or put an end to his position as a member of his natural family.

A mistaken impression of law regarding the validity of an adoption is not a ground on which any estoppel can be based.

(2) that *R.*'s adoption being invalid, his title to his adoptive father's estate was acquired by prescription, *viz.*, an absolute heritable estate and that plaintiff was entitled to the reversion.

Rajaya Lakhshmi v. *Suryanarayana*, 3 M. L. J. 100, referred to.

Dalton v. *Fitzgerald*, (1897), 2 Ch. 86; 66 L. J. Ch. 604; 76 L. T. 700; 45 W. R. 695, distinguished. AIYANNA CHARIAR *v.* LAKHSHMI AMMAL, 21 M. L. J. 500; 10 M. L. T. 19; (1911) 2 M. W. N. 62 **194**

——— **Adoption**—Kritrima—*Succession—Right of adopted son to succeed collaterally—Custom—Appointment of heir.*

Under Hindu Law it is only when an adoption in the *dattaka* form takes place that the adopted son has the right of collateral succession. In the case of a customary or *kritrima* adoption an adopted son succeeds ordinarily to the estate of his adoptive father only, as the relationship between the two is purely a personal one.

Baijnath v. *Shamboo Nath*, 113 P. L. R. 1908; 53 P. W. R. 1908, referred to. JIWAN MAL *v.* JAMNA DAS, 67 P. L. R. 1911 **822**

——— ——— **Alienation**—*Division by co-widows—Alienation by Will—Status of division.*

A. executed a Will by which he divided his properties into three shares, giving to the 1st wife one share, 2nd wife another share, and the daughters of the 2nd wife a third share. The two wives made a division of the properties and in the partition-deed they inserted a provision that one should not question the alienation by the other by sale, gift, &c. The first wife made a Will by which she gave the properties to her brother. In a suit to set aside the Will brought by the daughters as reversioners, it was contended that unless the right of survivorship which accrued to one co-widow on the death of the other, was present to the minds of the parties, they must not be intended to have given up such right and the words used only limited the kind of disposition that must remain unquestioned and did not include a disposition by Will:

Held, that the words used in the partition-deed were wide enough to cover the case of disposition by Will also.

Where the document provides that the widows have no right of alienation without the consent of each other, it must be presumed that the right of survivorship was present to their minds and must be deemed to have been given up.

Somathi Ammal v. *Kupputhoyi Amma*, 14 M. L. J. 175, distinguished. PACHATHAMAL *v.* ELUVAN CHETTY, 2 M. W. N. 311 **386**

——— ——— ——— ——— *by father without consent of son, validity of—Alienation questioned by a son's son subsequently born.*

A joint Hindu family consisted of one *R.* and his two sons *B.* and *S. R.* made a mortgage of the joint property to which *S.* gave no consent:

Held, that the mortgage was invalid and ineffectual: and that it could be questioned even by the sons of *B.* who were born subsequent to the mortgage.

Hindu Law—contd.

Kali Shanker v. *Nawab Singh*, 31 A. 507; 6 A. L. J. 762; 3 Ind. Cas. 909, referred to.

Chattan Lal v. *Jai Ram*, 8 A. L. J. 15; 8 Ind Cas. 721, distinguished. TOLSHI RAM *v.* BABU LAL, 8 A. L. J. 733 **908**

——— **Alienation**—*Widow—Consent—Next reversioner at date of alienation—Next reversioner at date of widow's death—Impeaching alienation—Estoppel.*

An alienation by a widow with the consent of the next reversioner at the time the alienation was made, cannot be questioned by the person who happens to be the next reversioner at the time of the widow's death.

Bajrangi Singh v. *Manokarnika Baksh Singh*, 30 A. 1; 3 M. L. T. 1; 12 C. W. N. 74; 9 Bom. L. R. 1348; 6 C. L. J. 766; 5 A. L. J. 1; *Rangappa Naik* v. *Kamti Naik*, 31 M. 366; 18 M. L. J. 309; 3 M. L. T. 355, followed.

The consent of the next reversioner cannot be treated merely as evidence of legal necessity.

Pilu Appa v. *Babaji Naru*, 34 B. 165; 11 Bom. L. R. 1291; 4 Ind. Cas. 584, dissented from. KUPPIER *v.* KOTA CHINNARAMIER, 9 M. L. T. 356 **421**

——— ——— **Debuttar property**—*Treating absolute* debuttar *as secular property—Whether character of property changed.*

If a certain piece of land is really absolute *debuttar*, the mere fact that the *shebaits* have chosen to divide it as if it was secular, does not alter the true character of the land.

The plaintiff and his brother were originally *shebait* of a certain idol, and in execution of a decree the plaintiff purchased his brother's share in the property. He now sues to eject the defendant's tenants in occupation of the land:

Held, that the Court was bound to decide the question of the true character of the land, because unless the plaintiff can establish his title to the property the defendants were entitled to retain possession thereof. BHABATARAN ROY *v.* BEHARI LAL **399**

——— ——— **Family settlement**—*Minor represented in the settlement—Right of minor to impeach the settlement*—Bona fides—*Settlement 'fair and prudent'—Compromise of doubtful claims—Absence of due inquiry nto facts by minor's guardian.*

A family settlement entered into on behalf of a minor by a person who acted as his guardian, is binding on the minor if it was a compromise of doubtful claims and each side had material of some strength on which to carry on the contest, the outcome of which might reasonably be thought doubtful and which a settlement enabled them legitimately to avoid.

The mere fact that the parties effected the settlement *honestly* is not conclusive of its binding character.

Where the lower Appellate Court found that the minor's guardian did not make due inquiry into certain circumstances forming the basis of the settlement, and yet held that the settlement was "fair and prudent:"

Held, that the settlement was binding on the minor and could not be avoided by him. NATESA IYER *v.* RAMA IYER, 9 M. L. T. 498 **221**

Hindu Law—contd.

——— ———Guardianship of the person of a minor—Unfitness of the presumptive heir—Mother-in-law and father-in-law, priority as between, for guardianship of a minor widowed daughter-in-law **283**

——— ——— **Joint family**—*Acquistion of property while family is joint—Whether joint property or self-acquired—Presumption—Onus.*

Certain members of a joint Hindu family acquired property while the family was joint. They subsequently sued for a declaration that the property so acquired was their self-acquired property:

Held, that there was no presumption that the property was self-acquired and the plaintiffs must show that it was their self-acquired property.

Hem Nath Rai v. *Jankee Rai*, A. W. N. (1905), 212; 2 A. L. J. 658; *Shivgolam* v. *Baran*, 1 B. L. R. 164, referred to. SARDAR SINGH *v.* BHOPAT SINGH **124**

——— ——— ——— — Debt due to the family—Suit by Manager for its enforcement—Right to sue—Omission to implead the other co-parceners—Maintainability of the suit **874**

——— ——— ——— —*Joint family consisting of father and son—Payment of debt made to son—Discharge of debt.*

Where in the case of a Hindu joint family consisting of a father and son, debts due to the family are paid sometimes to the father and sometimes to the son, the payment of a debt to the son would absolve the debtor from liability in respect of such debt. JAHANGIR *v.* GANDA SHAH, 62 P. L. R. 1911 **838**

——— ——— ——— , *manager of—Suit to recover debt belonging to joint family—Necessary parties—Competency of the Manager to bring such a suit.*

The plaintiff, as manager and head of a Hindu joint family, sued to recover a debt due by the defendant to the money-lending business belonging to the family. The debt was based upon a pro-note executed by the defendant in favour of the plaintiff's uncle, who at the time was the head of the family. The defendant objected that the plaintiff alone could not maintain the suit:

Held, that, as the head of the family, the plaintiff was competent to maintain the suit and that it was not necessary for the other members of the family to be joined as plaintiffs, although the Court had discretion to add them as defendants to enable it completely and effectively to adjudicate upon all the questions involved in the case.

Kishen Pershad v. *Har Narain Singh*, 15 C. W. N. 321; 8 A. L. J. 256; 9 M. L. T. 343; 13 C. L. J. 345; 21 M. L. J. 378; 9 Ind. Cas. 739 (P. C.), followed. BISHAMBAR NATH *v.* INDARBASI, 14 O. C. 127 **200**

——— ——— ——— *Marriage expenses of male members—Charge on property.*

The marriage expenses of the male members of an undivided Hindu family are a legitimate charge on the family property.

Kameswara Sastry v. *Veeracharlu*, 20 M. L. J. 855; 8 Ind. Cas. 195, followed. ARUNACHALA REDDY *v.* ARUNACHALA REDDY **285**

Hindu Law—contd.

——— ——— **Joint family**—*Property purchased in the name of one member—Presumption as to its jointness.*

There can be no presumption in favour of a family having any joint property nor can it be presumed that property found in the possession of any one member of a family is joint family property, unless it is shown that the family as such possessed at least some property.

Ramraj Rai v. *Salik Rai*, A. W. N. (1899) 214; *Hem Nath Rai* v. *Janki Rai*, A. W. N. (1905) 212; *Taruck Chander* v. *Jodheshur Chunder*, 19 W. R. 178; 11 B. L. R. 193; *Neel Kisto Deb* v. *Bur Chander Thakur*, 12 M. I. A. 523; 12 W. R. 51; 5 B. L. R. 13 (P. C.); *Dhuram Das Pandey* v. *Shama Soondri Dibiah*, 3 M. I. A. 229; 6 W. R. 43 (P. C.); *Gobind Chunder* v. *Dourga Parshad*, 22 W. R. 248; 14 B. L. R. 337; *Lakishman Mayaram* v. *Jamna Bai*, 6 B. 225; *Luximan Rao* v. *Mallar Rao*, 2 K. 60; 5 W. R. 67 (P. C.); *Moolji Lalla* v. *Gokuldas Vulla*, 8 B. 154; *Toolseedas Ludha* v. *Premji Tricumdas*, 13 B. 61; *Dwarka Das* v. *Jamina Das*, 13 B. L. R. 133; 9 Ind. Cas. 948, *Jagmohamdas* v. *Allu Maria*, 19 B. 338; *Kunhia Lal* v. *Debi Dass*, 22 A. 141; *Lal Bahadur* v. *Kanhaiya Lal*, 29 A. 244; 11 C. W. N. 417; 15 C. L. J. 340; 4 A. L. J. 227; 2 M. L. J. 147; 17 M. L. J. 228; 9 Bom. L. R. 597 (P. C.); referred to. RAM KISHUN DAS *v.* TANDA MAL, 8 A. L. J. 27 **543**

——— ——— ——— —Mitakshara—*Sale in execution of a decree on mortgage executed by father—Son not a party to the mortgage—Right of son's widow to impeach the sale—Decree, execution of.*

A Hindu joint family consisted of a father and four sons one of whom was a minor. The father executed a mortgage on the basis of which the mortgagee brought a suit for sale and obtained a decree in execution of which the property was sold. The minor son died leaving a widow:

Held, that it was not open to the widow of the minor son to say that her husband's share could not be mortgaged by his father and could not pass to the auction-purchaser at a sale in execution of the mortgage decree. SOHNI *v.* MOHAN KUAR **228**

——— ——— ——— **property**, *presumption as to—Property purchased from joint funds—Joint family property, existence of, necessary to raise presumption as to jointness.*

In order to establish that property purchased by a member of a joint family is joint family property, it must be shown either that it was acquired from the common funds or that the family of which the purchaser is a member possessed joint property. Without such proof the presumption that the property is joint family property cannot arise. GOPAL *v.* BISHUN NATH **64**

——— ——— **Joint property**—*Gift to daughter by father of ancestral immoveable property after her marriage.*

A gift of ancestral immoveable property by a Hindu father to his daughter, after the latter's marriage, is valid. In making such a gift the father merely discharges a moral obligation.

Churman Sahu v. *Gopi Sahu*, 37 C. 1; 13 C. W. N. 994; 10 C. L. J. 545; 1 Ind. Cas. 945, *Rammasami Ayyar* v. *Vengidusami Ayyar*, 22 M. 113; *Kudutamma* v.

Hindu Law—contd.

Narasimha Charlu, 17 M. L. J. 528; *Kamakshi Ammal* v. *Chakrapani Chettiar*, 30 M. 452; 17 M. L. J. 450; 3 M. L. T. 23, distinguished. ANIVILLA SUNDARARAMAYYA *v.* CHERLA SITAMMA, 9 M. L. T. 469; 2 M. W. N. 422; 21 M. L. J. 695 **56**

——— **Maintenance**—*Principles in awarding maintenance to widow—Rate of maintenance—Claim for arrears—Demand unnecessary—Costs in maintenance suits.*

The amount which a Hindu widow is entitled to for her maintenance is an amount, which in the opinion of the Court would be required to enable her to live comfortably according to the standard of comfort obtaining in the community to which she belongs, regard being had to the extent of the property out of which she is entitled to receive maintenance.

No hard and fast rule can be laid down that she is entitled to a particular fraction of the income, although she could in no event claim more than the income of the share of the estate which her husband would have been entitled to, if a division had taken place during his life-time.

A Hindu widow is entitled to arrears of maintenance from the date of her husband's death. No formal demand is necessary.

Arrears of maintenance may be refused to a Hindu widow only where the person liable to make the payment has justifiable grounds for inferring that the claim was abandoned and had in consequence not set aside any portion of his annual income to meet the claim.

Raja Yarlagadda Mallikarjuna Prasadha Naidu v. *Rajah Yerlaggada Durga Prasada Naidu*, 24 M. 147; 27 I. A. 151, referred to.

A widow may waive her right to maintenance by living separately from her husband's family, but the waiver cannot be inferred from the fact of separate residence alone.

The object of a maintenance suit being to ascertain the liability of the family estate, the costs of such suit should ordinarily come out of the estate.

Where a lesser maintenance is allowed to the widow than was claimed by her, the defendant should not be allowed proportionate costs on the amount disallowed, unless the claim is exorbitant. RANGATHAYI *v.* NELLI MUNUSAWMY, 2 M. W. N. 322; 9 M. L. T. 461; 21 M. L. J. 706 **110**

——— ——— **to widow**—Mitakshara—*Partition among her husband's co-parceners after suit for maintenance, how far affects claim for maintenance—Claim, enforceability of, as against the whole undivided family.*

The claim of a Hindu widow for maintenance as against the undivided family of her deceased husband is not affected by a partition effected between the co-parceners of her husband after the institution of her suit.

The claim is enforceable against the whole undivided family, *i. e.*, against all the co-parceners who can be traced to a common ancestor, and not against that branch of the family only to which the plaintiff's husband belonged.

Hemangini Dasi v. *Kedarath Kundu Chowduhry*, 16 C. 758, distinguished.

Jayanti Subbiah v. *Alamelu Mangamm*, 27 M. 45, explained and referred to. SUBRAYULU CHETTY *v.* KAMALAVALLI THAYARAMMA, 21 M. L. J. 493; 10 M. L. T. 1 **347**

Hindu Law—contd.

——— ——— **Marriage**—Legitimacy—*Jhabra Rajputs* not *Kshattriyas—Karewa* marriage between a *Jhabra Rajput* and a *Tarkhani* woman is valid—Burden of proof—Marriage between *Kshattriya* and a *Tarkhani* woman **152**

——— ——— **Partition**—*Decree for partition—Appeal pending—Doctrine of survivorship—Subsequent change in the family—Decree unaltered.*

Where a decree for partition effects a severance of the joint family, this severance is not affected by the subsequent filing of an appeal from the decree unless and until it is reversed. Births or deaths afterwards supervening in the family cannot alter the decree.

Ordinarily, decrees which were right at the time they were passed are not varied by reason of events which subsequently happen.

Sakharam Mahadev Dange v. *Hari Krishna Dange*, 6 B. 115, dissented from.

Joy Narain Giri v. *Grish Chunder Myti*, 4 C. 434; 5 I. A. 28; *Appovier* v. *Rama Subba Aiyan*, 11 M. I. A. 75; 8 W. R. 1; *Chidambaram Chettiar* v. *Gauri Nachiar*, 2 M. 83, referred to.

Gorakala Kanakayya v. *Janardana Padhi*, 1 M. W. N. 841 at p. 844; 9 M. L. T. 64; 21 M. L. J. 31; 8 Ind. Cas. 736; *Sangili* v. *Mookan*; 16 M. 350; distinguished.

Subbaraya Mudali v. *Manika Mudali*, 19 M. 345, followed. THANDAYUTHAPANI *v.* RAGUNATHA, 2 M. W. N. 223; 21 M. L. J. 240; 9 M. L. T. 421 **660**

——— ——— ——— ——— ——— —*Evidence necessary to prove—Presumption—Burden of proof—Partition of part—Agreement to separate—Conduct of members—Statement in Will—Admissibility—Evidence Act (I of 1872), s. 32—Construction of document—Use of technical terms of Hindu Law.*

There can be no partition without an intention to separate and though such an intention may be satisfactorily proved by evidence of conduct, direct proof of an intention to remain united will outweigh many acts which, though they may be more consistent with a state of partition, are not entirely inconsistent with a state of union.

It is open to a family to effect partition of part only of the family property and leave the remainder undivided.

Muthusami Mudaliar v. *Nallaku Lantha Mudaliar*, 18 M. 418; and *Tottempudi Venkataratnam* v. *Tottempudi Sheshiamma*, 18 B. 611; *Appovier* v. *Rama Subba Aiyar*, 11 M. I. A. 75; 8 W. R. (P. C.) 1, relied upon.

Vaidyanath Aiyar v. *Aiyasamy Aiyar*, 32 M. 191; 19 M. L. J. 94; 5 M. L. T. 49; 1 Ind. Cas. 408, distinguished.

An agreement to separate is sufficient to effect partition: actual division of the property is not necessary.

Appovier v. *Rama Subba Aiyar*, 11 M. I. A. 75; 8 W. R. (P. C.) 1; *Musammat Porbati* v. *Chaudri Naunilal*, 11 Bom. L. R. 878; 6 A. L. J. 597; 5 M. L. T. 427; 13 C. W. N. 987; 3 Ind. Cas. 195; 31 A. 412; 10 C. L. J. 121 and *Balkishen Das* v. *Ram Narain Sahu*, 30 C. 738, relied upon.

The question whether members of a joint Hindu family have separated or not is a question of fact to be decided according to the particular circumstances of each case.

Hindu Law—contd.

Where an estate was originally ancestral and belonged to a joint Hindu family, the presumption is that it remains joint and he who alleges the contrary must prove partition or acts of separation.

Musammat Cheetha v. *Baboo Miheen Lall*, 11 M.I.A. 369, followed.

Cesser of commensality, separate lodging, separate use of money for an apparently separate business and the conduct of the parties are all items of evidence which must be taken into account and to which due weight must be attached.

Ganesh Dutt Thakoor v. *Jewach Thakoorani*, 31 C. 262; 6 Bom. L. R. 1; 31 I. A. 10; 14 M. L. J. 1; 8 C. W. N. 146 *Murari Vithoji* v. *Makund Shivaji Naik Golatkar*, 15 B. 201, referred to.

A statement in the Will of a deceased co-parcener that he and his brothers were living, earning and holding property separately, is not evidence of separation, as it is not admissible under any clause of section 32 of the Evidence Act, nor under any other section of the Act.

Tottempudi Venkataratnam v. *Tottempudi Sheshamma*, 27 M. 228, relied upon.

When a Hindu uses about himself or his property terms which have a special technical meaning in Hindu Law, he must, in the absence of evidence to the contrary, be held to attach to those terms their special technical meaning. GOKALDAS *v.* CHANDIBAI, 4 S. L. R. 225 **967**

——— **Partition**—Onus probandi—*Breach in the state of union—Presumption—Rebuttal—Re-union—Proof.*

According to Hindu Law, the person who alleges partition must prove it, because 'once is a partition made.' If it is proved that there has been a breach in the state of union, the law presumes that there has been a complete partition both as to parties and property. The presumption in question continues until it is rebutted by proof of an agreement, which means proof of intention on the part of some to remain united as before and to confine the partition to the rest, or if the partition was intended to extend to the interest of all individually, there must be proof that some of them re-united. ANANDIBAI *v.* HARI SUBA PAI, 13 Bom. L. R. 287 **911**

——— ——— ———*Partition effected by award of arbitrators—Partition between two branches of a family—Status of the members of each branch—Presumption—Separation of branches not separation of individuals.*

Where by an award of arbitrators a partition was effected between two branches of a Hindu undivided family, and there was no provision for enjoyment by the individual members of each branch:

Held, that though the branches were divided, the members of each branch remained undivided in status as between themselves.

The separation of branches of a family does not imply the separation of the members of each branch.

Balabux v. *Rukmanibhai*, 30 C. 725 at p. 736 and *Ranganatha Row* v. *Narayanasawmi Naicker*, 31 M. 482 referred to. RAJARATHNASAMI *v.* ANJI LATCHI **103**

Hindu Law—contd.

——— **Partition deed**—*Sons by different wives—Construction of partition-deed—Severance in interest as between the sons of second wife.*

A had three sons—one by his first wife, and two by his second wife. He executed a Will by which he authorized his executors to effect a partition among his sons when the eldest of them attained the age of majority. The executors did as they were directed. Properties were divided into three shares, one of which was allotted to the eldest son, and two to the other two sons. The deed of separation provided (1) that if any property was left undivided, it should be divided into three shares by the three parties and (2) that in future the parties shall have no connection in respect of property except relationship by blood:

Held, that these provisions effected a severance in interest as between the sons of the 2nd wife also though their property was kept together without any division. KOMALAMBAL AMMAL *v.* KRISANASAMY BHATTAR, 2 M. W. N. 310 **385**

——— ——— **Partnership**—*Joint family trading firm—Power of representing firm—Manager.*

In the case of a joint Hindu family firm, the rights and liabilities of the partners cannot be decided by exclusive reference to the Contract Act but must also be considered with reference to the general rules of Hindu Law which regulate the transactions of united families.

Samalbhai v. *Someshwar*, 5 B. 38, followed.

In the case of an ordinary partnership, the acts of each partner such as are necessary for, or are usually done in the conduct of, the business are binding on the co-partners. But in the case of a Hindu joint family firm, the power of representing the firm is limited to the Manager or to adult members acting as Managers.

Ramlal v. *Lukhmichand*, 1 B. H. C. R. App. 51; *Sakorbai* v. *Maganlal*, 25 B. 206, followed. TOPANMAL *v.* MEYGOOMAL, 4 S. L. R. 260 **978**

——— ——— **Succession**—Daughter—Self-acquired property **819**

——— ——— ——— Occupancy holding—Succession, how governed—Son remaining joint with father **733**

——— ——— ——— ——— Right of adopted son to succeed collaterally **822**

——— ——— ——— *Daughter's sons inherit* per capita.

Daughter's sons inherit their maternal grandfather's property *per capita* and not per *stirpes*. LALOO *v.* LALOO **448**

——— ——— **Widow**—*Absolute interest—Want of reversioners—No claim by Crown.*

The mere fact that there are no reversioners, or that the Crown or other person, entitled to property on the death of a widow, does not claim it, cannot possibly give the widow an absolute interest in that property, which she can bequeath by a Will.

Collector of Masulipatam v. *Cavaly Vencata Narainapah*, 8 M. I. A. 500; 2 W. R. (P. C.) 59, referred to. JANARDAN PATHAK *v.* ANU RAM DATTA **51**

——— ——— Widow—*Alienation of family property—Suit by reversioners to set aside—Purchaser—Burden of proof—Future necessity.*

Where a Hindu widow sells her husband's property to a stranger, the burden of proving that the sale is binding on the reversioners rests on the purchaser and on his failure to discharge such burden the property reverts to the estate.

A widow is not entitled to mortgage her husband's property and raise a loan not for her present use but to be kept in deposit with the lender, to be given to her from time to time so long as the amount may last and she may have legitimate occasion for expenditure in future. APPAJEE *v.* RAMACHARLU, 9 M. L. T. 307 ; 2 M. W. N. 267 **676**

——— ——— ——— *Alienation of husband's property—Purpose of paying off husband's debts—Inquiry by purchaser—No inquiries made from alleged creditors—Whether inquiry sufficient.*

A person dealing with a Hindu widow is bound to make *bona fide* inquiries into the necessities of the transaction and to honestly satisfy himself that it was in the particular instance for the benefit of the estate.

Hunooman Persaud Pandey v. *Mundraj Koonweree*, 6 M. I. A. 393; 18 W. R. 81 *note*, relied upon.

The defendant purchased from a Hindu widow a part of her husband's property. The reason for the sale, as stated in the *kobala*, was the payment to *B*, her husband's creditor. The defendant did not make any inquiries from *B.* as to the existence of the debt but satisfied himself with an inquiry from the widow as to the reason for the alienation. In a suit by the reversioners to recover possession of the property, it was found that *B.* was not a creditor of the deceased husband:

Held, that the inquiry fell short of that which is required of a purchaser and that the suit was rightly decreed. JANHABI *v.* BALBHADRA SUAR, 15 C. W. N. 793 **350**

——— ——— *Widow managing her husband's estate—Removal—Grant of Letters of Administration—Liability to account.*

A Hindu widow is liable to removal from the management of her husband's estate if her conduct and management is such as to endanger the estate; where she has obtained Letters of Administration to her husband's estate, she becomes bound to the Court, apart from her position as widow, to account for failure to get in the estate. RAGHAVA CHETTY *v* THOYAMMAL, 9 M. L. T. 296 **670**

——— ——— ——— *Mortgage by widow—Decree on mortgage—Subsequent decree declaring mortgage to be honest transaction and executed for legal necessity—Whether mortgage-decree binding upon reversioner—Appeal—Death of appellant—Substitution of wrong person, whether affects respondent's decree.*

A Hindu widow mortgaged certain property which she inherited from her husband. The mortgagee obtained a decree against her precluding her from redeeming the mortgage. The widow appealed but died during the pendency of the appeal. The present plaintiff and one *J.* applied to be substituted, but the applicatian of the plaintiff was rejected and *J.* was substituted, subsequently the appeal was dismissed. The plaintiff then brought a suit for the recovery of the property, alleging that the mortgage was fraudulent and executed without legal necessity. That suit was dismissed and the mortgage was found to be an honest transaction and executed for legal necessity. After that, the plaintiff brought this suit for redemption:

Held, that the plaintiff was bound by the mortgage-decree obtained by the defendant against the widow, and that his suit must fail:

Held, also, that though *J.* was a wrong person to represent the widow in the unsuccessful appeal, yet the present defendant cannot be deprived of the value of the decree he had obtained. GIRIJA SUNDARI DEBI *v.* KAILASH CHUNDRA BOSE **32**

——— ——— **Widow**—*Payment by wife of husband's debt during his life-time - Voluntary payment—Wife, whether entitled to pay herself by sale of husband's property after his death—Proof that husband or estate liable to pay—Burden of proof.*

The payment by a Hindu wife of her husband's debt during his life-time must be considered, in the absence of evidence to the contrary, as a voluntary payment, and will not support an alienation by the widow after her husband's death of the estate which has descended to her from him.

An obligation lies upon the purchaser to prove that the husband or his estate was bound to pay the money which was paid by his wife. BHAWANI KUNWAR *v.* HIMMAT BAHADUR, 15 C. W. N. 466; 13 C. L. J. 441 ; 9 M. L. T. 465; 8 A. L. J. 474; 13 BOM. L. R. 384; 21 M. L. J. 641; 33 A. 342 **274 P. C.**

——— ——— *Power to make endowment.*

A Hindu widow has no power to make an endowment of her husband's property except for purposes conducing to the spiritual welfare of her husband. SOHAN BIBI *v.* HIRAN BIBI **230**

——— ——— ——— *Property in possession of widow not as heir—Qualified estate—Prescriptive title—Presumption—Practice.*

It cannot be presumed that the possession of a female member of a Hindu family, who is not entitled to take as heir, is the possession of a qualified owner, and the party making such an assertion must prove that she took only the limited estate of a Hindu widow.

Bapanayya v. *Pedichalanaya*, 9 M. L. J. 33, referred to.

Where plaintiff sued to set aside an alienation by a widow, on the ground that he was the reversioner to the estate, and that the widow, having been in possession for 13 years, had acquired title by prescription:

Held, that the question of the widow's acquisition of title by prescription was a question of fact which it was for the plaintiff to prove, and the High Court would not interfere with such a finding in second appeal. KUPPUSAWMY *v.* SRINIVASAIENGAR, 2 M. W. N. 314; 9 M. L. T. 445 **63**

——— ——— ——— *Re-marriage — Guardian—Children by first husband—Removal from guardianship—Hindu Widows' Re-marriage Act (XV of 1856), ss. 2, 3—Discretion of Court—Welfare of minor.*

There is nothing either in the Hindu Law or in the statutory provision on the subject which render it obligatory for a Court to remove a mother from the office of guardian of her infant childern, merely because she has re-married.

Hindu Law—contd.

The fact that, in spite of her re-marriage, she is allowed to continue to act as guardian, plainly indicates that according to other civilised systems of jurisprudence, the appointment is not contrary to dictates of humanity or principles of universal justice.

Although it is discretionary with a Court to remove a Hindu mother from the office of guardian of the children of her first marriage, upon her re-marriage, the exercise of such a discretion must be regulated from the point of view of the welfare of the infant concerned. GANGA PRASAD *v.* RAMASREY SHAHU, 15 C. W. N. 579: 13 C. L. J. 558 **69**

——————**Widow**—*Residence, right of —Maintenance—Nature and extent of right—Possession of house for residence—Alienation, effect of.*

The right of residence of a Hindu widow is a right to a provision for residence and is included in her general right of maintenance. Like the right of maintenance it is an equitable and not a legal right.

Venkatemmal v. *Andyappa Chetti*, 6 M. 130, dissented from.

Ramanadan v. *Rangammal*, 12 M. 260, referred to.

Lakshman v. *Satyabhamabai*, 2 B. 494, relied upon.

A widow's residence does not imply a right of possession of the house or of the part of the house she occupies; for the co-parceners may, from time to time, alter the provision for residence in accordance with any change in the fortunes of the family, and may require her to reside in another house or another part of the same house.

Kakebai v. *Khemchand*, S. D. of the S. S. C. Vol. 2 at p. 106, relied upon.

The right of maintenance (including residence) is an equity binding on the conscience of the co-parceners, but it may be defeated by a *bona fide* alienation, that is, an alienation made for proper purposes as for the discharge of family debts or to satisfy claims enforceable against the whole family. It cannot be defeated by an alienation which is not so justified or which is merely a pretext to shuffle off the obligation of maintenance. In the case of an improper alienation, the right is enforceable against the transferee unless he has taken for value and without notice of the right.

Ramanandan v. *Rangammal*, 12 M. 260; *Ram Kunwar* v. *Ram Dai*, 22 A. 326, followed. THAWAR DAS *v.* VANI, 4 S. L. R. 278 **985**

——————**Will.** *See* WILL.

——————*Bequest to a class some of whom unborn—Bequest not void—Valid as to those born at testator's death—Construction of documents—English rules not applicable.*

Where there is a gift to a class, some of whom are or may be incapacitated from, taking because not born at the date of gift or testator's death, as the case may be, and where there is no other objection to the gift, it should enure for the benefit of those members of the class who are capable of taking.

Ram Lal Sett v. *Kanai Lal Sett*, 12 C. 653, approved.

Leake v. *Robinson*, (1817) 2 Mer. 363; 16 R. R. 168, not followed.

Rules established in English Courts for construing English documents are not as such applicable to transactions between natives of this country. BHAGABATI BARMANYA *v.* KALI CHARAN SINGH, 15 C. W. N. 393; 9 M. L. T. 411; 13 C. L. J. 434; 21 M. L. J. 387; 8 A. L. J. 433; 13 BOM. L. R. 375; 38 C. 468 **641**

Hindu Law—concld.

——————**Will**—*Settlement in favour of mother—Will by mother—Fraudulent transfer—*Benami *transaction.*

In 1896 one *K. L.*, a well-to-do jeweller of Delhi, died leaving a son *K. C.* and a widow *S.* and a daughter, and his ancestral business in a prosperous condition valued at some *lakhs* of rupees.

In 1898 *K. C.* purchased a block of house property in the name of his mother *S.* for Rs. 18,000, and in 1902 he made a similar purchase in her name of other property for Rs. 12,000. Some years after his father's death, *K. C.* entered on a highly speculative form of business and borrowed large sums of money.

In 1902 *K. C.* was in serious straits. Later on, several decrees were passed against him and the house property purchased in 1898 and 1902 was attached. The mother executed a Will in favour of *C.*, wife of *K.C.*, to whom she bequeathed the two properties purchased in 1898 and 1902 and all other property inherited by her husband *K. L.* Objections were preferred by *C.* to the attachments but they were disallowed. She then filed the present suits for, *inter alia*, a declaration of her title to the attached properties and alleged that the purchases were made by *S.* with her own funds. It was pleaded that the purchases were fictitious, that the Will was a forgery and that the properties did not belong to the plaintiff:

Held, that there was nothing unreasonable or suspicious about the 1898 transaction, for *K. C.* was not at that time seriously embarrassed. Though the purchase was not made by *S.* with her own funds yet she was entitled to the property, for the arrangement made by *K. C.* was a perfectly justifiable one and it did not appear that it was made by him to defraud his creditors. But the 1902 purchase must be treated as one in fraud of creditors for *K. C.* was at that time much involved.

Held, further, that the transactions were not *benami*.

Bura Mal v. *Bhagwan Das*, 61 P. R. 1889, referred to.

Held, also, that the genuineness of the Will was established and that it was not invalid as regards the properties in suit; that it was ineffectual in so far as it purported to deal with property other than the properties purchased in the name of the testator *S.* but it was not on that account open to objection as regards the purchased property.

Kanshi Ram v. *Jiwanun*, 121 P. R. 1893; *Isri Dutt Koer* v. *Hansbatti Koerain*, 10 C. 324, (P. C.); 10 I. A. 150; 13 C. L. R. 418, referred to. CHEMBELI *v.* NATIONAL BANK OF INDIA LTD., 62 P. L. R. 1911 **647**

Hindu Widows' Re-marriage Act (XV of 1856), ss. 2, 3 **69**

Hundi drawn in favour of third person in discharge of debt due on a pro-note—Conditional discharge—Receipt for the amount of *hundi*—Endorsement on the pro-note—Presumption of conditional discharge **118**

——————Presentation for acceptance not obligatory—Dishonouring of *hundi* eleven days after presentation—Liability of drawer **133**

——————*Interest—Costs—Finding of fact by a Small Cause Court—Negotiable Instruments Act (XXVI of 1881), s. 80—Provincial Small Cause Courts Act (IX of 1887), s. 25.*

Hundi—concld.

In the absence of any cogent reason, a Court is bound under section 80 of Act XXVI of 1881 to award interest at 6 per cent per annum on a *hundi* from the date of its execution to date of realization.

A judgment of a Small Cause Court disallowing without reasonable grounds costs to a successful party is against law.

If there is no irregularity in the proceedings, a finding of fact by a Small Cause Court, arrived at after considering all the evidence in the case, cannot be interfered with on revision even if the Chief Court is able to arrive at a different conclusion. THAKAR SINGH *v.* ISHAR SINGH, 43 P. W. R. 1911; 113 P. L. R. 1911 **847**

Husband and wife—*Goods supplied to wife not approved of by husband—Liability of husband to pay for goods purchased by wife—Authority of wife, express or implied, to purchase goods—Goods concealed from husband, liability to pay the price of.*

The question in this case was whether a husband was liable for the price of goods purchased by his wife from the plaintiff's firm; it was found that the amount due for the goods exceeded the amount approved of by her husband; that bills for the amount approved by the husband were submitted monthly to him but he was never informed of the goods purchased in excess, nor were bills for such excess purchases submitted to him by the plaintiff's firm:

Held, that although the general principle is that a husband is liable to pay for the price of household goods purchased by the wife, yet it is subject to the condition that the goods so purchased are suitable to this situation in life and position in society and also to the condition that she is either expressly or impliedly authorized by her husband to purchase them.

Where, therefore, it is found that the amount due for goods purchased exceeds the amount approved of by the husband and the fact of purchase is concealed from him and the plaintiff connives at such concealment, he must be taken to have known that he was selling goods in excess of the quantity which the husband had or would have approved and is, therefore, not entitled to a decree against the husband. RAM CHARAN *v.* VAN HALTEREN **9**

——— ——— ——— *—Presumption that husband is the agent of the wife so long as they live together—Presumption rebuttable—Transfer of Property Act (IV of 1882), ss. 54, 100—Unregistered sale of land—Charge.*

When a married couple are living together and the husband acts alone in dealing with the joint property, the presumption is that he is acting as the wife's agent in respect of her interest as well as his own. But the presumption can be rebutted.

Ma Shwe U. v. *Ma Kyu*, 3 L. B. R. 66; *Soobramonian Chetty* v. *Ma Hnin Ye*, P. J. L. B. 568, relied upon.

A sale, which is invalid because of non-compliance with section 54 of the Transfer of Property Act as to registration, does not operate to give the purchaser a charge for the amount of the sale price against the seller's estate.

Section 100 of the Transfer of Property Act was never intended to indemnify people who endeavoured to get conveyances in violation of the express provisions of law.

Pran Nath Sarkar v. *Jadu Nath Saha*, 32 C. 729; 9 C. W. N. 627, relied upon. MA LON MA *v.* MG. SHWE BYU, 4 BUR. L. T. 115 **919**

Hypothecation—*Non-possessory hypothecation of moveables—Mortgage—Pledge—Principles of law governing hypothecation—Rights and remedies of hypothecatee—Foreclosure—Conditional sale—Subsequent transferee—Notice—Registration.*

Neither the Transfer of Property Act nor the Indian Contract Act recognize the non-possessory hypothecation of moveables.

Misri Lal v. *Mozhar Hussain*, 13 C. 262, relied upon.

The rights and remedies of the parties to such a transaction must be regulated by the Courts according to general law of contract, subject to those principles of justice, equity and good conscience, governing Courts in this country under the authority of the highest tribunal.

A non-possessory hypothecation of moveables is a valid contract and should be recognized and enforced by the Courts. The rights of the hypothecatee are entirely regulated by the terms of the contract between the parties. On default in payment of the debt, he can compel delivery of the property or obtain a decree for sale of the property, if so stipulated in the contract. If the property is simply hypothecated without any stipulation as to the manner in which it is to be dealt with, the only remedy open to the creditor is to obtain a money-decree declaring his lien on the property and his right to sell.

As the term is understood in Indian Law, there can be no foreclosure decree, in respect of moveables. A contract for the conditional sale of goods ripens into a sale absolute so soon as the condition is fulfilled.

The rights of a hypothecatee cannot be placed above those of a mortgagee without possession under an unregistered mortgage, nor should they be regarded as inferior. The lien of a hypothecatee cannot be enforced against subsequent transferees without notice of the hypothecation, who have taken in good faith and for value the hypothecated property from a transferor in actual possession thereof.

If a subsequent transferee of moveable property has notice at the time of his transfer, that such property is already hypothecated to a particular person for a lawful debt, he must be held bound by such hypothecation to the same extent as his transferor. The notice must, however, be actual notice.

A transferee is not put upon inquiry of any kind if there are circumstances which do not raise a reasonable presumption that the transferor in possession of the property has no right to make the proposed transfer, or that the property is already subject to some liability.

A prior hypothecation of moveable property without possession is not postponed to a subsequent transfer of such property by the person in possession thereof, if the subsequent transferee has actual notice of such hypothecation at the time of the transfer.

Pema v. *Ganpat Rao*, 2 C. P. L. R. 103; *Bansidhar* v. *Sant Lal*, 10 A. 133, relied upon.

The registration of a transaction whereby moveables are hypothecated without possession, is no notice, constructive or otherwise, of such transaction to a subsequent purchaser from the person in physical possession of the property. NANHUJI *v.* CHIMNA, 7 N. L. R 72 **869**

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Inam –Tirva—*Right to share in produce granted in* inam—*Government receiving money payment— Whether* inamdar *bound by commutation—Agreement to receive revenue at* olunga *rates—Fixity—Reversion to division of produce.*

Where an *inamdar* is entitled, in respect of the *nam*, to receive the *tirva* which the Government would be entitled to receive, it does not necessarily follow that because the Government has for a long term of years commuted its right to a share in the produce for a money payment, the *inamdar* is bound to do the same.

Even where the *inamdar* agrees to the commutation of his share in produce at the *olunga* rate of the village, this rate must not be looked upon as fixed for all time, it is open to the *inamdar* to revert either to division of produce or to commutation at an altered rate SRINIVASAIENGAR *v.* SIVASUBRAMANIAM PILLAI, 21 M. L. J. 125; 9 M. L. T. 501 664

Inherent power of Court—Refund of money wrongly taken by Court 818

Injunction restraining the riparian owner from erecting a dam across the river—Rights of such owners to the flow of water not absolute and exclusive but relative—Injunction allowable only so far as to stop the flow of the stream or cause material injury to the other owners 181

———— Suit against Secretary of State— Notice may be dispensed with 639

———— *Plaintiff claiming possession—Injunction against defendant restraining him from enjoyment of benefits --Injunction lacking precision.*

Pending an action for possession, while the title is disputed and still finally undetermined, the defendant ought not to be restrained from continuing in possession and from the ordinary natural use of the premises and the enjoyment of all benefits which flow from such possession. If, however, the defendant should attempt to commit any act in the nature of waste, the Court will interfere by injunction to restrain him.

An injunction so framed as to leave it open to the defendant to spend such portion of the income as might be needed for the management of the estates ought not to be granted, because it would be vague and indefinite and consequently valueless. KESHO PRASAD SINGH *v.* SRINIVASA PRASAD SINGH, 13 C. L. J. 394 256

Insolvency Act (11 & 12 Vict. C. 21), s. 5—*Meaning of residence.*

A. presented his petition at Rangoon for the benefit of the provisions of the Insolvency Act, describing himself as residing at No. 45 in 38th Street in Rangoon, although six of his twelve creditors were residents of places outside Rangoon and all his debtors were residents of Letpadan or Tharawa. The property in his possession was in Letpadan Township and he admitted that he had been living and carrying on business at Letpadan for the past 15 years and had come to Rangoon to file his schedule:

Insolvency Act—concld.

Held, that the Insolvency Commissioner at Rangoon had no jurisdiction to entertain the petition. *In re Tietkins*, 1 B. L. O. C. 84, *In re Ram Paul Singh*, 8 C. L. R. 14, relied upon.

In re De Monet, 21 C. 634, distinguished.

Where none of the partners carry on business at Rangoon, the petition of a partner asking to be relieved of partnership debts cannot be entertained by the Rangoon Court.

In re Howard Bros., 11 B. L. R. 254, distinguished. SUBRAMONIAM CHETTY *v.* PICHAI ROWTHER, 4 Bur. L. T. 81 786

———— ———— ————s. 47 792

Inspection—Judge not bound to record his view —Better procedure to record facts 914

Insurance. *See* LIFE INSURANCE.

Interest—Conditional decree for possession— Vendor's lien—Interest on purchase-money 662

———— ————Exorbitant interest—Power of Court to reduce—Urgent need of money 984

———— ——High rate—Compound interest—Unconscionable bargain—Undue influence 37

———— ——High rate -- Unconscionable bargain 14

———— ——*Hundi* 847

————--Mortgage—Conditional decree for sale or foreclosure—Interest subsequent to the date fixed —Court rate only allowed 695

—————Mortgagee's right to interest 846

————on pro-note—Pro-note silent about rate 315

————-—Refund of money wrongly taken from Court 818

———— ——*Enhanced rate of interest to be paid from the date of execution of bond under certain circumstances —Penalty—Penal enhanced rate not to be disallowed entirely—Reasonable compensation to be allowed— Contract Act (IX of 1872), s. 74*

A mortgage-deed provided that interest was to be paid at the rate of 11 annas per cent. per month, but if the interest for any year were not paid the interest on the entire amount due should be paid at the rate of 13 annas 4 pies per cent. per mensem instead of 11 annas from the date of the execution of the mortgage-deed:

Held, that the agreement to pay enhanced rate of interest was penal, but that the enhanced interest would not to be disallowed altogether,—a reasonable portion of it might be allowed by way of compensation

Sunder Koer v *Rai Sham Kishen*, 34 C 150; 4 A L. J. 109, 11 C. W. N. 249; 5 C. L. J. 106; 17 M. L. J. 43; 9 Bom. L. R. 304; 2 M. L. T. 75, referred to. KHUNNI LAL *v* KALIMUDDIN 572

Interpretation of Statutes—Grammatical construction—Manifest contradiction of purpose 787

———— ———— ————Punctuation, inference from 487

———— ———— —— Words judicially construed 491

Issues, *framing of, practice of.*

Issues should be confined to questions of law arising on the pleadings and to such questions of fact as it would be necessary for the Judge to frame for decision by Jury in a Jury-trial at *Nis Pirus* in England.

The practice of raising a number of issues which do not state the main questions in the suit but only various subsidiary matters of fact upon which do not agree the parties condemned. WEST END WATCH Co., *v.* BERNA WATCH Co., 13 BOM. L. R. 212 805

Jote, meaning of 451

Joinder *of causes of action and parties—Suit for possession as heir—Impleading of different alienees in one suit—Trial of separate issues—Interlocutory judgments—Practice—Amendment of plaint.*

In a suit for possession by inheritance, the plaintiff can in one suit attack several alienations made at different times in respect of various portions of property by a deceased owner in favour of different persons. There is no misjoinder of parties or causes of action by including all the alienees in one suit.

Musammat Gopal Devi v. *Jai Narain*, 1 P. R. 1905; 83 P. L. R. 1905; *Umabai* v. *Vithal Vasudev*, 33 B. 293; 11 Bom. L. R. 34; 5 M. L. T. 230; 1 Ind. Cas. 120; *Ballabh Rai* v. *Gopal Lal Singh*, 6 Ind. Cas. 577; *Fazal Hussein* v. *Amir Haidar*, 9 Ind. Cas 588, followed.

Where several alienees have been impleaded as defendants, the difficulties arising from variety of defences can be cured by successive trial of the issues separately affecting different defendants. Interlocutory judgments may, if the plaintiff succeeds, be given against different defendants as their cases are disposed of, final judgment for the possession of the whole property being reserved till the conclusion of the trial of the whole case. The plaintiff should not be compelled to bring a separate suit against each defendant.

Umabai v. *Vithal Vasudev*, 33 B. 293; 11 Bom. L. R. 34; 5 M. L. T. 230; 1 Ind. Cas. 120, followed.

Musammat Gopal Devi v. *Jai Narain*, 1 P. R 1905; 83 P. L. R. 1905, not approved. TUFAIL MAHOMED *v.* HIRA SINGH, 167 P. L. R. 1911; 120 P. W. R. 1911 48

Joint creditors—*Payment to one of joint creditors—Whether operates as a discharge of the debt—Payment to one in fraud of the rest—Whether valid discharge—Hindu Law—Joint family—Debt due to the family—Suit by Manager for its enforcement—Right to sue—Omission to implead the other coparceners—Maintainability of the suit.*

Assuming that payment to one of several joint creditors operates in law as a payment to all, the rule will not apply where the payment is made fraudulently to one of the creditors and not for the benefit of all.

Baikuntanath Chakrabati v. *Hara Lal Pal Chowdhry*, 13 C. L. J. 234; 9 Ind. Cas. 116; *Veerasawmy Naicker* v. *Ibrahamsa Rowther*, 19 M. L. J. 221; 5 M. L. T. 209; 1 Ind. Cas. 200; *Piercy* v. *Fynny*, L. R. 12 Eq. 69; 40 L. J. Ch. 404; 19 W. R. 710, referred to.

Quære:—Whether payment to one of several joint creditors is a valid payment to all?

Barbar Maran v. *Rammanne Gounden*, 20 M. 461, doubted.

Veerasawmi Naicker v. *Ibrahamsa Rowther*, 19 M. L. J. 221; 5 M. L. T. 209; 1 Ind. Cas. 200; *Ramasawmi* v. *Muniandi*, 20 M. L. J. 709; 7 M. L. T. 253; 1 M. W. N. 550; 5 Ind. Cas. 843; *Ramasawmy Chetti* v. *Manikka Mudeley*, 9 M. L. J. 155; *Hussainara Begam* v. *Rahmunnissa Begam*, 13 C. L. J. 3; 8 Ind. Cas. 837 and *Adaikalam Chetty* v. *Marimuthu*, 22 M. 326; referred to.

Joint creditors—concld.

Where a debt is due and owing to a joint Hindu family, the Manager of the family can sue for its enforcement without joining the other members as parties.

Keshen Pershad v. *Har Narain Singh*, 15 C. W. N. 321; 21 M. L. J. 378; 8 A. L. J. 256; 9 M. L. T. 343; 13 C. L. J. 345; 9 Ind. Cas. 739, followed.

Authorities on the subjects reviewed and discussed. SHEIKH IBRAHIM *v.* RAMA AIYAR, 21 M. L. J. 508; 2 M. W. N. 442 874

Joint decree—*Joint appeal—One of the appellants dying during pendency of appeal—Representative of deceased not brought on record—Abatement—Civil Procedure Code (Act XIV of 1882), s. 544.*

Where several defendants jointly appeal against a joint decree, to which section 544 of the Code of Civil Procedure, 1882, applies, the death of one of such appellants, if no legal representative of the deceased appellant is brought on the record within limitation, can only have the effect of causing the appeal to abate so far as the deceased appellant is concerned. It cannot have the effect of causing the appeal as a whole to abate.

Ram Sewak v. *Lambar Pande*, 25 A. 27, followed.

Kamla Pat v. *Baldeo*, 22 A. 222, disapproved and overruled. RAM LAL *v.* DEBI SINGH 27

——— *Joint property of judgment-debtors sold in execution—One of the judgment-debtors depositing money to set aside sale—Civil Procedure Code (Act XIV of 1882), s. 310A—Sale set aside—Suit for contribution—Contract Act (IX of 1872), s. 69—Reimbursement—To what extent—Whether contribution can lie in respect of 5 per cent. deposit and costs in making application under section 310A.*

One *M.* had a decree against *D.* and *P.* In execution of that decree certain property of the judgment-debtors was attached and sold. After the sale, *D.* made an application under section 310A of the Code of Civil Procedure, 1882, to have the sale set aside and deposited the requisite amount of money under that section. The sale was set aside, whereupon *D.* instituted the suit for contribution against *P.* He included in his claim not only the amount of the decree but also 5 per cent. deposit made under section 310A and also the costs of the application under that section:

Held, that the deposit made by *D.* in this case was not voluntary or gratuitous, that he was, therefore, entitled to be re-imbursed under section 69 of the Contract Act for the payment which he made for *P.*, but that he was not entitled to claim any portion of the 5 per cent. deposit which he was required to make under section 310A, inasmuch as that deposit was amade for his own benefit only. There was no obligtion on the defendants to pay that amount as they did not want to have the sale of their property set aside. For the same reason, the plaintiff was not entitled to a share of the costs of the application under section 310A.

Yagambal Boyee Ammanee Ammal v. *Nania Pillai Markayar*, 33 M. 15; 3 Ind. Cas. 110; 6 M. L. T. 162; 19 M. L. J. 489, not followed.

Joint decree—concld.

Fatima Khatun Chowdhrain v. *Mahommed Jan Chowdhry*, 12 M. I. A. 65 ; 1 B. L. R. (P. C.) 21 ; 10 W. R. (P.C.) 29, *Dulichand* v. *Ramkishen Singh*, 7 C. 648; *Ram Tuhul Singh* v. *Biseswar Lal Sahoo*, 2 I. A. 131; 33 W. R. 305; 15 B. L. R. 208, *Suchand Ghosal* v. *Balram Mardana*, 38 C.1; 14 C. W. N. 945; 12 C. L. J. 596; 6 Ind. Cas. 810, referred to. DORI LAL *v.* PATTI RAM, 8 A. L. J. 622 **458**

Joint trial of Jury and non-jury cases—Assessors selected for the non-jury cases from out of the Jury—Illegality **281**

Judicial proceeding. *See* CRIMINAL PROCEDURE CODE, s. 476.

Judgment *based on materials not evidence—Personal knowledge of Judge—Validity of judgment.*

A judgment based on materials which are not evidence and which have been improperly admitted, or on the personal knowledge of the Judge, is wrong in law and invalid.

Vallabha v. *Madusudanam*, 12 M. 495, referred to. DURGA PROSAD SINGH *v.* RAM DOYA, 38 C. 152 **955**

Jungle Lands—*Title—Possession.*

In the case of *jungle* lands, possession *prima facie* is with the person whose title is established. PRIYA NATH *v* MAHENDRA KUMAR **376**

Jurisdiction. *See* SMALL CAUSE COURT; SMALL CAUSE SUIT.

——— ———Investment of compensation-money—Allowance of portion of money for repairs absolutely necessary—Ordinary repairs—Land Acquisition Judge—Jurisdiction to entertain application—Separate suit not necessary **491**

——— ——— ———Kidnapping committed in British territory and offence of shoe-beating committed in Nepal territory—Certificate granted by Political Officer in Nepal only in respect of kidnapping—Magistrate convicts the accused under s. 355, Penal Code, only **959**

——— ——— ———Person living outside but carrying on business within jurisdiction of High Court **895**

——— ——— ———Suit for dissolution of marriage—Parties residing within jurisdiction but separately—"Reside or last resided together" **487**

——— ——— — Suit for redemption and for surplus profits—Account—Suit filed in Munsif's Court—Amount decreed after taking account for a sum exceeding Rs. 1,000 **402**

——— ——— ———Suit instituted in Court of Judicial Commissioner—Defendant agriculturist and residing within the jurisdiction of another Court—Objection raised late—Return of plaint **980**

——— ——— ———Valuation of suit—Suit for declaration that adoption is invalid **816**

——— ——— *Civil Court's power to grant a mortgage decree in respect of land over which no person has a right created by Government grant or a landholder's right—Lower Burma Land and Revenue Act (II of 1876), ss. 55 (b) and 56.*

A suit by a mortgagee for a decree for the sale of land, over which no right has been created by a Government grant or a landholder's certificate, is barred by section 56 of the Lower Burma Land and Revenue Act read with section 55, proviso (*b*).

Jurisdiction—contd.

If a mortgagee of land, held under section 19 of the Land and Revenue Act and Chapter IX of the Revenue Rules, wishes to enforce his mortgage, his remedy is to apply to the Revenue Authorities. All that the Civil Court can give is a money decree. ARUNACHALLAM CHETTY *v* VEERAPPA CHETTY, 4 BUR. L. T. 117 **864**

——— ——— *Consent of parties cannot confer.*

Consent of parties cannot change the statutory value of a suit, and thus determine the jurisdiction of a Court. PHEROZSHAW *v.* WAGHJI KUVERJI, 3 BOM. L. R. 158 **746**

——— ——— *Crime committed on High Seas—Territorial waters—Jurisdiction within one marine league of the coasts—Penal Code (Act XLV of 1860), ss. 2 to 4—Limitation on the power of the Indian Legislature—Criminal Procedure Code (Act V of 1898), s. 188—Meaning of the word 'Territory' in the first proviso to section—Whether Indian or English law applicable for the trial and punishment of such offences.*

Where a person commits the offence of murder on a British ship anchored opposite the mouth of the Ye river, in the Ahmerst District, and is convicted and sentenced to death by the Sessions Court of the Tenasserim Division:

Held, that the Tenasserim Sessions Judge has jurisdiction over the case, such jurisdiction having been conferred upon him by the Admiralty Offences Act, 1849, section 1, the Admiralty Jurisdiction Act, 1860, section 1, and section 686 of the Merchant Shipping Act, 1894.

A Court of Criminal Justice in British India dealing with a Native Indian subject of His Majesty for an offence alleged to have been committed by him on the high seas is bound to apply the provisions of the Indian Penal Code to the act or acts alleged against him.

The word 'territory' used in the first proviso to section 188, Criminal Procedure Code, refers only to territories of any Native Prince or Chief in India, and it cannot include the high seas since they are not part of the territories of any State. PO THAUNG *v.* EMPEROR; 5 L. B. R 221 ; 4 BUR. L. T. 58 **705**

——— ——— ——— *Private International law*—Kuri *chit conducted in British India—Foreigner a chit holder—Pledge of receipt in foregin territory—Sale of pledged interest by foregin Court—Valid.*

A debt contracted and payable in British India was pledged in Travancore with its receipt. A decree for sale was obtained on the pledge and the debt was sold by auction by the Travancore Court in pursuance of the decree:

Held, that the sale was valid. D' CONTHA *v.* ASSAN KUNHU, 2 M. W. N. 249 **665**

——— ——— **of Civil Court**—Occupancy-holding—Mortgage—Fraudulent relinquishment while question of mortgage *sub judice*—Void—Suit for declaration in Civil Court maintainable **573**

——— ——— ——— ———Power to interfere with Collector's orders, apportioning embankment charges **192**

——— ——— Suspension of *archaka* by trustee—Right to suspend pending allegation of misconduct—Suspension without notice, whether valid **548**

Jurisdiction—concld.

——————— of Civil or Revenue Court—*Partition suit regarding land—Question of title involved—Proper procedure—Punjab Land Revenue Act (XVII of 1887), Chap. IX, ss. 117, 158 (xvii).*

A suit for the partition of land is cognizable only by a Revenue Court, notwithstanding that, upon the defendant's plea, a question of title arises. In so far as the claim for partition is concerned, the jurisdiction of a Civil Court is clearly excluded by law.

A suit for partition must in the first instance be instituted in the Revenue Court and if that Court in taking the pleas of the defendant, finds a question of title involved in the case, it may refer a party to the Civil Court for a decision on the question of title or it may resolve itself into a Civil Court and hear and decide that question. The function of a Civil Court in partition cases is simply to decide the question of title, pure and simple. AUTAR SINGH *v.* SURAIN **902**

——————— of Court to interfere with election as *Mahant* **824**

Jury—Duty of juries—Soundness and honesty of decision—How far they should expect truth from witnesses **929**

Karachi Port Trust Act (VI of 1886), s. 87—*Bombay General Clauses Act (I of 1904)—'Person', meaning of—Limitation—Suit against—Port Trust for compensation—Conveyance from Wharf to Import-Yard—Liability of Board—"Carrier", meaning of—Limitation Act (XV of 1877), Sch. II, Art. 30.*

The word "person" in section 87 of the Karachi Port Trust Act includes the Board as well as any officer or servant of the Board, and any person acting under the orders of the Board.

Consequently, a suit brought against the Port Trust for anything done or purporting to have been done in pursuance of the Act must be brought within six months from the accrual of the cause of action.

A carrier is one who is employed to carry goods for others for reward. It is essential that the conveyance of goods should be for hire or reward, otherwise the person carrying is not technically a carrier.

Where, for the convenience of storage till delivery to consignee, the Board of the Port Trust remove goods from the Wharf to their Import-Yard and no fee is chargeable for such removal, such removal and storage is merely part of the act of landing and delivery just as the removal from one part of the Wharf to another would be.

The Board is not, therefore, acting as a carrier when taking goods to the Import-Yard for delivery to the consignee and Article 30 of the Limitation Act does not apply to a suit for compensation for damage done to the goods. PRAG NARAIN *v.* KARACHI PORT TRUST, 4 S. L. R. 233 **992**

Kidnapping. *See* PENAL CODE, s. 363.

Laches—*Suit filed with great delay—Custom—Hindu Law — Succession — Daughter—Self-acquired property.*

A suit by the daughter of a deceased proprietor based on right of succession for possession of immoveable property which the defendants, collaterals of the deceased, have held for 11⅓ years, cannot be defeated merely on the ground of great delay in bringing it.

Laches—concld.

Collaterals are not entitled, under the Hindu Law or custom, to succeed to self-acquired property in the presence of a daughter. BUA DITTI *v.* WARIAM SINGH, 64 P. L. R. 1911 **819**

Land, definition of **473**

Land Acquisition Act (I of 1894)—*Compensation amount deposited in Court—Taken out by claimant—Reduction of amount in appeal—Refund of the excess amount—Interest—Inherent power of Court.*

Where a party has wrongly taken from the Court moneys deposited in Court by his opponent, that Court has inherent power to enforce a refund of the amount with interest.

Mookoond Lal Pal v. *Mahomed Sami Meah*, 14 C. 484 at p. 486 and *Govind Vamin* v. *Sakharam Ramchandra*, 3 B. 42 at p. 43, referred to. COLLECTOR OF AHMEDABAD *v.* LAVJI MULJI, 13 BOM. L. R. 259; 35 B. 255 **818**

——————— s. 32—Debuttar *property acquisition of—Investment of compensation-money—Allowance of portion of money for repairs absolutely necessary—Ordinary repairs—Land Acquisition Judge—Jurisdiction to entertain application—Separate suit not necessary—Statutes, interpretation of—Words judicially construed.*

When *debuttar* land has been acquired, the provisions of section 32 of the Land Acquisition Act for investment of the compensation-money may be brought into operation

The terms of clause (*i*) of the section are comprehensive enough to justify the application of a portion of the compensation-money to effect repairs absolutely essential for the preservation of the remainder of the property.

Ordinary repairs are not payable out of capital moneys, they must be borne out of income; but the Court may authorize an expenditure in the nature of repairs for the preservation of the trust estate in cases amounting to salvage. And where there is a right of entry or a statutory power of sale, if repairs are not done, the compensation-money desposited in Court may, with its sanction, be applied for the purpose of repairs.

The Land Acquisition Judge has jurisdiction to deal with an application by a *shebait* for a grant of money for repairs. The *shebait* should not bring a suit in the Civil Court for the purpose.

Procedure to be followed by the Judge in the matter suggested.

When words in a statute have been judicially construed to have a certain meaning, and have been adopted by the Legislature in a subsequent statute *in pari materia*, they must be construed according to the sense in which they have been previously used, although that sense may vary from the strict literal meaning of them. KAMINI DEBI *v.* PROMOTHO NATH MOOKERJEE, 13 C. L. J. 597 **491**

Landlord and Tenant—Agreement embodied in decree of Court—Relief against forfeiture granted in execution proceedings **746**

——————— Decree for rent, effect of **363**

——————— Fixation of rent of ordinary tenants-at-will—Fair occupation-rent where no rent previously paid—Compensation for use and occupation **2**

Landlord and Tenant—contd.

———— ———— ———— Lease—Term exceeding one year—Evidence—Not admissible without registration—Whether admissible to prove present demise—Relation of landlord and tenant **892**

———— ———— ———— Suit for rent—Plea of improper *patta*—Question of title—Trial of suits and trial of issues—Explicit findings on issues necessary to operate as *res judicata* **75**

———— ———— ———— Tenant losing Government water **676**

———— ———— ———— *Agreement by tenant not to take compensation for improvements made without consent of the* zemindar—*Illegality—Agra Tenancy Act (II of* 1901*), ss.* 40, 90—*Agreement to pay enhanced rate—Distinct promises for the same consideration—One of them illegal, effect of—Cess—Essentials to be proved.*

An agreement between a tenant and a landlord thereby the former undertook not to make any improvements without the consent of the *zemindar*, and provided that if he did make any improvement, he would not be entitled to any compensation at the time of ejectment, is illegal and unenforceable at law.

An agreement by a tenant to pay an enhanced rate of rent is not illegal unless there has been a legal enhancement within 10 years of the agreement.

If several distinct promises are made for one and the same consideration and if one or more of them be such as the law will not enforce, this will not of itself prevent the rest from being enforced.

In order to show that a condition in an agreement as to a certain payment is of the nature of a cess which should not be recognized, it must not only be shown that the condition referred to relates to the payment which comes within the definition of a cess but it should also be shown that the payment of this nature has not been recognized by the Settlement Officer. BHOLA *v.* MOHAMMAD RAHMAN KHAN **465**

———— ———— ———— *Amount payable out of rent to third person by tenant under assignment—Nature of amount—Whether rent or not*—Res judicata—*Issue on disputed point in rent suit—Purchase of share in permanent transfrable tenure—Declaration of right of purchaser by setting aside sale in execution of decree to which he was no party.*

A suit by a landlord against a tenant for a certain sum of money payable by him out of the rent to a third person under assignment, is one for rent and not for damages.

When an issue has been raised on a disputed point in a suit for rent, and has been heard and finally decided, the decision operates as *res judicata* in a subsequent suit.

Ekabbar Sheikh v. *Hara Bewah*, 8 Ind. Cas. 660; 13 C. L. J. 1; 15 C. W. N. 335; and *Hara Chandra Bairagi* v. *Bipin Behary Das*, 6 Ind. Cas. 860; 13 C. L. J. 38; referred to.

A person who has purchased a share in a permanent transferable tenure is entitled to a declaration of his right to that share and for possession of the same after setting aside a sale held in execution of a decree to which he was not made a party.

Mohesh Chunder Ghose v. *Saroda Prasad Singh*, 21 C. 433, referred to. KALI KUMAR *v.* BIDHU BHUSHAN **382**

Landlord and Tenant—contd.

———— ———— ———— *Decree for rent—Sale of tenure—Suit for rent for intermediate period—Personal liability of tenant—Estate in the hands of executor—Executor's personal liability—Personal liability of beneficiaries.*

A rent-decree was obtained for the period ending with *Magh* 1310. In execution the tenure was sold and the sale confirmed in *Baisak* 1312. The landlord now sues to recover the rent which accrued due between *Falgoon* 1310 and before the confirmation of the sale in *Baisak* 1312. The tenure was during the period vested in certain executors:

Held, that as the property has been sold, the landlord can obtain only a personal decree against the tenants, and as the property was vested in the executors, they are personally liable and not the beneficiaries who would ultimately be entitled to the property if anything remained to be distributed. BIJOY CHAND *v.* PARBATI CHARAN **560**

———— ———— ———— *Distraint—Evidence—Tenancy in one year—No proof of tenancy in another year*—Res judicata.

Before a landlord can be held entitled to distrain he must show that the relation of landlord and tenant existed between him and the opposite party during the years in respect of the rent of which the distraint was made.

The fact that a person was a tenant in one year would not, as a matter of course, show that he was also tenant in another year. TOTA RAM *v.* MAN SINGH **329**

———— ———— ———— *Encroachment by tenant on landlord's lands not included in the lease—Prescription—Landlord's knowledge of encroachment, whether necessary.*

The true presumption as to encroachments made by a tenant, during his tenancy, upon the adjoining lands of his landlord is that the lands so encroached upon are added to the tenure and form part thereof for the benefit of the tenant so long as the original holding continues and afterwards for the benefit of his landlord, unless it clearly appears by some act done at the time that the tenant made the encroachment for his own benefit.

In such a case the tenant-trespasser is not bound to prove that his trespass was known to the landlord.

Gooroodas Roy v. *Issar Chunder Bose*, 22 W. R. 246 *Ishan Chandra Mitter* v. *Raja Ramaranjan Chakarbutty*, 2 C. L. J. 125 and *Moidin Saiba* v. *Nagappa*, 7 B. 96, approved.

Mali Ahmad Chowdry v. *Tota Meah Chowdhry*, 31 C. 397, explained.

Krishna Govind Jamadar v. *Banka Behari Shah*, 13 C. W. N. 698; 4 Ind. Cas. 526; *Prohlad Teor* v. *Kedar Nath Bose*, 25 C. 702, distinguished. MUTHURAKU THEVAN *v.* ROBERT GORDON ORR, 21 M. L. J. 615; 10 M. L. T. 12 **575**

———— ———— ———— *Lease—Ambiguous clause—Status of tenant, determination of—Surrounding circumstances—Conduct of parties—Origin of tenancy.*

In determining the status of a tenant, the Court should not confine its attention solely to an ambiguous clause of the lease, but should also have recourse to evidence of the surrounding circum-

Landlord and Tenant—contd.

stances and the subsequent conduct of the parties in regard to the subject-matter of the lease, and should consider the origin of the tenancy.

Mohesh Jha v. *Manbharan Mia*, 5 C. L. J. 522, relied upon. MIDNAPORE ZEMINDARY CO., LD. *v.* BAMAPADA ROY, 13 C. L. J. 485 **430**

———— ———— ————*Mortgage-decree by landlord —Purchase by third party in execution—Rent-decree by landlord—Purchase by landlord in execution of rent-decree—Priority of title—Estoppel—Bengal Tenancy Act (VIII of 1885), Sch. III, art. 3—Limitation —Possession of landlord after purchase in execution of rent decree—Period of limitation for suit by tenant for recovery of possession.*

P. as *shebait* sued *A.* a tenant on a mortgage. On the day this suit was instituted, all the *shebaits*, including *P.*, sued *A.* for rent. *P.* obtained a decree on his mortgage, advertised it for sale and the plaintiff purchased the holding at the auction. Subsequently execution was taken out of the rent-decree and the *shebait* landlords themselves purchased the holding. The plaintiff sued the landlords for possession. The son of *P.* defended the suit:

Held, that ordinarily the purchase at the rent-decree sale would be entitled to preference over the mortgage-decree sale; but as *P.* advertised the holding for sale in execution of his own mortgage-decree when he knew all the time that the interest passing at the sale was valueless, as it could be put an end to by the sale in execution of the rent-decree, the plaintiff should be given priority, and the son of *P.* should be held estopped by the conduct of his father from claiming that his purchase should prevail.

When the whole body of landlords obtain a proper rent-decree and purchase the holding in execution and dispossess the tenant, the special law of limitation contained in Article 3 of Schedule III of the Bengal Tenancy Act applies. SATIS CHANDRA GHOSE *v.* PUTU MALLIK **54**

———— ———— ————*Non-transferable occupancy-holding—Mortgage of holding—Subsequent sale of holding in execution of rent-decree obtained by co-sharer landlord—Subsequent private sale—Title—Right of auction-purchaser to dispute transferability of holding.*

A non-transferable occupancy-holding was mortgaged to plaintiff. Defendant No. 1, a co-sharer landlord, subsequently purchased, in execution of a money-decree for rent, the interest of some only of the tenants. After that the tenants sold the holding to the plaintiff, the mortgagee. The plaintiff sued to recover possession:

Held, that the defendant No. 1 purchased only the right, title, and interest of the judgment-debtors whose representative he was, and that he could not raise the question of the transferability of the holding which could not have been raised by the tenants. KAILASH CHANDRA *v.* AKHOY NARAIN SOW **530**

———— ———— ————*Non-transferable occupancy-holding—Sale in execution—Decree for share of rent by co-sharer landlord—Sale, whether irregular or null—Legality of transaction—Law as understood when transaction took place.*

A non-transferable occupancy-holding cannot be sold at the instance of a landlord who has obtained a decree for rent for his share only.

Landlord and Tenant—contd.

Bhiram Ali Sheikh Sikdar v. *Gopi Kanth Shaha*, 24 C. 355; 1 C. W. N. 396 and *Sadagar Sircar* v. *Krishna Chandra Nath*, 26 C. 937; 3 C. W. N. 742, referred to.

But if a sale in execution of a decree by one of several joint landlords for his share of the rent, takes place in fact, it is not necessarily a nullity but is merely irregular and till the sale has been successfully impeached by appropriate proceedings in execution, it must be treated as a valid sale and cannot be set aside by a separate suit.

Durga Charan Mandal v. *Kali Prosama Sarkar*, 26 C. 727; 3 C. W. N. 586; *Sheikh Murullah* v. *Sheikh Burullah*, 9 C. W. N. 972 and *Ashutosh Sikdar* v. *Behari Lal Kirtania*, 35 C. 61; 11 C. W. N. 1011; 6 C. L. J. 320, referred to. KHODA BAKHSH *v.* SADER PRAMANIK **417**

———— ———— ————Pattahs—*Stipulation for increased rent for cultivation of dry lands with wet crops by means of Government water, whether enforceable—Madras Rent Recovery Act (Mad. VIII of 1865), s. 11.*

A stipulation in a *muchilika* executed by a tenant to his landlord for payment of a special rent for cultivating dry lands with wet crops by means of a channel constructed and maintained by Government, is not supported by any consideration and is unenforceable.

There is no obligation on the part of the tenant in such a case to pay higher rent as the improvement was not made by the landlord, nor was he required to make any additional payment to Government. The landlord cannot, therefore, apply to the Collector, under section 11 of the Madras Rent Recovery Act, to enhance the rent payable by his tenant.

Suppu Pillay v. *Nagaya*, 31 M. 19; 3 M. L. T. 103; 17 M. L. J. 511 and S. A. Nos. 1121 to 1125 of 1908, distinguished.

The proviso to section 11 of the Madras Rent Recovery Act precludes a landlord from enhancing rent except under the conditions laid down by that section.

Vencatagiri Rajah v. *Pichana*, 9 M. 27; *Fischer* v. *Kamakshi Pillai*, 21 M. 137; *Gopalsawmi Chettier* v. *Fischer*, 28 M. 328; 15 M. L. J. 14; *Armugam Chetty* v. *Raja Jagaveera Rama Vencateswara Ettappa*, 28 M. 444; 15 M. L. J. 292; *Suppa Pillai* v. *Nagayasawmi Thambichi Naicker*, 31 M. 19; 3 M. L. T. 103; 17 M. L. J. 511 and *Paramasawmi* v. *Pusala Thevan*, 20 M. L. J. 142; 5 Ind. Cas. 911, referred to.

Assuming that a landlord is entitled to claim *varam* under the sharing system in the absence of the said stipulation in the *muchilika*, if any rent under the sharing system was higher than the money rent paid by tenant under the terms of the *muchilika*, that would be an enhancement of rent under section 11 of the Rent Recovery Act.

A stipulation in a *pattah* that the tenant should relinquish the right of cultivation, if he cultivated dry lands with wet crops without the landlord's permission, is penal and cannot be enforced.

Appa Rau v. *Ratnam*, 13 M. 253, followed. MALIKARJUNA PRASADA *v.* VEMULAPALLI SUBBAYA, 2 M. W. N. 315; 9 M. L. T. 443 **68**

Landlord and Tenant—contd.

——— ——— ——— ——— *Plot in* abadi—*Right of an agriculturist tenant to build upon—Agra Tenancy Act (II of* 1901*), s.* 4 (12)—*Improvement.*

An agriculturist tenant has no right to build a shed upon a plot of land in the *abadi* without the permission of the *zemindar* although he has been throwing rubbish over it for a long time.

A structure built on a plot of land within the *abadi* is not an improvement within the definition of the word in section 4 (12) of the Tenancy Act. JAGAN NATH *v.* GURDYAL SINGH **284**

——— ——— ——— ——— *Right of suit—Plaintiffs co-sharers—Arrangement to collect rent separately—Subsequent joint suit for rent, whether maintainable.*

Plaintiffs, co-sharer landlords, who by an arrangement with the tenants used to collect their shares of the rent separately and had in previous years brought separate suits, are competent to sue jointly for the total amount of demands due to them although they may relate to different periods.

Pramada Nath Roy v. *Ramani Kanta Roy*, 35 C. 331: 12 C. W N. 249; 10 Bom. L. R. 66; 7 C. L. J. 139; 3 M. L. T. 151; 18 M. L. J. 43, referred to. BHOLANATH *v.* BELCHAMBERS **891**

——— ——— ——— ——— *Suit by landlord against tenant for certain sum payable by him out of rent to third person by assignment—Whether such suit is for rent or damages—Alternative right.*

The aggregate rent for a lease was fixed at Rs. 970, out of which the tenant undertook to pay to the superior landlord of his lessor Rs. 470, and the remainder Rs. 500 direct to the lessor. The tenant undertook to obtain receipts for the sum of Rs. 470 and make them over to his lessor and then to get receipts from the latter:

Held, that the whole of the sum, Rs. 970, represented the rent payable for the tenancy.

When a tenant fails to pay the sum which he undertook to pay to the landlord of the lessor, if upon the terms of the contract such sum may be rightly treated as rent, it is open to the lessor either to recover it as rent or to institute a suit for damages for breach of contract. If the lessor choose to treat it as rent, he has to commence his action within the period of limitation prescribed by the Bengal Tenancy Act, and the decree which he obtains may be enforced against the tenure with the results mentioned in the Act. If, on the other hand, he brings a suit for damages for breach of covenant in the contract of tenancy, though he obtains a longer period of time for purposes of limitation, the decree which he secures is a personal decree in execution of which the right, title, and interest merely of the judgment-debtor in the property can be sold.

The mere fact that the lessor adopted one of the courses in a previous litigation does not debar him from following a different and alternative course in a subsequent litigation. BANKU BEHARI SIKDAR *v.* GOPAL CHANDRA NEOGY **406**

——— ——— ——— ——— *Surrender—Holding under mortgage—Landlord's right to redeem.*

The defendant No. 2 was a tenant with a right of occupancy-holding land under the plaintiffs. He mortgaged his holding to defendant No. 1 with possession and afterwards surrendered it in favour of the plaintiffs who sued to redeem the mortgage and recover possession:

Landlord and Tenant—contd.

Held, that surrender in law was a matter of contract between the landlord and the tenant, that there was nothing in the law to prevent a landlord from accepting the surrender of a holding under mortgage, and that he was quite within his rights in bringing the present suit. ISSUR BEHARA *v.* KASHI NATH **307**

——— ——— ——— ——— *Tenant's goods attached in execution of a creditor's decree and locked up in the house occupied by him—A second creditor putting forward a prior claim and obtaining sale-proceeds of the attached goods—What person liable to pay rent for the period during which goods remained stored in the house.*

In execution of a decree against a person, who was occupying a house as a tenant, his property was attached and locked up in the house by the *Nazir* of the executing Court. A creditor, other than the decree-holder, put forward a preferential claim to the attached property on the basis of a mortgage of the property and obtained all the money realized by auction of the attached property. The landlord sued the tenant and the decree-holder for rent for the period during which the property remained locked up in the house:

Held, (1) that as the house remained under lock and the tenant could not enter it, he was not liable for the rent;

(2) that also the decree-holder, in execution of whose decree the property was attached and locked up in the house, was not liable for the rent;

(3) that granting that the *Nazir*, when he attaches property, does so as the decree-holder's agent, still when a creditor with a prior claim steps in and ousts the attaching creditor, he must be regarded as taking over the liabilities, including rent due for the storing of the property from time of attachment to sale. MRS. GROSE JONES *v.* MR. A. CUMPER **285**

——— ——— ——— ——— *Tenants represented by one in landlord's books—Whether one represents tenancy—Question of fact.*

The decision in *Ashok* v *Karim*, 9 C. W. N. 843, does not lay down any rule of universal application that one person cannot represent a tenancy in the books of the landlord on behalf of himself and his fellow tenants The contrary view has been maintained in a long series of decisions.

Rupram Namasudra v. *Iswar Namasudra*, 6 C. W. N. 302 and *Afraz Mollah* v. *Kulsumannessa*, 10 C. W. N. 176, referred to.

The question whether one of several heirs of the original tenant represents the tenancy on behalf of all the persons interested, is essentially a question of fact. GAGAN SHEIK *v.* ABAJAN KHATUN, 14 C. L. J. 180 **116**

——— ——— ——— *Tenant, right of, to build on his* 'sahan'—*Estoppel against the landlord if building not objected to in time—Minority of landlord at the time of building, effect of*—Wajib-ul-arz, *interpretation of*—"Chaupal", *meaning of.*

The appellants, as *zemindars* of a village, brought a suit calling upon the respondent, a tenant in the village, to remove a *chabutra* and a *chaupal* erected by him on land which was entered in the *khasra* as the "*sahan*" of his house. The Court of first instance decreed the claim but the lower Appellate Court dismissed it on the ground that the appellants were not entitled under the terms of the *Wajib-ul-arz* to

have the erections removed, and that they were estopped from making the present claim as they were aware that the defendant was building on the land and took no steps to prevent him from going on with the buildings:

Held, that the appellants were not estopped from making the present claim because when erections were made one of the major plaintiffs was in jail and the other major plaintiff was absent from the village and the rest of the plaintiffs were at that time and were still minors.

Held, further, that inasmuch as the *Wajib-ul-arz* provided that the tenant was not to build a '*makan*' on the *zemindar's* land without his premission, the defendant was not competent to build the *chaupal*, which being a covered building was to be treated as a '*makan*' under the terms of the *Wajib-ul-arz* BIKAR-MAJIT SINGH *v.* SARNAM **186**

——— ——— ——— ———*Transfer of non-transferable holding—Acceptance of rent by* gomasta *of landlord from transferee—Whether landlord bound by receipts—Authority of* gomasta*—Burden of proof—Scope of agent's authority—Decision on particular facts—Evidence Act (I of* 1872*), s.* 103.

It cannot be affirmed as a general proposition of law that a landlord is always bound by the receipts given by his *patwaris* or *gomastas* with regard to payments of rent made by purchasers of a non-transferable holding.

It must be decided on the particular facts about the scope of the authority of a *gomasta* to bind his principal. The burden of proof in the first instance is upon the landlord to show the precise scope of the authority he had conferred upon his agent, because this is a matter peculiarly within his knowledge.

Where it has been found that rent was paid by the transferees for about six years, but the landlords did not repudiate the act of their *gomastas* who received the rent, and have not offered to refund the money received on their behalf by the agents, of which persumably they enjoyed the benefit during all these years:

Held, that the act of the agent was within the scope of his authority, and the acceptance of rent by him from the transferees was sufficient recognition of their *status* as tenants of the holding.

Nabakumari v *Behari Lal*, 34 C. 902; 2 M. L. T. 433; 6 C. L. J. 122; 11 C. W. N. 865; 4 A. L. J. 570; 9 Bom. L. R. 846; 17 M. L. J. 397, referred to. SUDAMAN *v.* BEHARI MAHTON, 15 C. W. N. 953 **456**

Lease. *See* LANDLORD AND TENANT; LESSOR AND LESSEE.

——— *Construction—Lessee, whether tenure-holder or* raiyat*—Principles of construction—Conduct of parties, when may be looked into—*Jote, *meaning of.*

A lease to a tenant recited that there were resident tenants on the land demised, that it was a lease for a term of 12 years but it was to be regarded as a temporary tenancy, and that the lessee was to hold the land either in *khas* or by letting it out to tenants:

Held, that the lessee was a tenure-holder and not a *raiyat*.

If the terms of an original grant are ambiguous, the subsequent conduct of the parties may be looked into to ascertain the nature of the tenancy in its inception; but where the terms are unambiguous, it cannot be laid down as an invariable proposition of law

that the nature of the tenancy is necessarily altered by the subsequent conduct of the parties to the detriment of the under-tenants.

The mere description of a tenancy as a *jote* does not conclusively show its true nature. It is open to strangers to show that, although the tenancy is described as a *jote*, its real character is that of a tenure.

Syed Nawab Ali Chowdry v. *Hemanta Kumari Debio*, 8 C. W. N. 117, followed. PRAMOTHA NATH KUMAR *v.* NILMONI KUMAR, 14 C. L. J. 38 **431**

——— ———, *permanent, creation of, before Transfer of Property Act—Whether* pattah *necessary—Whether acceptance of* kabulyat *sufficient—Proof of acceptance of* kabulyat, *whether to be direct—*Dakhila, *how to be proved—Acceptance by* tahsildar *of rent paid by tenant—Covenant against alienation—Permanent lease - No right of re-entry reserved—Effect of covenant—Transfer of Property Act (IV of* 1882*) s.* 10.

For the creation of a permanent lease before the Transfer of Property Act, it was not necessary that the landlord should grant a *pattah*. It was sufficient to create a valid tenancy if the tenant executed a *kabulyat* which was accepted by the landlord.

It is not necessary, however, to prove, by direct evidence, that the *kabulyats* were accepted. The Court may find from the conduct of the parties and from the circumstances of the case that the *kabulyat* was accepted and acted upon by the landlord.

If a tenant produces *dakhilas* and swears that he received them from the land-owner or his agent or gives other *prima facie* evidence of their genuineness, they may be taken for the purpose of proving that the rent has been paid or that the rent has been paid at a fixed rent for a certain number of years, if the landlord or his agent does not come forward to deny them.

Kriteebash v. *Ramdhun*, 7 W. R. 526, and *Surja Kanta Acharjee* v. *Baneswar Shaha*, 24 C. 251, relied upon.

It is obvious from the rule embodied in section 10 of the Transfer of Property Act, which in substance reproduces the pre-existing law on this point, that a covenant against alienation in a permanent lease, when no right of re-entry is reserved, is not operative. AKRAM ALI *v.* DURGA PROSONNA ROY **489**

——— *Term exceeding one year—Evidence—Not admissible without registration—Whether admissible to prove present demise—Relation of landlord and tenant.*

An unregistered lease for a period exceeding one year cannot be received in evidence to prove a present demise of the property constituting the relation of landlord and tenant between the parties. It cannot be received in evidence of any transaction affecting the property. KANAI MANDAL *v* SHYAMA CHARAN **892**

Legitimacy. *See* MARRIAGE.

——— ——— ———Burden of proof—Non-access **389**

Lessor and lessee—*Payment of premium—Possession to lessee—Conditional decree.*

The right of a lessor to claim payment of a premium reserved under a lease does not depend upon his obligation to put the lessee in possession, as a matter of law. But Courts will not be justified in passing a decree for the payment of the premium alone without

Lessor and lessee—concld.

compelling the lessor at the same time to perform his obligation and to give possession, as is done in the case of sales.

Subramaniya Iyer v. *Poonan*, 27 M. 28; *Muthia Chetty* v. *Sina Velian Chetty* alias *Sinna Karuppan Chetty*, 21 M. L. J. 236; 9 Ind. Cas. 1062; 9 M. L. T. 378; 2 M. W. N. 228, followed. RAMANATHAN CHETTIAR v. VEERA NAGAPPA CHETTIAR, 2 M. W. N. 325; 9 M. L. T. 510 **392**

Letters of Administration—Revocation **717**

License—Condition prohibiting transfer of the privilege of vending opium—Admission by licensee of partner—Suit to enforce partnership **126**

Lien. *See* TRANSFER OF PROPERTY ACT, s. 55.

Life insurance contract—*Insurance money, part of estate—Debt—Succession certificate under Succession Certificate Act (VII of* 1889*)*, *ss.* 4, 16—*Married Women's Property Act (III of* 1874*), not applicable to Hindus—Interest.*

A. insured his life with a Life Insurance Company for Rs. 3,000; on his death, his sons claimed payment of the amount and produced a succession certificate in support of their claim. The Company wished to be protected against an action by the daughters, by a certificate under the Married Women's Property Act:

Held, (1) that the insurance money formed part of the estate of the deceased, though payable on the death of the insured, and is "a" debt due to him within the meaning of section 4 of the Succession Certificate Act; (2) that a production of a succession certificate was sufficient protection for the Company.

(3) Under section 16 of the Succession Certificate Act the certificate was a conclusive title to recover the amount from the defendant Company.

(4) The act of the Company in refusing to make payment of the whole amount was wrongful and the Company was bound to pay interest, from the date on which it was claimed.

Cleaver v. *Mutual Reserve Fund Life Association*, (1892) 1 Q. B. 147; 61 L. J. Q. B. 128; 66 L. T. 220; 40 W. R. 230; 56 J. P. 180, followed.

Rajamma v. *Ramakrishna*, 29 M. 121 and *Banchharan Mayanduq* v. *Adyanath Bhattacharjee*, 36 C. 936; 10 C. L. J. 180; 13 C. W. N. 966; 3 Ind. Cas. 492, referred to.

The Married Women's Property Act is not applicable to Hindus. ORIENTAL GOVERNMENT SECURITY LIFE ASSURANCE CO., LTD. v. VANTEDU AMMIRAJU, 2 M. W. N. 276; 9 M. L. T. 451 **263**

Limitation for an application of execution **182**

——— Application by a person other than the judgment debtor to be restored to possession of a portion of a house sold in execution of decree—Application dismissed for want of evidence—Suit to establish the right **401**

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——— Breach of contract—Right to sue for damages, whether assignable—Contract for payment of debts—Breach of contract—Repudiation of liability by promisor—Cause of action—Right of promisee to sue promisor—Promisee to wait for a reasonable time **320**

Limitation—contd.

——— Case between mortgagees—Mortgagee not entitled as of right to redeem a prior mortgage—Principles applicable **20**

——— Date of amendment of plaint immaterial **731**

——— Execution of decree—Objection that decree was made without jurisdiction, if can be taken in execution proceedings **532**

——— Failure of consideration—Special facts of individual case—Lease granted on payment of premium—Dispossession of lessee—Suit for recovery of premium—When time begins to run **486**

——— Gift of ancestral land by widow in favour of her husband's near collateral who is also his daughter's son **387**

——— Infringement of trade-mark **787**

——— Payment out of Court—Omission by decree-holder to certify—Payment of the amount by judgment-debtor to third party—Suit for recovery of amount from decree-holder **462**

——— Possession of landlord after purchase in execution of rent-decree—Period of limitation for suit by tenant for recovery of possession **54**

——— Pre-emption suit—Sale ostensibly in favour of one person—Real purchaser another person—Active concealment—Fraud **114**

——— to recover surplus profits **402**

——— Right of distant collaterals to contest alienation—Declaratory decree **725**

——— Sale for arrears—Confirmation by Court, if necessary—Suit to set aside sale—Limitation, starting point of **87**

——— Suit for compensation against Railway Company for non-delivery of goods **122**

——— Suit for contribution—Starting point of limitation **839**

——— Suit against Port Trust for compensation—Conveyance from Wharf to Import-Yard—Liability of Board **972**

——— Suit for possession of office and lands appertaining thereto—Adverse possession by defendant in respect of lands—Whether gives right to office—Vesting of beneficial enjoyment of lands in plaintiff's family **573**

——— Suit for possession of an office—Starting point of limitation—Possession commenced by defendant adversely to plaintiff's right of succession—Absence of appointment to office for a period prior to defendant's nomination—Right of defendant to tack on period to his possession **95**

——— Suit for possession—Suit for declaration of invalidity of adoption **338**

——— Suit for recovery of price paid for property found to be non-existent **716**

——— Suit for recovery of price paid for property to which the judgment-debtor has no title **716**

——— Suit for sale on mortgage by subsequent mortgagee—Subsequent mortgagee paying off the prior mortgagee—Entire debt of subsequent mortgagee not satisfied by sale of the mortgaged property—Simple money decree—Whether a second suit would lie to recover the balance money **336**

——— *Talukdari* Settlement Officer—Notice—Decree-holder submitting his claim—Exclusion of time—Application for execution **912**

Limitation—concld.

——— ———Widow in possession of husband's property in lieu of her dower—Dispossession by heirs —Suit to recover dower debt **282**

——— ——*Decree-holder given formal possession—Actual possession remaining with judgment-debtor —Decree-holder's right to bring fresh suit within* 12 *years.*

Where in execution of a decree for possession the decree-holder is given formal possession, the judgment-debtor remaining in actual possession, the possession of the decree-holder is deemed actual or legal possession in the eye of the law and he can bring a fresh suit for possession within 12 years.

Mangli Prasad v. *Debi Din*, 19 A. 499, applied. RAHIM BAKHSH *v* MUHAMMAD HAFIZ **319**

——— *Suit for recovery of money due on a decree assigned to plaintiff—Plaintiff barred from realizing the money at the time of receipt by defendant —Limitation Act (XV of* 1877), *Sch. II, Arts.* 29, 49, 62, 97 *and* 120.

Article 62, applies only when the money realised by the defendant has been actually or constructively received by the defendant for the plaintiff's use.

Where plaintiff was legally barred from collecting the money due on a decree assigned to him, and the assignors decree-holders received the amount and entered satisfaction, it cannot be said that the money received by the assignors was received by them for the plaintiff's use.

Narayana v. *Narayana*, 13 M. 437, followed.

The period of limitation applicable to a suit for the recovery of such money is that provided by article 120. RAMASWAMY CHETTIAR *v* HARI KRISHNA CHETTIAR, 2 M. W. N. 220; 9 M. L. T. 465; 21 M. L. J. 705. **658**

Limitation Act (XIV of 1859), s. 4—*Acknowledgment—Mortgagee recorded as such in a* khewat *which was attested by the mortgagee—Signature made in the hand-writing of a third person but in presence of the signor, effect of.*

A mortgagee was recorded as such in a *khewat* and the entry was duly attested by him. The signature of the mortgagee, however, was written by a third person in his presence and apparently with his sanction.

Held, that the signature was the personal signature of the mortgagee, and the entry in the *khewat* was a valid acknowledgment under section 19 of the Limitation Act. MAHARAJ SINGH *v.* SHANKAR LAL **215**

——— ———(IX of 1871), s. 20—Acknowledgment by one of several joint mortgagees, effect of **238**

——— ———Sch. I, art. 105 **402**

——— ———(XV of 1877), ss. 5, 12—*Application for copy not accompanied by deposit of fee—Exclusion of time—Extension of time—Sufficient cause.*

Exclusion of time under section 12 of the Limitation Act can be claimed only from the date of deposit of copying fee and not from the date of application not accompanied by such deposit. Therefore, where a party neglects to make the requisite deposit and time is lost owing to such neglect or carelessness, he cannot take advantage of the provisions of section 12.

Parbati v. *Bhola* 12 A. 79 referred to.

Limitation Act—(1877)—contd.

Where the judgment of the Court was pronounced on 15th October but the decree was signed on the 9th November and an application for copy of the decree was made five weeks after the decree was signed:

Held, that, as delay was not due to the non-signing of the decree but to the non-deposit of copying fee, it was immaterial when the decree was signed, and that the cause of delay in applying for copy was not sufficient and substantial to justify an extension under section 5.

Ganpat v. *Ananaji*, 23 B. 144, *Lakhoomal* v. *Joomromal*, 1 S. L. R. 71; *Karsondas* v. *Bai Gangabai*, 30 B. 329; 7 Bom. L. R. 965, referred to. TOPANDAS *v.* MANAGER, ENCUMBERED ESTATE, 5 S. L. R. 47 **210**

——— ———s. 12 **210**

——— ———s. 18—*Construction of the section—Pre-emption suit—Sale ostensibly in favour of one person—Real purchaser another person—Active concealment—Fraud—Limitation.*

The sale of certain landed property was ostensibly effected in favour of one *B.* but the real purchaser was one *M.* who actively concealed the fact of the sale in his own favour:

Held, in a pre-emption suit against *M.*, that section 18 of the Limitation Act extended the period of limitation by making it run from the date of the pre-emptor's knowledge of the fraud:

Held, further, that as the suit was against *M.* who was guilty of the fraud, it was quite immaterial that a possibly infructuous suit against *B.* the ostensible purchaser, might have been instituted before the fraud became known to the pre-emptor.

The literal reading of section 18 of the Limitation Act is not against the view that the words "against any person" should be understood to follow the words 'a suit" in the beginning of the section. ISMAIL *v.* BOJI **114**

——— ———s. 19—Gumasta—*Acknowledgment after master's death—Death not known to the creditor—Contract Act (IX of* 1872), *ss.* 208, 209—*Estate of master bound by act of* gumasta.

Plaintiffs had dealings with the firm of one *H.* A *gumasta* carried on the business of the firm for his master, and generally managed its affairs, and his master always allowed him to write letters on behalf of the firm and never repudiated any of them. After *H.'s* death, a fact not known to the plaintiffs, the *gumasta* in answer to a letter from the plaintiffs, relating to their account, wrote, 'you mention that there are moneys due; as to that I admit whatever may be found on proper accounts to be owing by me, you need not entertain any anxiety':

Held, (1) that the statement amounted to an acknowledgment within the meaning of section 19 of the Limitation Act, 1877;

(2) that the case fell within the provisions of sections 208 and 209 of the Contract Act and hence the *gumasta* did bind the estate of *H.* IBRAHIM *v.* CHUNI LAL, 13 Bom. L. R. 264 **888**

——— ———Sch. II, art. 11 **401**

——— ——— ———art. 12 **87**

——— ——— ———art. 29 **658**

——— ——— ———art. 30 **972**

——— ——— ———art. 49 **658, 839**

Limitation Act—(1877)—contd.
——— **Sch. II, art. 62** 658
——— **art. 97** 658
——— **art. 99**—*Failure of consideration—Special facts of individual case—Lease granted on payment of premium—Dispossession of lessee—Suit for recovery of premium—When time begins to run.*

Whether a suit is barred under Article 97 of the Limitation Act, 1877, or not, must depend upon the special facts of each individual case, because it is only with reference to such circumstances that the Court can determine the date of the failure of consideration.

Where a lessee was evicted by a person successfully claiming a superior title, and the lessee sued his lessor for the amount of premium paid for the lease: *Held*, that time ran against the plaintiff from the date when he was actually evicted from the land, and not from the date when the successful claimant obtained a decree against him for possession

Bassu Kuar v. *Dhum Singh*, 11 A. 47; *Hanuman Kamat* v. *Hanuman Mandur*, 19 C. 123; 18 I. A. 158 and *Amma Bibi* v. *Udit Narain Misir*, 31 A 68; 11 Bom. L. R. 525; 19 M. L. J. 295; 6 M. L. T. 89; 1 Ind. Cas. 890; 9 C. L. J. 512, distinguished.

Ram Chandra Singh v. *Tohfah Bharti*, 26 A. 519; *Kul Kunwar* v. *Chatar Singh*, 5 A. L. J. 480; A. W. N. (1908), 185; 30 A. 402; and *Ram Jaggi Rai* v. *Kauleshar Rai*, 5 A. L. J. 484; A. W. N. (1908), 185 *Note*; 30 A. 405, relied upon. SUKMOY SARKAR v. SHASHI BHUSHAN 486
——— **art. 104** 282
——— **art. 105** 402
——— **art. 106** 250
——— **art. 120**—Suit for recovery of money due on assigned decree 658
——— **art. 124**—*Suit for possession of office and lands appertaining thereto—Adverse possession by defendant in respect of lands—Whether gives right to office—Vesting of beneficial enjoyment of lands in plaintiff's family—Limitation.*

The acquisition by a person of a prescriptive title to lands attached to an office does not give him a right to that office unless he was in adverse possession of the office also for the statutory period.

The mere receipt of the emoluments of an office without performance of its duties will enable the recipient to claim possession of the office, if its duties are performed by another in his own behalf and not as the deputy of the person enjoying the emoluments.

Where plaintiff, the widow of an *archaka*, sued 1st defendant, alienee from her husband, for possession of the office of *archaka* and of the lands attached thereto, and it was found that 1st defendant was in adverse possession only of the lands, the beneficial enjoyment whereof vested in the plaintiff's family:

Held, (1) that plaintiff was entitled to the office as the adverse possession by defendant of the lands did not give him a right to the office;

(2) that the plaintiff's claim to the lands was not barred and she had a right to recover the property from the time her right to beneficial enjoyment accrued.

Mahomed v. *Ganpati*, 13 M. 277; and *Gnanasambanda Pandara Sanadhi* v. *Velu Pandaram*, 23 M. 271, referred to,

Limitation Act—(1877)—contd.

Abhiram Goswami v. *Shyam Charan Nandi*, 36 C. 1003; 10 C. L. J. 284; 6 A. L. J. 857; 11 Bom. L. R. 234, explaind. KAMALATH AMMAL v. KRISHNA PILLAY 573
——— **Sch. II, art. 124**—*Suit for possession of an office—Starting point of limitation—Possession commenced by defendant adversly to plaintiff's right of succession—Absence of appointment to office for a period prior to defendant's nomination—Right of defendant to tack on period to his possession—Limitation.*

One *V.* held the office of *Sri Pandaram* of a temple till 1884. In 1884 he relinquished the office and his widow, *T.*, was permitted by the trustee to perform the duties of the office by her proxy *A. A.* continued in office till 1829 when *T.* was dismissed. Afterwards, no one was appointed to the office till 1900 when defendant was appointed. From 1889 to 1900 the trustee had the duties of the office performed by his servants. In an action by plaintiff for possession of the office and of the properties attached thereto in 1905, on the ground that he was the reversioner entitled to them after *T.*:

Held, that the suit was not barred under Article 124 of Schedule II of the Limitation Act as the defendant's possession did not commence to be adverse to the plaintiff before the date of his appointment in 1900 and that he was not entitled to tack on the possession of *A.* to his own, as *A.* only held on behalf of *T.* through whom the plaintiff claimed and the period between 1889 and 1900 could not enure to defendant's benefit as no one was appointed to the office during that period. UMAYURUBHUGUM PILLAI v. VITHINATHASAWMI, 9 M. L. T. 485 95
——— **art. 134**—*"Purchased", if includes permanent lease—Privy Council—Review.*

The word "purchased" in Article 134 of Schedule II to the Limitation Act of 1877 means the purchase of an absolute title. A permanent lessee is not a purchaser within the meaning of that Article.

That Article, therefore, does not apply to a suit brought by the *shebait* of an idol for possession of immoveabe property let out in permanent lease by a former *shebait* without legal necessity.

Abhiram Goswami v. *Shyama Charan Nandi*, 4 Ind. Cas. 449; 36 I. A. 148; 10 C. L. J. 284; 6 A. L. J. 857; 19 M. L. J. 530; 36 C. 1003; 14 C. W. N. 1; 11 Bom. L. R. 234, followed. ISHWAR SHYAM CHAND JIU v. RAMKANAI GHOSE, 15 C. W. N. 477; 9 M. L. T. 448; 8 A. L. J. 528; 13 BOM. L. R. 421; 33 A. 526; 14 C. L. J. 238 683 P. C.
——— **art. 135**—*Case between mortgagees—Mortgagee not entitled as of right to redeem a prior mortgage—Principles applicable.*

Article 135 of Schedule II to the Limitation Act, 1877, has no application to a case where the mortgagor is merely a *pro forma* defendant and the real dispute is as to whether the puisne mortgagee is entitled to redeem and to take possession of the mortgaged property from the prior mortgagee in possession.

The principle of the Full Bench ruling in *Gokal Chand* v. *Rahman*, 59 P. R. 1907 is not applicable to cases where the mortgagee cannot, as of right, redeem the mortgaged land. GANDU MAL v. UDHO 20

Limitation Act–(1877)—contd.

——— ——— ——— **Sch. II, art. 141** 387

——— ——— ——— ——— ——— ——— **arts. 142, 144**—*Tenant-in-common—Suit for possession—Presumption—Burden of proof—Ouster—Evidence necessary to prove.*

The presumption is that the possession of one tenant-in-common is the possession of the other.

Although an allegation of dispossession and discontinuance of possession brings a suit *prima facie* under Article 142 of the Limitation Act, yet, in the case of a suit for possession by a tenant-in-common, the presumption arising from the possession of a defendant tenant-in-common shifts the onus on to the defendant. It is incumbent on the defendant to show that plaintiff's joint possession had ceased by virtue of an ouster.

Bandacharya v. *Serinivas Acharya*, 5 Bom. L. R. 742; *Gangadhar* v. *Parashram*, 29 B. 300; 7 Bom. L. R. 252; *Culley* v. *Doe de Taylerson*, (1843) 11 A. and E. 1008; 3 P. & D. 539; 9 L. J. Q. B. 288 and *Fisher* v. *Prooser*, (1774) 1 Cooper 217, relied upon.

Faki v. *Babaji*, 14 B. 458 at p. 462; *Vasudev Atmaram* v. *Eknath Balkrishna*, 12 Bom. L. R. 956; 35 B. 79; 8 Ind. Cas. 639; *Ittappan* v. *Manvikrama*, 21 M. 153, referred to.

Exclusive receipt of profits by one tenant-in-common for a long period without any claim or demand from the other is evidence of ouster of the nature of a denial of the rights of the tenant-in-common.

Gangadhar v. *Parashram*, 29 B. 300, followed.
ASUDOMAL *v.* ALI, 5 S. L. R. 49 **554**

——— ——— ——— ——— ——— **art. 144** 742

——— ——— ——— ——— ——— **art. 144**—Possession of tenant-in-common 554

——— ——— ——— **art. 175C**—*Civil Procedure Code (Act XIV of 1882), s. 368—Application of the article and section to execution proceedings—Estoppel—Pre-emptor denying* locus standi *of deceased vendee's sons to appeal—Whether he can give them a* locus standi *to execute his decree.*

Article 175C of the Limitation Act (XV of 1877) and section 368 of the Civil Procedure Code (Act XIV of 1882) do not apply to execution proceedings.

In a pre-emption suit, the vendee died before decree. By inadvertence, the decree was passed against the dead vendee. An appeal by the sons of deceased vendee was dismissed on the ground, taken by the pre-emptor, that as their father had died before the decree was passed, they had no *locus standi* to appeal. Later on, the pre-emptor attempted to get the decree executed against the same sons:

Held, that the pre-emptor was legally—at any rate equitably,—estopped from executing his decree against the sons, as he could not be allowed to confer on the sons a *locus standi* in execution proceedings which he had denied them in their appeal.
AMOLAK RAM *v.* SHANU RAM, 99 P. W. R. 1911 **405**

——— ——— ——— **art. 179**—*Execution of decree—Limitation—Fresh starting point—Issue of notice—Civil Procedure Code (Act XIV of 1882), s. 248—Application not in accordance with law.*

The issue of a notice under section 248 of the Civil Procedure Code is sufficient to save a decree from the bar of limitation, under Article 179 of the Second Schedule to the Limitation Act of 1877, even though it is issued upon an application which is not in accordance with law.

Gopal Chunder v. *Gosain Das*, 25 C. 594 (F. B.); 2 C. W. N 556; *Khoshal Chandra Roy* v. *Ukiladdi*, 3 Ind. Cas. 47; 14 C. W. N. 114; *Dhonkul Singh* v. *Phakkar Singh*, 15 A 84 and *Hari Ganesh* v. *Yamunabai*, 23 B. 35, relied upon. DEO NARAIN SINGH *v.* SRI BHAGWAT NAIK **411**

Limitation Act (IX of 1908), s. 5—*Sufficient cause—Revision—Review—Rejection of review application—Subsequent delay in filing petition for revision.*

The appellant in this case applied to the Appellate Court for review of its judgment; his application was rejected; very nearly two months afterwards he filed a petition in the Chief Court for revision of the judgment of the Appellate Court:

Held, that even if there were any reasonable grounds for filing a review application, the petitioner should have filed his petition for revision within a reasonable time after his application for review had been dismissed, and, consequently, there was no sufficient cause for not filing the revision within the prescribed period. GANDA SINGH *v.* JAWALA SINGH, 140 P. L. R. 1911 **129**

——— ——— ——— **ss. 5, 12**—*Appeal filed without copy of decree—Copy of judgment obtained first—Copy of decree applied for after expiry of ordinary period of limitation—Exclusion of time taken in obtaining copy of decree—Time requisite for obtaining copy—Sufficient cause.*

In order that a memorandum of appeal may be a good memorandum of appeal in law a copy of the decree appealed against must be filed with it.

Musammat Narbadi v. *Musammat Gojri*, 9 C. P. L. R. 109; *Akbar Ali* v. *Ramchand*, 53 P. R. 1887; *Bhawani Prasad* v. *Kallu*, 17 A. 537 at p. 553; *Khirode Sundari Debi* v. *Jnanendar Nath*, 6 C. W. N. 283 at p. 286, followed.

The Appellate Court may dispense with the copy of a judgment but a copy of the decree is indispensable. The time requisite for obtaining a copy of the decree appealed from does not ordinarily begin till an application for the copy is made.

Bechi v. *Ahsanullah Khan*, 12 A. 461, followed.

Where, however, a copy of the judgment alone is applied for and obtained before expiry of the scheduled period of limitation prescribed for an appeal, and an application is made after the expiry of that period for a copy of the decree, the appellant is not entitled to exclude the periods occupied in preparing both these copies, unless some explanation to the satisfaction of the Court is forthcoming why a copy of the decree was not applied for with the judgment.

Mohmud Siyudat-un-nissa v. *Muhammad*, 19 A. 342, relied upon.

Silamban Chetty v. *Ramanadhan*, 21 M. L. J. 152; 4 Ind. Cas. 301; 9 M. L. T. 29; 1 M. W. N. 114; 33 M. 256, distinguished.

A decree was passed on 21st July 1910, and a copy of the judgment only was applied for by post on 14th September and despatched on the 26th *idem*. The memorandum of appeal was presented to the Judicial Commissioner along with the copy of the judgment

Limitation Act—(1908)—contd.

on 31st October, the appellant's Counsel intimating that he proposed to file later a copy of the decree appealed against. The copy of the decree was applied for on 28th October, was ready on the 12th November but was not actually delivered till 14th December 1910. The copy of the decree was actually filed in the Appellate Court on 15th December. The delay in delivering the copy of the decree was due to the fact that the appellant did not attend the copying office with the receipt. It was also explained on behalf of the appellant that a copy of the decree was not applied for with the judgment as it was not known that a copy of the decree was required to make the memorandum of appeal valid:

Held, (1) that the memorandum of appeal should be considered to have actually been filed on the 15th December;

(2) that the time occupied in obtaining a copy of the decree could not be excluded in computing the period of limitation;

(3) that the delay in obtaining and filing a copy of the decree had not been sufficiently explained. PARASHRAM *v.* LIKHAN, 7 N. L. R 67 **866**

——— ——— ——— **s. 7**—*Discharge by one of two joint decree-holders—Whether bars fresh execution.*

One of two joint decree-holders cannot give a valid discharge of the decree without the concurrence of the other.

Periasawmi v. *Krishna Aiyan*, 25 M. 431 at p. 439, referred to.

Such a discharge, therefore, does not prevent the decree-holder from applying a fresh for execution under section 7 of the Limitation Act, 1908. VENKATRAMA AIYAR *v.* DURAISAWMY SASTRIAL, 9 M. L. T. 482 **464**

——— — ——— **s. 12** **866**

——— ——— ——— **s. 12**—*Appeal—Application for copy of judgment and decree—Decree not ready—Copy of judgment delivered—Application for copy of decree to be treated as pending—Time between date of signing decree and date when copy of decree was ready to be deducted—Revision petition treated as memorandum of appeal.*

A suit was dismissed, by the first Court in which it was instituted on June 30th 1910, on July 2nd, 1910 The plaintiff with a view to file an appeal applied for copies of the judgment and decree. He filed a certain number of folios and the prescribed Court-fee. The copy of the judgment was ready on July 8th, but the decree had not then been signed by the Judge. On that date one unused folio as also Court-fees of the value of Rs. 8 were returned to him. The decree was signed on July 11th, and on July 15th the plaintiff made a fresh application for a copy of the decree. This copy was ready on July 20th and he filed his appeal on August 17th, but it was dismissed on the ground that it was barred by limitation:

Held, that the plaintiff was entitled to deduct the time between the delivery of the judgment and the signing of the decree.

Bani Madhub Mitter v. *Matungini Dassi*, 13 C. 104, followed.

Held, also, that, when the copy of the judgment was ready, the unused folio ought not to have been returned as the application for a copy of the decree

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was still pending, and the plaintiff should not have been obliged to make a fresh application for the copy, that the application for a copy of the decree made on July 2nd should be treated as a pending application on July 11th when the decree was signed, that the plaintiff was entitled to deduct the time between July 11th and July 20th when the copy of the decree was ready, and that the appeal was filed within time:

Held, further, that the plaintiff ought to have filed a second appeal to the High Court as the order of the lower Appellate Court dismissing the appeal was a decree. The High Court treated this application for revision as a memorandum of appeal. TARABATI KOER *v.* JAGDEO NARAIN, 15 C. W. N. 786 **542**

——— ——— ——— **ss. 14 (2) and 15 (1) and art. 18**—*Time taken in defending another suit, exclusion of*—Bona fide *prosecution of a case in another Court—Injunction or order, necessity of, in order to exclude time—Exclusion of time for purposes of limitation—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 6—Execution proceedings, application in.*

The appellant obtained a mortgage-decree against respondents on the 15th October 1900 for sale of the mortgaged property. The decree was made absolute on the 12th August 1902. The mortgaged property was sold on the 25th June 1906 and a portion of the decree was realized. On the 24th July 1906 one of the respondents instituted a suit asking for a declaration that the mortgage-decree of 1900 and the sale thereunder were not binding on him. The suit was dismissed by the first Court but was decreed by the District Judge on appeal on the 30th April 1907. The latter decision was again reversed in second appeal on the 8th July 1908. On the 8th December 1909 the present application for execution was made. On objection by the judgment-debtors-respondents that the application was time-barred, it was urged by the decree-holder that the period between the 30th April 1907 and the 8th July 1908, during which time the mortgage-decree was in abeyance, should be excluded:

Held, that the application for execution was time-barred. The appellant could not claim the benefit of section 14, clause (2), or of section 15, clause (1), of the Limitation Act of 1908. The former section applies only to a case where a person makes a *bona fide* application to a Court without jurisdiction and the latter only to a case where the execution of a decree has been stayed by an injunction or order:

Held, further, that even on general principles of equity, the appellant was not entitled to exclude the period between the 30th April 1907 and the 8th July 1908:

Held, lastly, that an application under Order XXXIV, rule 6, of Civil Procedure Code, 1908, must be treated as an application in execution proceedings to which Article 18 of the Limitation Act would apply.

Ram Raghubir v. *Mussammat Zahur-un-Nisa*, 6 O. C. 114, followed.

Prannath Roy v. *Rookea Begum*, 7 M. I. A. 323; 4 W. R. 37 (P. C.); *Rajah Enayet Hossein* v. *Sayed Ahmed Reza*, 7 M. I. A. 238, *Musamwat Rannee Surno Moyee* v. *Shoshee Mokhee*, 12 M. I. A. 244: 11 W. R. 5 (P. C.); 2 B. L. R. 10 (P. C.); *Bassu Kuar* v. *Dhum Singh*, 11 A. 47; *Lakhen Chandar Sen* v. *Madhu Sudhan*, 35 C. 209; 3 M. L. T. 90; 5 C. L. J. 59; 12 C. W. N. 326, referred to. AMIR CHAND *v.* NARSINGH NARAIN **21**

Limitation Act—(1908)—contd.

——————s. 15 (1) 21

——————s. 19—*Acknowledgment—Deposition, when an acknowledgment—Application signed by mortgagor's widow.*

A deposition, containing an admission, may amount to an acknowledgment within the meaning and for the purposes of section 19 of the Limitation Act, provided it is duly signed by the deponent.

Venkata v. *Parthasaradhi*, 16 M. 220; *Periavenkanudaya* v. *Subramanian Chetti*, 20 M. 239, referred to.

An application signed by the widow of a deceased mortgagor distinctly admitting the mortgage constitutes an acknowledgment sufficient to save limitation. ALLAH DITTA *v.* KARAM CHAND 142

——————s. 31, Art. 132—*Extension of time—Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 48—Prescribed period.*

The period of limitation prescribed for a suit or application of the kind referred to in section 48 of the Dekkhan Agriculturists' Relief Act is twelve years under Article 132 of the Limitation Act.

Section 31 of the Limitation Act (IX of 1908) gives a period of grace of two years from the date of the passing of the Act, and this period of two years cannot be extended by excluding any period of time within it. DAYARAM *v.* LAXMAN, 13 Bom. L. R. 284 910

——————Sch. I, art. 14, does not apply to suits on title 223

——————art. 18 21

——————art. 31 122

——————art. 62 716

——————art 97 716

——————art 118 338

——————art. 120—*Declaratory suit, limitation for—Cause of action for a suit for declaration—Entry in revenue records, effect of—Order passed by Partition Officer for seeking declaration in civil Court.*

In an application to the Revenue Court for partition the defendant alleged that the share of the plaintiff was ⅓rd and that the partition be made accordingly. The plaintiff filed an objection stating that he was owner of a one-half share. The Revenue Court referred the plaintiff to a civil suit to determine his rights. Immediately after, the plaintiff filed the present suit, in reply to which the defendant pleaded that the plaintiff had been recorded both at the settlement and the revision of settlement as owner of a ⅓rd share only, and that the present suit for declaration was barred by time. The entry in the settlement papers had admittedly been made so far back as 1872. It was, however, found that in spite of the entry the plaintiff had been throughout in possession of ½ instead of ⅓rd:

Held, that as the plaintiff had all along been in possession of a half share it was not necessary for him to bring a suit for a declaration and consequently limitation for the present suit could not be reckoned from 1872. The cause of action for the declaratory suit accrued on the date of the order passed by the Revenue Court and as the suit had been brought immediately after the passing of an order by the Revenue Court, it was well within limitation. SARJU SINGH *v.* GAYA DIN SINGH 11

——————art. 144 338

Limitation Act—(1908)—concld.

——————Sch. I, Art. 164, s. 3—Ex parte *decree—Application to set aside—Applicability of Act.*

Article 164 of the First Schedule of the Limitation Act, IX of 1908, applies to an application to set aside an *ex parte* decree made after that Act came into force, even if the decree was passed before the Act came into force. Section 3 of the Act clearly lays down that the provisions of the Act apply to all suits, appeals and applications filed after the coming into force of the Act. ZAIB-UN-NISSA *v.* GHULAM FATIMA, 70 P. L. R. 1911 823

——————art. 181 130

——————art. 182 182

——————art. 182—*Execution of decree—Decree to be taken as a whole—Starting point of limitatian—Decree providing for costs of Appellate Court and for costs of lower Court after taxation—Limitation.*

A decree of the High Court dated 30th July 1906 provided that appellant should pay respondent's costs in the High Court, and his costs in the lower Court "which will be ascertained and taxed by the Court." The lower Court's costs were taxed by that Court on 1st December 1906. The application for execution of the whole decree was presented on the 7th August 1909:

Held, that the decree should be taken as a whole; and that limitation for purposes of execution commenced to run from 1st December 1906, and the execution application was not barred.

The policy of the Limitation Act, in the case of execution of decrees, is to lay down a simple rule and to treat the decree as a whole, except when the decree itself directs that different portions of the relief granted are to be rendered by the defendant to the decree-holder at different times.

There is only a single starting point for limitation where there has been an appeal, review or amendment of the decree, though it might be open in some cases to the decree-holder to apply for execution of part of the decree before the proceedings in appeal, review or amendment have terminated.

Where a portion only of the amount decreed is left to be ascertained in future, limitation for execution of the whole decree runs from the date of ascertainment.

Haji Ashfak v. *Lala Gauri Sahai*, 13 C. L. J. 351; 15 C. W. N. 370; 8 A. L. J. 332; 9 M. L. T. 380; 9 Ind. Cas. 975, followed.

C. M. A. No. 74 of 1903, not approved.

Gopal Chunder Manna v. *Gosain Das Kalay*, 25 C. 594; 2 C. W. N. 556 (F. B.); *Krishnamachariya* v. *Mangammal*, 26 M. 91 (F. B.); *Abdur Rahman* v. *Moidin Saiba*, 22 B 500, *Gauri Sahai* v. *Ashfak Husein*, 29 A. 623; A. W. N. (1907) 204; 4 A. L. J. 552, *Ratnachella Aiyar* v. *Vencatrama Aiyar*, 29 M. 46; *Krishnan* v. *Nilakandam*, 8 M. 137; *Subramanya Chettyar* v. *Alagappa Chettiar*, 30 M. 268; 2 M. L. T. 189; *Nepal Chundra Sadhookan* v. *Amrit Lal Sadhookan*, 26 C. 888, *and Prayag Singh* v. *Rajan Singh*, 25 C. 203, referred to.

Obiter dictum.—If the direction were that the costs of the lower Appellate Court should be paid when ascertained by the Subordinate Court, the result might be different. VYDIANATHA IYER *v.* SUBRAMANIAN PATTAR, 21 M. L. J. 546; 10 M. L. T. 69; (1911) 2 M. W. N. 93 552

Lis pendens, doctrine of—Mortgage effected during the pendency of a suit, validity of—Sub-mortgagee, rights of **16**

——— A person having equal or superior right to pre-emptor buying property during pendency of suit—Application of the doctrine of *lis pendens* **367**

——— Pre-emption—Exchange during pendency of suit—Transferee having superior right—Right time-barred on the date of exchange **1007**

Local investigation, how to be made **615**

Locusts—*Owner's right to drive away locusts from land—Liability to owner of land where they alight.*

The principles of law laid down for preserving or regulating the settled course of a river, on which may depend so many of the rights and benefits of adjacent owners, are not necessarily appropriate to the course of an insect pest, which it is the interest of every one concerned to repel or destroy.

The obligation of a landowner not actively to transfer to his neighbours a danger which he himself has created or increased, is not inconsistent with his right to repel some extraordinary misfortune which comes to him by way of his neighbour's land.

If an extraordinary flood is seen to be coming, the owner may protect his land from it, and so turn it away without being responsible for the consequences. Visitations of locusts are in the nature of extraordinary and incalculable events, and landowners would be entitled, as an agricultural operation, to drive the locusts away just as they are entitled to scare crows, without regard to the direction they may take in leaving. SAMUEL JACOBUS *v.* DANIEL WILHELMUS, 15 C. W. N. 569; 21 M. L. J. 674 **P. C. 460**

Lower Burma Land and Revenue Act (II of 1876), ss. 55 (b), 56 864

Madras Irrigation Act (VII of 1865), ss. 1 and 2 and Rules framed under the Act *Levy of water-cess by Government—"Arrears of water-cess", meaning of—Right to levy cess retrospectively to the date of order.*

The right vested in Government under Madras Act VII of 1865 and the rules framed thereunder to levy water-cess can have effect only from the date of the levy. This levy cannot operate so as to entitle Government to claim arrears for a period antecedent to the levy.

The word 'arrears' in section 2 of the Act means payments which have become due and have remained unpaid after the levy was made

Harrison v, *Stickney*, 2 H. L. Cas. 108; *Rajah Srimat Vencatraya Appa Roy* v. *Secretary of State*, 26 M. 51, distinguished.

Per *Sankaran Nair, J.*—The language of section 1 of Act VII of 1865 does not mean that the liability to pay water-cess attaches itself the moment that Government water is used.

Government cannot, at any time at their pleasure, impose the cess, the cess has to be imposed within the *fasli, i. e.*, before the crop on the land has been harvested. ZEMINDAR OF NUSVID *v.* SECRETARY OF STATE, 10 M. L. T. 5; 21 M. L. J. 678 **633**

——— ——— ——— **s. 2 633**

——— ——— ——— ——— **Rules under the Act 633**

Madras Local Boards Act (Mad. Act III of 1890), s. 51 301

——— ——— ——— **s. 162 (c)**—*Branch of tree in public road felled with Chairman's permission—Conversion of branches to personal use—Conviction under the section—Legality.*

Section 162 (*c*) of the Local Boards Act does not provide for wrongful conversion of trees: where, therefore, a person cut down, with the permission of the Chairman, the branch of a tree, and converted it to his own use, it was held that he could not be convicted under this section. EMPEROR *v.* ADAM KHAN, 9 M. L. T. 458 **577**

——— Rent Recovery Act (VIII of 1865), ss. 3, 4, 7 75

——— ——— ——— ——— **s. 11 68**

——— ——— ——— ——— **s. 11**—Shrotriemdar, *right of—Rent—Rate.*

Where a right of occupancy is in the *mirasidars*, Shrotriemdars are entitled to charge rent only; and the rate of rent is governed by the provisions of section 11, cls. (*i*) to (*iii*), of the Madras Rent Recovery Act. SUBBARYA REDDI *v.* THIAGARAYA CHETTY, 9 M. L. T. 293 **659**

——— ——— ——— **s. 39**—*Service of notice of demand—Service—Illegality of sale held without proper notice*

Before a sale for arrears of rent can be held under the Madras Rent Recovery Act, it should be shown that notice of demand for the arrears due was served in the manner required by section 39 of the Act.

The affixing of the notice to the defendant's house is not valid service under the section.

It should be shown that attempts were made to show the notice to the defaulter.

A failure to serve the notice of demand in the manner authorised renders the sale altogether illegal.

Dorasawmy Pillay v. *Muthusawmi Moopan*, 27 M. 94; and *Zemindar of Ettyapuram* v. *Sankarappa Reddiar*, 27 M. 483 (F. B.), referred to.

Where a notice of demand is taken inside the house of a defaulter and it is afterwards reported to the process-server that the defaulter refuses to receive it:

Held, that this is not sufficient service. CHIDAMBARAM CHETTY *v.* MEENAKSHI SUNDARA, 8 M. L. T. 447; 2 M. W. N. 354 **118**

——— Revenue Recovery Act (II of 1864)—*Landlord and tenant—Tenant using Government water.*

Under Madras Act VII of 1865 it is the land that is subject to the payment of cess to Government. NARAYANASAWMI NAIDU GARU *v.* ARETI TIRAPATIRAYUDU, 9 M. L. T. 30 **676**

Mahantship—Succession—Custom—*Sanyasis* **824**

Maintenance. *See* HINDU LAW—MAINTENANCE; HINDU LAW—WIDOW.

Malabar Law—*Lands set apart for private temples of a* tarwad—*Whether* tarwad *properties—Trust.*

Lands set apart for private temples attached to a *tarwad* cannot be regarded as *tarwad* properties. They are trust properties which can be held by the *tarwad* only for purposes of the trust.

Rupa Jagashet v. *Krishnaji Govind*, 9 B. 169, followed.

Malabar Law—concld.

Ruling of Sudder Court in Appeal No. 64 of 1861, dissented from.

Quære:—Whether, where a temple was founded by the *tarwad* for the benefit of the family, the members for the time being can put an end to the trust so as to affect those who may be subsequently born in the family. PATTANUR VALANGERI *v.* NARAYANAN NAMBIAR, 21 M. L. J. 585; 10 M. L. T. 64 **398**

Malicious prosecution—*Charge of insult not sustainable—Magistrate acting* bona fide—*Sufficient protection.*

The plaintiff walked in view of the defendant, who was holding Court as a Magistrate, with his shoes on, and before he had gone a few yards, the defendant had him arrested and produced before himself. The parties were previously acquainted and on the plaintiff tendering an apology, he was let off. The present suit for malicious prosecution was brought nearly one year after the above events:

Held (1) that the facts did not of themselves show that the Magistrate did not act *bona fide* when he ordered the accused to be brought up before him;

(2) that the present suit, after the tender of an apology by the plaintiff, was not justifiable. VEMAREDDI *v.* YOKE J. ABBOY NAIDU, 2 M. W. N. 319; 9 M. L T. 444 **391**

——— ——— ——— ———, *suit for—Defendant acting in the capacity of a member of a Municipality—Notice—Municipalities Act (I of 1900), s.* 49.

The defendant, who was a member of a Municipal Board and was charged with supervising the sanitation of the town reported to the Secretary of the Board that dirty water was allowed to flow from a house of the plaintiffs. The Secretary ordered the prosecution of the plaintiffs but they were acquitted, whereupon they brought a suit for damages for malicious prosecution: it was *held*, that as the defendant had acted in his capacity as a member of the Municipal Board he was entitled to a notice under section 49 of the Municipality Act before institution of the suit.

Muhammad Sadiq Ahmad v. *Panna Lal*, 26 A. 220, distinguished.

Bakhtawar Mal v. *Abdul Latif*, 29 A. 567; A. W. N. (1907) 170, referred to. JUGAL KISHORE *v.* JUGAL KISHORE, 8 A. L. J. 589 **1**

Mandamus not to issue where general law sufficient—Title to property not to be tried in *Mandamus* proceedings **253**

Map—Thak *map—Map prepared under supervision of Collector—Map more than thirty years old—Presumption—Accuracy to be proved—Map prepared by Collector under private capacity—Evidence Act (I of 1872), ss.* 83, 90.

The plaintiff relied mainly on the *thak* map of 1856, whereas the defendant relied upon a map prepared in 1865 at the instance of the Collector in his capacity as the holder of a particular estate:

Held, that section 90 of the Evidence Act only shows that the map of 1865 was prepared at the time at which it purports to have been made by the Collector whose signature it bears but it does not establish the accuracy of the map; and that section 83 has no application to the map as it was prepared by the Collector in his private capacity. PRIYA NATH *v.* MAHENDRA KUMAR **376**

Marriage between *Khatria* and a *Tarkhani*—Validity **152**

Married Women's Property Act (III of 1874), not applicable to Hindus **263**

Maxims—*Actus curiæ neminen gravabit* **51**

Mercantile Usage—Delivery order—Jute trade in Calcutta—Custom—Title—Unpaid vendor—Estoppel **859**

Merchandise Marks ACt (IV of 1889), s. 15 **787**

Merchant Shipping Act, 1894 (57 & 58 Vic. C. 60), s. 686 **705**

Mesne profits, assessment of—Court-fee **268**

——— ——— ———Godown—Letting value—Profits of business carried therein—Principle for assessment **312**

——— ——— ——— Partition suit — Arbitration award—False assertion by plaintiff—Title by limitation **498**

——— ——— ——— *Damages for catching fish—Immediate right of possession—Plaintiff not in possession—Importance of case—Pecuniary limit of claim.*

A plaintiff may perhaps recover mesne profits even though he be out of possession

Dyamoyee Dayee v. *Modhoo Soodun Mytee*, 3 W. R. 147 and *Dwarkaram Misser* v. *Jogessur Lall*, 21 W. R. 276, referred to.

But to recover damages for fish, said to have been caught by the defendant from a tank, the plaintiff must at least show that he has an immediate right of possession, if he were claiming it If he fails to do so and it is found that the defendant is in possession, the suit must fail ELAHI BAKSH MANDAL *v.* RAM NARAYAN GHOSE **117**

Minor. *See* GUARDIAN AND WARD; HINDU LAW—GUARDIAN; MUHAMMADAN LAW—GUARDIANSHIP.

——— ———Family settlement—Minor represented in the settlement—Right of minor to impeach the settlement—*Bona fides*—Settlement 'fair and prudent'—Compromise of doubtful claims—Absence of due inquiry into facts by minor's guardian **221**

——— ——— Hereditary trusteeship—Removal of present trustees—Minor successor—Appointment till minority **300**

———representative—Right of guardian to apply for certificate—Application through next friend not competent **981**

——— ——— Sale by father in favour of his minor son, validity of **906**

Misjoinder—Joining causes of action in respect of two different estates **890**

——— ——— ——— ——— **of causes of action** does not justify the rejection of plaint **212**

——— ——— **of causes of action and parties**—Defendants not prejudiced by misjoinder—Practice—Appeal **515**

——— ——— **of charges** **946**

——— ——— ——— *See* CRIMINAL PROCEDURE CODE, ss. 232—239.

——— ——— ——— **or offences** **156**

——— ——— ———**of parties.** *See* PARTIES.

Mistake of fact. *See* CONTRACT ACT, s. 22.

Mortgage—Absolute occupancy-holding along with other property—Court cannot apportion charge **698**

——— ——— Case between mortgagees—Mortgagee not entitled as of right to redeem a prior mortgage —Principles applicable **20**

——— ——— Charge—Decree for sale of property **481**

——— ——— Conditional decree for sale or foreclosure—Interest subsequent to the date fixed—Court rate only allowed **695**

——— ——— effective during the pendency of a suit, validity of—Sub-mortgagee, rights of **16**

——— ——— Forfeiture-sale—Effect of equities—Burden of proof **689**

——— ——— Hypothecation—Non-possessory hypothecation of moveables—Pledge—Principles of law governing hypothecation—Rights and remedies of hypothecatee — Foreclosure — Conditional sale—Subsequent transferee—Notice—Registration **869**

——— ——— Mortgaged property sold under s. 295B, Civil Procedure Code, 1882 - Right of mortgagee to interest on sale-proceeds **552**

——— ——— of occupancy-holding – Suit by mortgagor to get back property **249**

——— Purchaser of equity of redemption—Whether entitled to plead unconscionable bargain in a suit by mortgagee—Pleadings **14**

——— ——— Suit for possession—Mortgage from an ostensible owner party—Plea of estoppel not raised by mortgagee—Suit by mortgagee - *Res judicata* **961**

——— ——— Suit for sale on mortgage by subsequent mortgagee—Subsequent mortgagee paying off the prior mortgagee—Entire debt of subsequent mortgagee not satisfied by sale of the mortgaged property — Simple money decree—Limitation—Whether a second suit would lie to recover the balance money **336**

——— ——— by trespasser—Mortgagee in possession for 12 years—Prescriptive title complete **545**

——— ——— by unauthorized person—Sale upon that mortgage—Acquisition by transferor of ownership in the property subsequent to the sale upon the mortgage, effect of—Contract of transfer must subsist at the time of acquisition **443**

——— ——— by widow—Decree on mortgage—Subsequent decree declaring mortgage to be honest transaction and executed for legal necessity—Whether mortgage decree binding upon reversioner **32**

——— ——— Widow put in possession of property by husband in lieu of dower – Widow to become absolute owner on husband predeceasing her—Nature of interest created **727**

——— ——— *Agreement by third party to pay mortgage amount to mortgagee and interest—Part-payment of interest - Breach of other conditions of agreement—Right of suit by mortgagee on the mortgages—Whether mortgagee bound to refund the amount received from third party—Agreement to pay intending purchaser for not competing for purchase of property—Consideration.*

Mortgage—contd.

An agreement whereby a person undertakes to pay money to another in consideration of the latter not competing for the purchase of certain property with the former is not illegal.

Second defendant executed three mortgage-bonds to plaintiffs. First defendant entered into an agreement with the plaintiffs whereby he agreed to pay a certain portion of the principal within 3 months, the interest on the principal amount immediately and to execute a fresh mortgage for the balance. The agreement was not carried out save that the 1st defendant paid Rs. 10,000 out of the principal and the interest on the whole liability undertaken under the agreement up to a certain date. In consequence of the breach of the agreement by 1st defendant plaintiffs sued for the balance of the amount due to them under the 3 mortgage-bonds executed by 1st defendant:

Held, (1) that plaintiffs were entitled to sue on the mortgages and that they were not bound to enforce specific performance of 1st defendant's agreement;

(2) that the 1st defendant was not entitled to refund of the interest he had paid in part performance of his obligations under the agreement. RANGIAH GOUNDAN *v.* FAKIR MAHOMED **627**

— *Consideration Full consideration not paid—Validity of mortgage to the extent of consideration paid.*

A mortgage-bond, of which the whole consideration has not been paid, is valid to the extent of the money advanced unless the mortgagor has expressly put an end to the mortgage. SUBBARAYA REDDI *v.* MANIKKA KOUNDAN, 2 M. W. N. 265; 9 M. L. T. 479 **258**

——— — *Consolidation—Clog on equity of redemption*—Mashrut-ul-rehn.

A. executed an usufructuary mortgage in respect of certain property in favour of *B.* Later on *A.* executed another mortgage-deed styled *Mashrut-ul-rehn* in which he stipulated that he would not be entitled to redeem the original mortgage without at the same time paying off the further debt:

Held, that both the mortgages were consolidated together and that *A* could not redeem the earlier mortgage without redeeming the later.

Brij Lal Singh v *Bhawani Singh*, 7 A. L. J. 821; 7 Ind. Cas. 115, referred to HARGOBIND *v.* TULA RAM **222**

——— —— *Implied authority of one of the partners to create—Parties—Non-joinder—Time for redemption.*

Where the nature of the business of a partnership included the buying of land and the raising of money on loan in order to carry on the business, an authority to one partner to mortgage the partnership land may be implied.

Where one of two mortgagees sued on a mortgage alleging that he had bought up the share of the other mortgagee but the latter was not joined as a party and there was no registered deed of assignment of his interest in the mortgage to the plaintiff:

Held that the formal defect in the suit might be remedied in appeal by permitting him to join as a plaintiff or permitting plaintiff to add him as a formal defendant.

A Court ought not to allow a period of less than six weeks for redemption. ANA PENA NATER SHA *v.* ANAMALAYA CHETTY, 4 BUR. L. T. 71 **776**

Mortgage—contd.

——— ——— *Interest—Endorsement of payment of mortgage-money—Registration—Registration Act (III of 1877, s. 17.*

An endorsement on a mortgage-deed merely acknowledging receipt of the mortgage-money is not compulsorily registrable under section 17 of Act XVI of 1908. Such an endorsement is at most a memorandum containing a hint that redemption has been effected but it does not contain the contract of redemption.

In a mortgage suit, a mortgagee is entitled to a decree allowing him to recover interest on the amount decreed from the date of suit upto date of realization. PIRBHU DIAL *v.* RISAL SINGH, 37 P. W. R. 1911; 111 P. L. R. 1911 **846**

——— ——— *Mortgagee purchasing half of the mortgaged property—Suit to recover the remaining half of the mortgage-money from the other moiety of the property—Maintainability of suit—Discharge of mortgage-debt.*

A. and *B.* mortgaged their property to *C.* In execution of a simple money-decree against *A.*, the mortgagee purchased one half of the mortgaged property:

Held, that by the purchase of one moiety of the property by the mortgagee only one moiety of the mortgage-debt was extinguished and that the mortgagee could recover the remaining half of the mortgage-debt from the other moiety of the property.

Bishesar Dayal v. *Ram Sarup*, 22 A. 284, followed. JAGGAN NATH PERSHAD *v.* MIHIN **235**

——— ——— *Payment to first mortgagee by second mortgagee for releasing property from second mortgage Sale of the property—Failure of consideration for the payment—Contribution suit.*

The plaintiff, the second mortgagee, purchased the mortgaged property in execution of his mortgage decree. Subsequently, the defendant, the first mortgagee, obtained a decree on his mortgage and attempted to sell the property. Then the second mortgagee, the plaintiff, paid to the defendant, the first mortgagee, Rs. 215 for the express purpose that the property purchased by the second mortgagee should be released from all liability under the defendant's decree. The defendant was unable to release the property by reason of objections taken by persons interested in the equity of redemption. The property was, therefore, sold and purchased by a stranger. The defendant applied the sale proceeds towards the satisfaction of his decree. The plaintiff brought this suit for recovery of the amount Rs. 215:

Held, that there is no answer to the claim of the plaintiff who should not be driven to a contribution suit to enable him to realise a proportionate amount from persons who had been benefited by the payment he made. GULAB RAI *v.* RAM RAJ **570**

——— ——— *—Prior and puisne mortgagees—Sale by both mortgagees—Right of the first purchaser to be confirmed in possession—Right of puisne incumbrancer to redeem First mortgagee purchaser impleaded in suit of puisne mortgagee—How far his right under the prior sale affected—Right of puisne mortgagee decree-holder to sue first mortgagee decree-holder for possession—Position of prior and puisne mortgagees.*

Where there are two mortgages in favour of two persons, neither of them being usufructuary, and the first mortgagee sells the property before the puisne mortgagee, there is nothing for the latter to sell and the first mortgagee is entitled to possession under his sale.

The second mortgagee has the same right to sell his mortgagor's interest but the first sale puts an end to the mortgagor's interest and conveys it to the purchaser.

Venkatnarsammah v. *Ramiah*, 2 M. 108; *Akatti Moidin Kutty* v *Chirayil Ambu*, 26 M. 486; *Nanack Chand* v. *Toluckdye Koer*, 5 C. 26?; 4 C. L. R. 158, *Dirgopal Lal* v. *Bolakee*, 5 C. 269; *Kutti Chettyar* v. *Subramanya Chettyar*, 32 M. 485; 19 M. L. J. 728; 4 Ind. Cas. 1077, referred to.

The right of the prior mortgagee purchaser is not lost to retain possession under his sale merely because he was impleaded in the suit of the second mortgagee.

The only right vested in the puisne mortgagee is the right to redeem the first mortgage.

Krishnan v. *Chadayan Kutti Haji*, 17 M. 17, *Mahomed Usan Rowthan* v. *Abdulla*, 24 M. 171, referred to.

After redemption, as aforesaid, the purchaser in execution of the decree on the first mortgage may redeem the two mortgages vested in the same person.

Sivaraman Chetty v. *Kuppumuthu Chetty*, 13 M. L. J. 72; *Govardan Doss* v. *Veerasawmi Chetty*, 26 M. 537; *Vencatrama Iyer* v. *Gompertz*, 31 M. 425; 3 M. L. T. 397; 18 M. L. J. 298, referred to.

If the purchaser does not redeem the puisne mortgagee who has obtained by redemption the right of the first mortgagee, the properties may be sold, the mortgagees paid, and the balance paid to the purchaser, as the representative of the mortgagor.

Vencatramana Iyer v. *Gompertz*, 31 M. 425; 3 M. L. T. 397; 18 M. L. J. 298, *Nagammal* v. *Vencatagiri Aiyar*, 8 M. L. J. 299, referred to.

The puisne mortgagee has got a right to sell the property even after sale by the first mortgagee, but he can exercise that right only after redeeming the first mortgage. The prior mortgagee cannot be deprived of his right to require the puisne mortgagee to redeem him, and in default, to enforce his rights under his instrument of mortgage by sale or foreclosure, and he may be allowed to do this even as defendant in a mortgage suit.

Rangaya Chettyar v. *Parthasarathy Naicker*, 20 M. 120, explained. VENKATAGIRI AIYAR *v.* SADAGOPACHARIAR **83**

——— ——— *of property not in the possession of the mortgagor, effect of—Long term for redemption fixed in the mortgage-deed, validity of—Redemption not allowed by the assignee of mortgagor in a suit for possession by the mortgagee—Mortgagee bound to pay money paid for redemption of prior mortgage—Suit for possession not a suit for specific performance.*

In 1886 one *K.* mortgaged a share in a village with possession to one *J.* Subsequently, in 1898, the same share was mortgaged with possession to the plaintiff for a term of 80 years, it being expressly stipulated that the mortgagor shall not redeem until the expiry of the said period. In 1905 *K.* sold the property to the defendants who then paid off *J.*'s mortgage of 1886 and took possession of the property mortgaged. The plaintiff now brought a suit for possession on the basis of the mortgage of 1898. The defendants contended that the mortgagor, not being at the date of

Mortgage—contd.

transaction in possession of the mortgaged property, had no right to mortgage it with possession and that the plaintiff could not claim possession on the strength of the deed. It was also contended that the condition in the mortgage-deed that the mortgagor shall not redeem for 80 years should not be enforced and the defendants should be allowed to redeem the plaintiff's mortgage:

Held, that although the property was not in the possession of the mortgagor in 1893 when he mortgaged it to the plaintiff, yet that circumstance could not prevent the plaintiff from asserting her right under the terms of her mortgage-deed and that, therefore, she was entitled to recover possession of the property mortgaged to her:

Held, further, that the present suit for possession could not be treated as a suit for the specific performance of the contract, and that the defendants could not be allowed to redeem in the present suit inasmuch as the defendants had not offered to redeem the plaintiff's mortgage, nor had they paid the Court-fee which would be payable on a prayer for redemption of the mortgage:

Held, also, that it was premature to consider whether the provision that the mortgage shall not be redeemed for 80 years should be enforced or not, as the plaintiff had not yet obtained possession of the property and no question of redemption could till then arise:

Held, lastly, that the plaintiff, before obtaining possession of the property mortgaged, must pay to the defendants the amount of money paid by them to the mortgagee of 1886.

Kalka Singh v. *Himayat Ali*, 10 O. 218, referred to. KANCHAN SINGH v. JAFRI BEGAM **190**

——— ——— *Purchase of property by mortgagee—Liability of mortgagee to prevent redemption by mortgagor - Estoppel.*

A mortgagee cannot acquire any higher right as against the mortgagor merely by setting up an absolute title in himself to the mortgaged property.

Suit properties were held by 1st defendant's family on *otti* right under the plaintiff's family. In an action by plaintiff for redemption, 1st defendant pleaded that plaintiff's family had not the *jenm* right in the properties which the 1st defendant had purchased from a third person:

Held, that whether plaintiff had the *jenm* right or not in the properties, 1st defendant was estopped from denying the plaintiff's right to recover the land on the demise, and that 1st defendant's purchase of the *jenm* right from a third person could not enlarge his rights so far as his obligation to surrender the land to the demiser was concerned. KADAKAM VALLE MARU v. OTHENAN NAIR, (1911) 2 M. W. N. 61 **339**

——— ——— *Purchaser of mortgaged property - Mortgage suit—Purchaser not made party - Mortgage, whether to be proved against him again.*

When a mortgagee has obtained a decree on his mortgage, the validity of the mortgage must again be proved against a purchaser who was not a party to the suit on the mortgage and who ought to be given an opportunity of redeeming it, if valid.

Protab Chandra Mandal v. *Ishan Chandra Choudhry*, 4 C. W. N. 266, distinguished.

Mortgage—contd.

Defendant No. 2 executed a mortgage in favour of the plaintiff. Defendant No. 1 purchased the mortgaged property and got possession of it The plaintiff obtained a decree but defendant No. 1 was no party to it. In execution, the property was put up for sale and purchased by the plaintiff. Defendant No. 1 filed a claim which was successful and the plaintiff sued for confirmation of possession:

Held, that as the plaintiff had not proved the genuineness of the mortgage in the presence of defendant No. 1, who denied it, and had also not given him an opportunity of redeeming, the suit as framed was not maintainable.

Har Pershad Lal v. *Dal Mardan Singh*, 9 C. W. N. 728; 1 C. L. J. 371; 32 C. 891 and *Ganga Das Bhattar* v. *Jogendra Nath Mitter*, 11 C. W. N. 403, 5 C. L. J. 315, referred to and distinguished. JOTE KUMAR v. INDRA NARAIN **137**

——— *Redeem up and foreclose down*—Res judicata—*Decree in general terms—All the intrinsic evidence may be looked into—Decree* nisi—*Document containing separable parts—Registration—How far necessary—Agreement by mortgagee to get salaray out of profits—Not registrable - Mortgagee in possenssion—Remuneration for personal services—When allowed—Company*—De facto *Directors—Notice to outsiders—Acquiescence—Depriving a man of his legal rights—Must amount to fraud—Its elements—Liability of mortgagee to account, mortgagee cannot contract himself out of.*

Where there is more than one mortgage upon a property the rule is, redeem up, foreclose down, which means that the first mortgagee suing for foreclosure must make all subsequent mortgagees parties to the suit and so afford each in turn the chance of redeeming before being foreclosed. The first mortgagee can neither foreclose nor be redeemed by the original mortgagor without taking into account intermediate encumbrances. If the intermediate encumbrancers, who are parties to the suit, do not choose to exercise their rights to redeem, each in turn would be foreclosed before the first mortgagee could come into touch with the mortgagor.

A mortgagor can redeem each of the mortgagees above him separately and in their turn, but he cannot skip all the mesne mortgagees and redeem his first mortgagee in a suit brought against him alone.

Even after foreclosure the right to redeem revives if the mortgagee pursues his remedy on the personal covenant.

Where a decree is couched in general terms and a question of *res judicata* arises upon it, the Court may look at all the intrinsic evidence before it and the materials of the case as a whole, even going so far as statements in the depositions of witnesses.

Amriteswari Debi v. *Secretary of State*, 24 C. 504; 24 I. A. 33, followed.

A decree *nisi* cannot constitute a *res judicata*, and so none of the materials upon which that decree is based can be *res judicata* either.

Where a document which as a whole requires registration, contains separable parts which do not require registration, those parts may be admitted in evidence to prove transactions which *ex hypothesi* do not affect immoveable property of the value of Rs. 100 or upwards.

Mortgage—contd.

The mortgagee in possession cannot, in the absence of an agreement or stipulation, charge the mortgagor for personal service.

An agreement, whereby a mortgagee in possession is to get a fixed remuneration even straight out of the profits for management of the property mortgaged, is not compulsorily registrable.

As between a Company and persons having no notice to the contrary, the directors *de facto* are as good as directors *de jure*.

Outsiders dealing with a Company are bound to acquaint themselves with its external position which can usually be gathered from the papers of their constitution, the Memorandum of Association, and the Articles of Association; but are not bound to inquire into and satisfy themselves upon all the details of the Company's indoor management. This principle, however, would require modification, where the persons sought to be affected with notice are themselves within the Company.

Howard v. *Patent Joory Mannfacturing Company*, (1888) 38 Ch. D. 156; 57 L. J Ch. 878; 48 L. T. 395; 36 W. R. 801; *Mahoney* v. *East Holyford Mining Company*, (1875) L. R. 7 H. L. 869; 33 L. T. 338; Ir. R. 9 C. L. 806, referred to.

An agreement whereby a mortgagee in possession agrees with his mortgagor to charge for his personal services is valid if it does not constitute a clog on the equity of redemption. This arises out of the maxim 'once a mortgage always a mortgage', which means that there can be no additional contract in the mortgage-deed which would alter the essential nature of the mortgage contract, so as to preclude the mortgagor from redeeming. But it does not include previous or post agreements independent of the mortgage, unless these were unconscionable, or clearly obtained by undue influence or the abuse of fiduciary relations.

The payment of a fair remuneration to the Manager of a large concern to keep it in a high state of efficiency is not a clog on the equity of redemption, and in principle it makes no difference whether the Manager is the mortgagee in possession or a third party.

No acquiescence of a share-holders' meeting would be of any legal effect to destroy the share-holders' right unless it is given with full knowledge of that right.

The acquiescence which will deprive a man of his legal rights must amount to fraud. The necessary elements to constitute such a fraud are, (*a*) the plaintiff must have made a mistake as to his legal rights, (*b*) he must have expended some money or must have done some act on the faith of his mistaken belief, (*c*) the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff, (*d*) the defendant must know of the plaintiff's mistaken belief on his rights, (*e*) the defendant must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right All these elements must exist to restrain the possession of the legal right from exercising it.

Willmott v. *Barber*, (1880) 15 Ch. D 96 at p. 105; 40 L. J. Ch. 792; 43 L. T. 95; 28 W. R. 911, followed.

A mortgagee in possession cannot contract himself out of his statutory liability to render proper accounts nor deprive the mortgagor of his right to examine into and challenge any of their details. HOPE MILLS, LD. *v.* SIR COWASJI J. READYMONEY, 13 BOM. L. R. 162 **748**

Mortgage—contd.

——*Sale of mortgaged property in execution of simple money-decree—Purchaser at auction-sale whether representative of judgment-debtor—Subsequent sale in execution of decree for sale passed on mortgage—Auction-purchasers at the two sales respective rights of.*

The property in suit was mortgaged to the respondent on 4th November 1877, who obtained a decree on foot of the mortgage which was made absolute on the 14th November 1903. On 13th February 1900, the appellants' father obtained a money-decree against the mortgagor and on 30th November 1904 purchased the property in execution of his decree and obtained possession on 4th September 1905. The respondent purchased the property in execution of his mortgage-decree on 20th December 1907, and obtained symbolical possession on 4th February 1909. This was a suit by respondent against appellants for possession:

Held, that as the appellants' title was based upon an auction-sale in execution of a money-decree they represented the judgment-debtor in interest in exactly the same way as if they had purchased the property by private sale, and were as much bound by the respondent's decree as the mortgagor himself was.

Lalji v *Munna Lal*, 8 O. C. 330; and *Manjan Lal Mulji* v. *Doshi Mulji Bhaichand*, 25 B. 631, distingaished.

Maharaj Singh v. *Jagannath*, 14 O. C. 70; 9 Ind. Cas. 714 and *Bhagwati* v. *Banwari Lal*, 31 A. 82; 6 A. L. J. 71; 5 M. L. T. 185; 1 Ind. Cas. 416, referred to.

CHANDI DAYAL *v.* RATAN LAL, 14 O. C. 89 **722**

——*Simple or anomalous—Mortgagee's option to take possession on default of payment of interest—Decree for sale, whether mortgagee entitled to—Agreement to pay.*

A mortgage-bond contained a covenant to the effect that if the whole or a portion of the interest remains unpaid by the due date, the mortgagee shall take possession of the mortgaged properties immediately thereafter and enjoy the said properties as under a usufructuary mortgage, and the profit shall be credited towards the interest of this document. If it be not sufficient for the interest, the mortgagor shall pay off the deficit interest on the liability of the mortgage property, over other properties and himself. The bond further provided that after the discharge of the entire principal and interest of this document, the mortgagor shall receive back the mortgaged properties. this document and the title-deeds For the principal and interest of this document, this mortgaged property, the mortgagor and his heirs and other properties shall be liable:

Held, that the bond was a simple mortgage bond and the mortgagee was entitled to a decree for sale. LINGAM KRISHNA *v.* MANYA SULTAN, 15 C. W. N. 441; 9 M. L. T 445; 8 A. L. J. 594; 13 C. L. J. 584; 13 BOM L. R. 447; 2 M. W. N. 429 **27 2 P. C.**

——*Two simultaneous mortgages—Suit on one of them—Mortgagee of the other not made party, effect of—Redemption.*

Two mortgages of Rs. 50 and Rs. 96 respectively

Mortgage—contd.

were executed on the same day in respect of the same property in favour of the ancestors of the plaintiffs and the defendant who were members of a joint Hindu family. Subsequently, at a partition, the bond of Rs. 50 was allotted to the defendant and that of Rs. 96 was allotted to the plaintiffs. The defendant brought a suit for sale of the property on the basis of the mortgage bond allotted to him. He did not make plaintiffs a party to the suit. In execution of the decree obtained in the suit defendant purchased a portion of the mortgaged property himself: *Held*, in a subsequent suit brought by the plaintiffs on the basis of the mortgage bond of Rs 96, that the whole of the mortgaged property was liable to be sold and that the defendant had only a right to redeem. MAGGAN LAL v. ANAND SINGH **422**

——— — *Stipulation in the bond postponing the period of redemption in case the mortgagor fails to redeem within a specified period—Valid agreement—Penalty.*

In a usufructuary mortgage there was a stipulation that the mortgagor could redeem on the expiry of 13 years and that if he failed so to redeem then the mortgage would hold good for another period of 13 years. The mortgagor did not redeem at the expiry of the first 13 years but brought a suit to redeem about a year after the expiry of the first term of the years:

Held, that his suit was premature as the stipulation postponing the period of redemption was enforceable at law and not penal. RAMBARAN SINGH v. RAMKER SINGH **243**

——— —*Suit for possession by mortgagee not brought until last day of limitation—Execution of mortgage admitted—Consideration denied—Presumption*—Onus *on plaintiff to prove consideration.*

The fact that a usufructuary mortgagee took no step to recover possession of the mortgaged property until the last day of limitation raises a presumption that he did not consider that he was entitled to possession.

In such a case the burden of proving that consideration passed is on the mortgagee.

Achobondi Kuari v. *Mahabir Prasad*, 8 A. 641, followed.

Mahabir Prasad v. *Bishen Dayal*, A. W. N. (1904) 163, distinguished. BEHARI v. RAM CHANDER, 8 A. L. J. 368 **927**

——— ———*Suit for redemption and for surplus profits—Account—Suit filed in Munsif's Court—Amount decreed after taking account for a sum exceeding Rs.* 1,000 *- Jurisdiction—Limitation to recover surplus profits—Limitation Act (IX of* 1871*), Sch. I, Art.* 105*—Limitation Act (XV of* 1877*), Sch. II, Art.* 105.

Plaintiffs sued for redemption of a mortgage executed in 1854 and prayed that an account be taken of the income received from the mortgaged property and a decree given them for any surplus profits which might be found due to them. The Munsif found that Rs. 9,701-7-2 surplus profits were due to the plaintiffs and decreed this amount in their favour:

Held, that the Munsif had jurisdiction to pass the decree.

Madho Das v. *Ramji Patak*, 16 A. 286; *Sudarshan Das* v. *Ram Prashad*, 33 A. 97; 7 A. L. J. 963; 7 Ind. Cas. 385, followed.

Mortgage—contd.

Held, further, that the plaintiffs were entitled to only so much of the surplus profits as were not barred under the Limitation Act, 1871. SUDARSHAN DAS v. RAM PRASHAD **402**

——— ———*Time fixed for redemption—Agreement between mortgagee and purchaser from mortgagor for redemption before expiry of mortgage term—Agreement that mortgagee will pay consideration to two stake-holders within a fixed time and purchase equity of redemption—Power of mortgagor's assignee to redeem in default—Death of one of the stake-holders—Breach of contract by mortgagee—Payment to surviving stake-holder, whether sufficient compliance with condition—Suit in ejectment—Defective frame of suit.*

The suit properties were under mortgage with first defendant. Plaintiffs purchased the equity of redemption from the mortgagor and entered into an agreement with first defendant, whereby they were to convey the equity of redemption to the latter on the first defendant and one *L.* paying Rs. 1,350 to *A.* and *N.*, two stake-holders, before 15th October 1904. On first defendant's default in making payment, as aforesaid, plaintiffs were to have power to redeem 1st defendant's mortgage immediately, even though under the terms of his mortgage there was still 30 years more for the mortgage to run out. *N*, one of the stake-holders, died before 15th October 1904, and first defendant not having paid the amount to the surviving stake-holder *A* within the time, plaintiffs brought this suit in ejectment having deposited the amount of the mortgage in Court:

Held, (1) that the suit should have been one for redemption and was wrongly framed in ejectment;

(2) that under the terms of the agreement between plaintiffs and first defendant the mortgage could be redeemed even before the expiry of the term;

(3) that 1st defendant was not guilty of a breach of contract in not paying the amount to the surviving stake-holder as the intention of the parties was to pay to both the stake-holders together and it was the plaintiffs' duty, on the death of *N.*, to require the first defendant to agree to fresh arrangements before they could charge him with breach of the agreement, and that, therefore, plaintiffs were not entitled to enforce the covenant for redemption in the favour. KUPPU NAIDU v. SUBBARAYA REDDI, 2 M. W. N. 355; 9 M. L. T. 454 **105**

——— ——— **decree** based on award—Decree giving personal remedy as well as remedy against mortgaged property—Personal remedy not postponed—Duty of execution Court in interpreting decree—Mortgagee's right to personal remedy. **975**

——— ——— ——— by consent—Instalment-decree—Order absolute—Waiver by judgment-debtor **536**

——— ——— ——— Execution—Sale of property mortgaged—Sale proceeds insufficient—Balance—Second mortgage between same parties—Redemption decree—Mortgagee applying for sale of second property in respect of the balance of the first mortgage—Sale **815**

Mortgage—contd.

——— **decree** for foreclosure obtained against all the defendants—Order absolute obtained only against some of the defendants, validity of—Payment of the decretal amount by the defendant against whom no order absolute passed, effect of—Foreclosure decree discharged by the payment made by one defendant against all—Decree joint and indivisible against all the judgment-debtors—Redemption by a puisne mortgagee, effect of **174**

——— ——— **Redemption**—Decree—Appeal on the ground that money deposited too late—Court-fee **736**

——— ——— ——— Time for redemption **776**

——— ——— ——— ——— *Breaking up of security by mortgagee—Liability of mortgagor.*

A. mortgaged his *sir* to *B.* in 1881. At a sale in execution of a simple money-decree in 1888 *B.* purchased the proprietary right in the *sir* leaving *A.* owner of the ex-proprietary right only:

Held, as *B* by his own act had broken up the integrity of his security, he was precluded from placing the whole burden of his mortgage-debt upon the ex-proprietary rights

Bisheshur Dayal v. *Ram Sarup*, 22 A. 284, followed. CHUNI LAL *v.* SIKISHAN SINGH, 8 A. L J. 227 **729**

——— ——— ——— ——— *by one who believes himself to have interest in the mortgaged property—Subrogation.*

A. mortgaged his property to *R.* Subsequently, in execution of a simple money-decree *A's* right in the property was sold and purchased by *F.*, the predecessor-in-interest of the plaintiff. Meanwhile *A.*, by a private sale, sold all his interests in his property to *T. T.* brought a civil suit to have the auction-sale in favour of *F.* set aside. The Subordinate Judge dismissed the suit but on appeal the District Judge decreed it. After the decree of the Subordinate Judge and before the decree of the District Judge *F.* paid off the mortgage-money to *R.* and redeemed the property:

Held, that as *F.* had paid the mortgage-money in the belief that his auction-sale was good and he had interest in the property, he had a right to be subrogated to the position of *R*, the mortgagee.

Syamalaryudu v. *Subbarayudu*, 21 M. 143; *Chama Swami* v. *Padala Anandu*, 31 M. 439; 3 M. L. T. 395; 18 M. L. J. 306; *Sundar Singh* v. *Chandrika Singh*, 36 C. 193; 5 C. L. J. 611; 1 Ind Cas 9 3; *Brocklesby* v. *Temperance Permanent Building Society*, (1895) A. C. 173; 64 L. J Ch. 433; 11 R. 159. 22 L. T. 477; 43 W. R. 606; 59 J. P. 676; *Thurston* v *Nottingham Permanent Benefit Building Society*, 1902) 1 Ch. 1; 71 L. J. Ch.83; 50 W.R. 179; 86 L. T 35; 18 T. L. R 135, referred to. KESRI MAL *v.* MOBARAK HUSSAIN, 8 A. L J. 663 **556**

——— **Redemption suit**—Claim for future *harra* on basis of lease cannot be joined with claim for redemption **737**

——— ——— ——— *Terms of the mortgage, no evidence to prove—Period for which the mortgage is made, effect of, no evidence to prove—Interest to be presumed equal to the profits of the property.*

In a suit for redemption the plaintiff, in order to prove the mortgage set up by him, produced a witness whose evidence established the fact of mortgage. In appeal it was contended that as this evidence did not prove the terms of the mortgage, the plaintiff was not entitled to a decree for redemption:

Mortgage—contd.

Held, that in the absence of evidence it could not be assumed that the mortgage was made for a period exceeding that alleged by the plaintiff:

Held, also, that in the absence of evidence to the contrary it could not be assumed that the interest, if any was agreed to be paid, exceeded the profits of the property. PANCHAM TEWARI *v.* RAM UDIT UPADHYA **7**

——— ——— **or sale**—Construction of document **630, 814**

——— ——— **suit**—Mortgagor taking money from Receiver as accommodation loan—Refusal to pay—Power of Court to compel payment **398**

——— ——— ——— **property**—Mortgagee in possession—Attachment as mortgagee's property—Claim by mortgagor—Position of mortgagee—"On account of or in trust for"—"As his property" **994**

Mortgagee in possession—Remuneration for personal services—When allowed—Liability of mortgagee to account, mortgagee cannot contract himself out of **748**

Mortgagor and mortgagee—Transfer and transferee of non-transferable holding—Question of transferability of holding—Mortgagee purchaser and private purchaser **49**

——— ——— ——— *Mortgagee escaping payment of rent for certain years—Who is to be benefited by such escape, mortgagee or mortgagor—Rights of mortgagee.*

A. executed a usufructuary mortgage of an occupancy-holding to *B.* which provided that the mortgagee was to take the profits in lieu of interest after payment of the rent to the *zemindar*. During the subsistence of the mortgage the mortgagee escaped paying rent to the *zemindar* for several years:

Held, that the mortgagee was entitled to the benefit of such non-payment of rent to the *zemindar* and that the mortgagor was not entitled to redeem the mortgage on payment of the principal sum after deducting the rent not so paid. FAKIR MUHAMMAD KHAN *v.* ALI SHER KHAN **113**

——— ——— ——— ———, *rights of—Splitting up of the mortgaged property with the consent of all parties, effect of—Loss of rights in execution of a decree based on a prior mortgage.*

In 1878 *A.* mortgaged a share in a certain village to *R.* In 1881 he mortgaged the same property together with another share to the plaintiff and one *S.* In 1885 *R.* brought a suit upon his mortgage and obtained a decree for sale of the mortgaged property. To this suit the mortgagees of 1881 were parties. Before this decree was actually put into execution, the heirs of the mortgagors redeemed half the property mortgaged from *S.* in 1893. In 1906 the prior mortgagee *R.* put his decree into execution and got the other half of the mortgaged property sold. On a suit by the plaintiff to recover half the mortgaged property: *Held* that the mortgage security had with the consent of all the parties, *viz.*, the heirs of the mortgagors and the mortgagees, been split up into two portions and the portion redeemed in 1893 was not liable to the claim of the plaintiff, nor could the other half of the mortgaged share be recovered by the plaintiff, as whatever rights he had were lost in execution of the decree based on the prior mortgage. The plaintiff's suit was, therefore, dismissed *in toto*. BALJIT SINGH *v.* BAHADUR SINGH **15**

Muhammadan Law--Adoption—*Inheritance—Converts from Hinduism to Muhammadanism—Burden of proof—Suit for declaration that adoption is invalid—Valuation—Jurisdiction.*

The Muhammadan Law does not recognise adoption. In the case of converts from Hinduism to Muhammadanism, the presumption is that, as a necessary consequence of conversion, the law of adoption recognised by Hindu Law and usage has been abandoned by them. Those who allege that the usage and law in question has been retained must prove it.

Adoption is not necessary inheritance or succession although it leads to inheritance or succession. BAI MACHHBAI *v.* BAI HIRBAI, 13 Bom. L. R. 251; 35 B. 264 **816**

——— ——— ——— **Alienation** – Widow inheriting house property from her husband—Right of husband's brother to contest alienation—*Sayads* of Sialkot city **855**

——— ——— ——— **Dower**—*Arrangement—Widow put in possession of property by husband in lieu of dower—Widow to become absolute owner on husband predeceasing her—Mortgage—Nature of interest created.*

A Muhammadan gave his wife possession of his property in lieu of her dower on the condition that if she died before him, the property would revert to him, the balance of the dower becoming extinct; but that if she were to survive him she would become absolute owner of the property. The husband predeceased the wife: *Held*, that on the husband's death the wife became absolute owner of the property.

Musammat Bebee Bachan v. *Sheikh Hamid Hosein*, 14 M. I. A. 377; 17 W. R. 113; referred to.

The interest created was a right to enjoy the usufruct of the property during the life-time of the husband, which was to develop into full ownership on the happening of a contingeney, *viz.*, the death of the husband in the life-time of the wife. MUBARAK-UN-NISSA *v.* MUHAMMAD MUNSUB HASAN KHAN, 8 A. L. J. 206 **727**

——— ——— ——— *Widow in possession of husband's property in lieu of her dower – Dispossession by heirs Suit to recover dower-debt—Limitation Act (XV of 1877, Sch. II, Art. 104, application of.*

F., a Muhammadan, put his wife in possession of his property in order that she might satisfy her dower thereout. *F.* died in 1895 His heirs wrongfully took possession of his property in 1906. In a suit for recovery of the balance of the dower-debt in 1907, it was *held*, that limitation ran from the date of dispossession and not from the date of the death of the husband, and that Article 104 of the Limitation Act did not apply. HAMIDULLAH KHAN *v.* NAJJO, 8 A. L. J. 578 **282**

——. ——. — **Guardianship**—*Mother's right to be guardian of minor children—How defeated.*

The rule of Muhammadan Law is strict and the mother's right to the guardianship of her children can only be defeated on proof of gross and open immorality.

Where it is found that a mother was divorced by her husband because she was in the habit of going out in the evening and neglecting her children, and refusing to cook for him but that since her divorce she has lived in a hut in a respectable quarter, belonging to her husband, and has supported herself and her family by keeping cows and selling milk,

Muhammadan Law—concld.

and that she is now an elderly woman: *Held*, that she should have the custody of her children, the boy until he arrives at the age of seven and the girl until she reaches the age of puberty. JANNATUNNESSA BIBI *v.* HAFIZ-UD-DIN **904**

——— ——— ——— **Pre-emption.** *See* PRE-EMPTION.

Multifariousness—*Suit not to be dismissed—Amendment—Plaint—Mortgage—Redemption suit—Claim for future* harra *on basis of lease cannot be joined with claim for redemption.*

A suit which is bad for multifariousness should not be dismissed without allowing the plaintiff an opportunity of amending his plaint, and so restricting his claim as to avoid the objection of multifariousness.

Varajlal v. *Ramdat* 26 B. 259; *Ashabai* v. *Haji Tyab Haji*, 6 B. 390; *Kalian Singh* v. *Gur Diyal*, 4 A. 163, relied upon.

Ganeshi Lal v. *Khairati Singh*, 16 A. 279; *Mullick Kefait Hossein* v. *Sheo Pershad Singh*, 23 C. 821; *Smurthwaite* v. *Hannay*, (1894) A. C. 494; 63 L. J. Q. B. 737; 6 R. 299; 71 L. T. 157; 43 W. R. 113; 7 Asp. M. C. 485, considered.

A prayer for amendment should not be refused on the ground that another party will have to be joined and as against him the suit would be time-barred.

Shriram Sadasheo Balkrishna Joshi v. *Ganpati Kunbi*, 2 N. L. R. 79, considered.

A claim to future relief in respect of *harra* on the basis of a lease from the mortgagee cannot be joined with a claim for redemption. BANSIDHAR *v.* RAGHUBIR, 7 N. L. R 43 **737**

Murder. *See* PENAL CODE, s 302

——. ——. Culpable homicide Riot—Unlawful assembly armed with *dangs*—Intention **852**

——. ——. Riot—Unlawful assembly armed with *dangs*—Intention **852**

——— ——— *Intention — Circumstantial evidence — Conviction based on circumstantial evidence—Duty of juries—Soundness and honesty of decision—How far they should expect truth from witnesses—Moral conviction Certainty of the conclusion*

Intention is the result of working of the brain and as one human being cannot see into another human being's brain, the only way of gathering intention is to judge from the act itself and from the circumstances under which it was done.

Circumstantial evidence is evidence of circumstances as opposed to what is called direct evidence. Circumstances, however, sometimes afford just as strong, if not stronger, grounds for coming to a conclusion as to something having happened than the evidence of any witness even of the highest stamp, who may say he saw it happen.

Juries are expected to give the best of their brains to consideration of the matters brought before them and to give a sound and honest decision. If that is not done, it must bring the jury system into disrepute.

As regards belief of witnesses, juries should not expect the witnesses to come to the reputed standard of Washington, but must take people as they are and try and discover the truth by close consideration of each one's evidence, in order that truth may prevail and that justice may be done in the acquittal of an innocent man or in the conviction of a guilty man.

Murder—concld.

Before the jury convict an accused of the offence with which he is charged, they must come to a certain conclusion on the matters brought before them. Those matters must appear to them to leave no reasonable doubt and prove with certainty that the accused and the accused alone could have been the man who committed the offence. By 'certainty' it is not meant that juries are not to act upon evidence unless it puts them in the position of having actually seen the thing done; but that they have to be satisfied upon the whole evidence beyond reasonable doubt as they would be on any important question on which they have to take action one way or the other. EMPEROR *v.* ALI CASIM ARIFF, 4 BUR. L. T. 97 **929**

Negligence. *See* CONTRIBUTORY NEGLIGENCE.

Negotiable Instruments Act (XXVI of 1881), ss. 1, 83—*Scope of s.* 83—*Inapplicable to* hundis—*"All previous parties" include drawer*—Hundi—*Presentation for acceptance not obligatory—Dishonouring of* hundi *eleven days after presentation—Liability of drawer.*

The words "all previous parties" in section 83 of the Negotiable Instruments Act should be construed as including the drawer.

The twenty-four hours' rule specified in section 83 was not intended by the Legislature to apply to bills of exchange generally or to *hundis*.

Section 83 applies only to bills of exchange in which acceptance by the drawee is obligatory. The only form of bill of exchange for which such acceptance is required by the Act is described in the Act as a bill of exchange "after sight."

Section 83 of the Act has been inadvertently placed in Chapter VII instead of in what would seem to be its proper place, immediately after section 63.

The ordinary *hundi* of this country comes under the class of bills which require presentation for *payment only* and not for acceptance.

Ram Chand v. *Shadi Ram*, 19 P. R. 1888, referred to.

A *hundi* was duly presented to the drawee who, after taking eleven days to consider whether he would honour the draft, dishonoured it on the ground that he had no assets belonging to the drawer:

Held, that section 83 of the Negotiable Instruments Act was not applicable and that the drawer was liable on the *hundi*.

Judgment in Civil Appeal No. 83 of 1907 overruled.

(Per *Kensington, J.*, in his order of reference). The Negotiable Instruments Act does not affect any local usage relating to any instrument in an oriental language.

The words "all previous parties" in section 83 ought not to be construed as covering the drawer.

Nilkund v. *Menshi*, 10 B. 346; *Ram Ravji* v. *Pralhaddas*, 20 B. 13, referred to. KHAN CHAND *v.* GOLAB RAM, 142 P. L. R. 1911; 39 P. R. 1911 **133**

——— ——— ——— **ss. 30, 93, 98 (c)**—*Notice of dishonour to the drawer—Damage—Burden of proof—Issue.*

In a suit by the holder of a dishonoured *hundi* where no notice of dishonour has been given to the drawer, the burden of proving that the party charged could not suffer damage for want of notice is on the plaintiff and there should be a definite issue on the point. JHANDA RAM *v.* TODA MAL, 96 P. W. R. 1911; 73 P. L. R. 1911 **405**

Negotiable Instruments Act—concld.

——— ——— ——— **s. 32** **734**

——— ——— ——— **s. 80** **847**

——— ——— ——— **s. 80**—*Evidence Act (I of* 1872*), s.* 92, *proviso* 2—*Negotiable instrument silent as to interest—Separate* oral *agreement as to interest whether can be proved—Separate entry as to interest in* sahukar's *or broker's book, whether proof of written agreement—Rate of interest, when instrument silent—Remand for fresh evidence, when not to be allowed.*

Where a suit is based on a negotiable instrument, which is a document of a formal character, the existence of a separate *oral* agreement as to any matter on which the instrument is silent, cannot be proved under section 92 of the Evidence Act, as proviso 2 to the section would not apply to the case.

Fathuma Bibi v. *Ammul Hanumanta Row*, 17 M. L. J. 296, followed.

Ghansham Lalji v. *Ram Narain*, 29 A. 33 (P. C.); 4 A. L. J. 29; 5 C. L. J. 7; 11 C. W. N. 105; 9 Bom. L. R. 1; 1 M. L. T. 427; 17 M. L. J. 35, distinguished.

A *Shah Jog Hundi* is an instrument of a formal character and where it is silent as to interest a separate oral agreement for payment of interest cannot be proved in virtue of proviso 2 to section 92 of the Evidence Act. But interest at 6 per cent. per annum will be allowed under section 80 of the Negotiable Instruments Act.

Where a *hundi* does not contain the rate of interest but such rate is entered separately in the books of the *sahukar* and the broker, this entry by itself would not be sufficient evidence of a written agreement between the parties to pay interest at the rate therein mentioned. KISHORE CHAND *v.* GURDITTA MAL, 165 P. L. R. 1911 **315**

——— ——— ——— **s. 83, scope of**—Inapplicable to *Hundi*—All previous parties **133**

——— ——— ——— **ss. 93, 98 (c)** **405**

——— ——— ——— **s. 120** **734**

Non-joinder of parties. *See* PARTIES.

——— ——— ——— ——— does not justify rejection of plaint **212**

——— ——— ——— *Misjoinder of parties and causes of action—Rejection—Dismissal—Non-joinder or misjoinder of parties, whether justifies rejection of plaint.*

The mere fact that there is a misjoinder of parties and of causes of action or non-joinder of parties does not justify a Court in rejecting a plaint. SHAHAB-UD-DIN *v.* ANJUMAN-I-NAUMANIA, 132 P. L. R. 1911 **212**

N. W. P. Rent Act (XII of 1881) **573**

——— ——— ——— **s. 9** **145**

——— ——— ——— **s. 9**—*Sale of occupancy-holding illegal—Vendee's possession is that of a trespasser—Suit to eject the vendee of occupancy-holding—Jurisdiction of Civil Court—Adverse possession—Mortgagee cannot hold adversely to mortgagor.*

In 1888, *A.*, an occupancy-tenant, sold his occupancy rights to *B.*, who held a mortgage over the entire *mahal* from the *zemindars*. In 1901, *C.* purchased the occupancy-holding from *B.* Plaintiffs purchased in 1906 one-half of the mortgaged *mahal* and redeemed the entire *mahal* from *B.* and entered into possession. In 1908, plaintiffs sued for possession of

N. W. P. Rent Act—concld.

the occupancy plot on the ground that the original occupancy-tenant had no power to transfer it:

Held, that the suit was governed by N.-W. P. Rent Act, 1881, that the sale of the occupancy-holding was illegal under section 9 of that Act, and that the vendee's possession was that of a trespasser.

Jakhu Ram v. *Harshankar Prashad*, A. W. N. (1886) 75; *Madho Lal* v. *Sheo Parshad*, A. W. N. (1890) 162, followed.

Such being the nature of the possession of the vendee, the *zemindar* was entitled to sue him for ejectment in a Civil Court within 12 years.

The derivative possession of the mortgagee, *B*, or his representative, during the continuance of the mortgage was that of his mortgagor and could not be turned into adverse possession by any act of his behind the back of his mortgagor.

Umr-un-nissa v. *Muhammad Yar Khan*, 3 A. 24; *Jeechoo Sahoo* v. *Syed Maseeoollah*, 21 W. R. 13, relied upon. GANDHRAP SINGH *v.* HARI KISHNA, 8 A. L. J. 458 **999**

Notice—Defendant acting in the capacity of a member of a Municipality—Malicious prosecution, suit for **1**

——of dishonour to the drawer—Damage—Burden of proof—Issue **405**

——Non-possessory hypothecation of moveables—Subsequent transferee—Registration **869**

— Suit against Secretary of State—Injunction—Notice may be dispensed with in case of immediate need **639**

Oaths Act (X of 1873), s. 12—*Refusal to take oath offered by other party—Effect of refusal—Right of Court to take refusal into consideration—Weight to be attached when both parties refuse to take oaths.*

A Court does not act irregularly or illegally in taking into consideration the fact that the plaintiff declined to take an oath by which the defendant offered to be bound. The refusal is a piece of conduct which the Court is entitled to consider along with the other evidence.

Durga v. *Kewal*, Civil Revision No. 6 of 1881, distinguished.

Issen Meah v. *Kalaram*, 2 C. L. R. 476; *Chintaman* v. *Shrinivas*, 22 B. 630; *Moyan* v. *Pathukutti*, 31 M. 1; 17 M. L. J. 545; 3 M. L. T. 98, relied upon.

No weight should be attached to the refusal of a plaintiff to take an oath, where there is a similar refusal by the defendant. SUKHDEO *v.* GANESH, 7 N. L. R. 50 **472**

Occupancy-holding—Succession, how governed—Hindu Law—Succession—Son remaining joint with father **733**

——*Mortgage—Fraudulent relinquishment while question of mortgage* sub-judice—*Void—Suit for declaration in Civil Court—Maintainable—N. W. P. Rent Act XII of* 1881).

An occupancy-tenant can validly mortgage his occupancy-tenancy with possession under the Rent Act XII of 1881, and any fraudulent and collusive relinquishment by the occupancy-tenant would be void against the mortgagee. The mortgagee is entitled to sue for a declaration in the Civil Court that the relinquishment was not operative as against him. JAI GOPAL *v.* UMADAT, 8 A. L. J. 695 **573**

Occupancy-holding—concld.

——*Mortgage—Possession delivered to mortgagee—Suit by mortgagor to get back possession without payment of money received from the mortgagee—Whether maintainable—Void contract—Refund of consideration.*

A usufructuarily mortgaged his occupancy-holding to *B* and delivered possession. The mortgage of the holding was void in law. The mortgagor sued for recovery of possession without offering to re-pay the mortgage-money:

Held, that he could not recover possession of the property without refunding to his mortgagee the money he had taken as the consideration of the mortgage.

Fasihuddin v. *Karamatullah*, A. W. N. (1888) 128, followed.

Bhikham Singh v. *Har Prasad*, 19 A. 35, distinguished. RAM NIHORA RAI *v.* MANBODH UPADHEYA **248**

—— *not transferable—Purchase—Title of purchaser—Subsequent sale of holding in execution of rent decree obtained by some of co-sharer landlords—Estoppel—Conduct Evidence Act (I of* 1872), *s.* 115.

The plaintiff purchased from an occupancy-*raiyat* the holding in dispute which is not transferable without the consent of the landlord. Subsequently defendant purchased the same holding in execution of a decree for rent obtained by some of the co-sharer landlords, defendants Nos. 2–9. The plaintiff has sued for declaration of title and recovery of possession:

Held, that the plaintiff got no title to the holding which was not transferable, that there could not be any estoppel against the defendants, for they were no party to the transaction under which the plaintiff claimed title, and that the suit must fail. ACHAMULLA SIRCAR *v.* CHOLAMUNNESSA BIBI, 12 C. L. J. 479 **928**

——. *See* AGRA TENANCY ACT; BENGAL TENANCY ACT; CENTRAL PROVINCES TENANCY ACT.

——, creation of—Pre-emption **4**

Opium Act (I of 1878), ss. 4, 5, 9—*License—Codition prohibiting transfer of the privilege of vending opium—Admission by licensee of partner Suit to enforce partnership—Contract Act (IX of* 1872), *s.* 23—*Contract forbidden by law—Public policy.*

The provisions of the Abkari and Opium Acts are not intended to merely protect the public revenue, the prohibitions contained therein are based on public policy.

Marudamuthu Pillai v. *Rangasami Mooppan*, 24 M. 401; *Hormasji Motabhai* v. *Pestonji Dhanjibhai*, 12 B. 422; *Thethi Pakurndasu* v. *Shamudu*, 26 M. 430, *Behari Lal* v. *Jogodish Chunder Shah*, 31 C. 798 and *Raghu Nath Lalman* v. *Nathu Herji Bhet*, 19 B. 626, referred to.

Defendants, who had obtained a license for the vend of opium from the Collector, admitted plaintiff as a partner, without the Collector's sanction and though the conditions of the license prohibited defendants from transferring or sub-letting the privilege. In a suit for dissolution and winding-up of the partnership between plaintiffs and defendants:

Opium Act—contd.

Held, (1) that the suit was not maintainable, as the combined effect of sections 4, 5 and 9 of the Opium Act was to nullify a transfer made in violation of the provisions of the conditions of the license and the plaintiff acquired no rights enforceable in law under it.

Judoonath Shaha v. Nobin Chunder Shaha, 21 W. R. 289, *Behari Lal Shaha* v. *Jagodish Chunder Shaha*, 31 C. 798; *Raghunath Lalman* v. *Nathu Herji Bhate*, 19 B. 626, referred to.

Natla Bapiraju v. *Puran Achutha Rajajee*, 1 M. W. N. 549; 7 M. L. T. 176; 20 M. L. J. 337: 5 Ind. Cas. 456, *Marudamuthu Pillai v. Rangaswami Moopan*, 24 M. 401; *Bhikanbhai* v. *Hiralal*, 24 B. 622 and *Abdulla* v. *Mammod*, 26 M. 156, explained and distinguished.

(2) that the plaintiff's partnership with the defendants was a 'transfer' of the right of sale under the conditions of the license.

Gathercole v. *Smith*, (1881) 17 Ch. D. 1: 50 L. J. Ch. 671; 44 L. T. 439; 29 W. R 434, *Gauri Shankar* v. *Mumtaz Ali Khan*, 2 A. 411, explained.

Thithi Pakurudasu v. *Bheemudu*, 26 M 430, approved. NALAN PADHMANABHAN *v.* BADRI NATH, 9 M. L. T. 459; 21 M. L. J. 425; 2 M. W. N. 371 **126**

——ss. 5, 9 **126**

Oudh Laws Act (XVII of 1876), s. 15 **721**

Oudh Rent Act (XXII of 1886), ss. 124B, 124C, and 124D—*Fixation of rent of ordinary tenants-at-will—Fair occupation-rent where no rent previously paid—Compensation for use and occupation.*

At the time of partition of a village certain lands, which were the *khud kasht* of the respondent, were thrown into the *mahal* of the appellants and it was agreed that the respondent would have the rights of an ordinary tenant-at-will. No contract was made regarding the amount of rent, or whether it was to be paid in kind or in cash. The appellants sued the respondent for arrears of rent claiming half the produce. The first Court decreed the suit but the lower Appellate Court dismissed it, holding that no contract express or implied as to the amount of rent or the method of payment of rent had been proved:

Held, that there being no provision in the Oudh Rent Act for the fixation of rent of ordinary tenants-at-will, the appellants were entitled to a fair occupation-rent as compensation for use and occupation of the land in suit.

Musammat Raj Kuar v. *Nabi Bakhsh*, 9 O. C. 296, *Mohommad Hasan* v. *The Deputy Commissioner of Bahraich as Manager, Court of Wards, Nanpara Estate*, 9 O. C. 362, followed. RAM DULARE *v.* HAIDAR ALI **2**

——ss. 124C, 124D **2**

Ouster—Evidence necessary to prove **554**

Pardon, forfeiture of. *See* CRIMINAL PROCEDURE CODE s. 339.

Parties. *See* MISJONDER.

——— Claim petition—Order thereon, effect of—Judgment-debtor not a necessary party **424**

——— Joint family, manager of—Suit to recover debt belonging to joint family—Necessary parties—Competency of the Manager to bring such a suit **200**

Parties—concld.

——— Misjoinder of causes of action and parties—Defendant not prejudiced by misjoinder—Practice—Appeal **515**

——— Non-joinder or misjoinder of parties, whether justifies rejection of plaint **212**

———Non-joinder—Mortgage suit **776**

——*Agent*—Benamidar—*Transfer of Property Act (IV of 1882), s. 41—Re-purchase, condition for—Bona fide purchaser for consideration without notice.*

Where in any transaction a person is an avowed agent or a *benamidar* for another, he is not a necessary party to a suit in respect of such transaction.

A stipulation for re-purchase cannot be enforced against a *bona fide* transferee for consideration without notice. MAUNG BYA *v.* MAUNG SAN THE, 4 BUR. L. T. 74 **779**

——*Non-joinder of parties—Objection—Proper course—Practice.*

Where an objection on the score of non-joinder of parties is taken *for the first time* in the Appellate Court, the proper course for that Court is to add the necessary parties to the appeal and dispose of it, or remit the suit to the first Court for re-trial. It should not dismiss the suit. GOTETI VENKANNA *v.* GOTETI CHINNA, 2 M. W. N. 321; 9 M L. T. 503 **392**

——, *non-joinder of—Wrong person sued as heir of a deceased person—True heir not taking steps for a long time, effect of.*

M. and *R.* were two brothers. *M.* died leaving a son *J.* A mortgage suit was brought against *R.*, in which he was sued in his own capacity and also as the heir of his deceased brother *M. J.*, who was the legal representative of *M.*, was not made a party to the suit. In execution of the personal decree obtained in that suit, certain property, which belonged to both *R.* and *M.*, was sold in 1879. No step was taken by *J.* until this suit to question the validity of the sale:

Held, that *J.*'s interest in the property also passed away by the sale. JAIMANGAL SONAR *v.* BACHU PANDE **344**

Partition. *See* HINDU LAW; PARTITION.

——— *Adhsalidar*, right to partition—Not a joint owner or tenant where original proprietor known—*Adhsalidar*, definition of **147**

——— Decree for partition—Appeal pending—Doctrine of survivorship—Subsequent change in the family—Decree unaltered **660**

——— Evidence necessary to prove—Presumption—Burden of proof—Partition of part—Agreement to separate—Conduct of members **967**

——— Jurisdiction of Civil or Revenue Court—Partition suit regarding land—Question of title involved—Proper procedure **902**

——— *Onus probandi*—Breach in the state of union—Presumption—Rebuttal—Re-union—Proof **911**

——*Muhammadans—Partition of portion of properties—Whether allowable.*

It is inexpedient to allow suits for partition of a portion of properties because it would lead to a multiplicity of suits and to endless litigation between the parties who are jointly entitled to the properties

Partition—contd.

There is no distinction in principle between partition of joint property under Hindu or Muhammadan Law. MAHOMED FAZLUR RAHMAN *v.* MAHOMED FAYZUR RAHMAN, 15 C. W. N. 677 **354**

——— *Mode of partition of* shamilat—*Maintenance of possession—Compensation for turning* barani *into* chahi—*Revision—Question of limitation.*

Where *shamilat* is being partitioned the possession of the share-holders therein should be preserved to the extent of their respective shares only. Where, however, a share-holder has sunk a well on his share of such land, thereby altering the nature of it from *barani* to *chahi*, he is, in equity, entitled, by way of compensation, to some portion of it.

A Court of revision can review a finding upon a question of limitation. HUKAM SINGH *v.* SHAM SINGH, 1 P. W. R. 1911 (REV.) **293**

——— *Partial partition—Trustee or Manager of minor's property, mixing his own property with that of the other, effect of—Onus of proof.*

A suit for partial partition of an estate is not maintainable. But the Court may decide such a suit if the defendant is willing that the rights of the parties in respect of the property be decided in that suit.

If a trustee or agent mixes or confuses the property which he holds in a fiduciary character with his own property, the onus lies heavily on him to prove the extent of his property. If he fails to do so, and the two properties cannot be distinguished or separated with perfect accuracy, the whole must be considered as belonging to the other party. BURUGAPALLI SRIRAMULU *v.* NANDIGAM SUBBARAYADU **57**

——— **deed**—Sons by different wives—Construction of partition-deed—Severance in interest as between the sons of second wife **385**

——— **suit**—*Court Fees Act (VII of* 1870), *Sch. II, Art.* 17—*Suit for declaration and possession—Amending plaint according to decision of Appellate Court—Appeal from order—Acquiescence—Conduct—Estoppel—Right to file appeal.*

In a suit for partition a preliminary decree was made by the first Court. The District Judge on appeal considered that the Court-fee payable should be calculated *ad valorem* on the property in suit and the case re-tried as a suit for declaration of title and recovery of possession. The plaintiff agreed to amend his plaint so as to make it one for a declaration of title as well as for partition and to pay the necessary Court-fee. The District Judge thereupon remanded the case to the first Court for re-trial. The plaintiff appealed from that order:

Held, that if the plaintiff had title to the property and was a co-owner of that property with the defendant, the suit was one for partition of joint property and not one for declaration of title and recovery of posssession.

Bidhata Rai v. *Ram Chariter Rai*, 12 C. W. N. 37; 6 C. L. J. 651; 3 M. L. T. 33, relied upon.

Held, also, that the plaintiff was not precluded by his conduct in acquiescing in the decision of the District Judge and amending his plaint, from filing this appeal if, on reflection, he thought that the action he had taken was injudicious. SHASHI BHUSHAN *v.* JOTENDRA NATH ROY **463**

——— ——— *Mesne profits—Arbitration award—False assertion by plaintiff—Title by limitation.*

Where in a suit for partition the plaintiff asked for mesne profits, and the claim was disallowed

Partition—concld.

on the ground that he had falsely represented that there was no complete award by arbitration while in fact there was:

Held, on appeal, that mesne profits must be allowed with respect to the properties to which the plaintiff had established his title when there was no evidence that he waived the right to mesne profits in regard to them.

Where in the same suit, partition was claimed in respect of a certain item of property which had been sold without the document being registered:

Held, that as the plaintiff did not show that the family was dispossessed of this item of property in question within 12 years prior to the suit, the title of the transferee must be held to have been perfected by limitation. SUBRAMANIA REDDI *v* RAMACHANDRA REDDI, 9 M. L. T. 476 **498**

Partnership—Joint family trading firm—Power of representing firm—Manager **978**

——— Lender and borrower—Contract—Construction—Conduct of parties—Suit for recovery of debt—Amendment of plaint into a suit for partnership accounts not permissible—Partner agent of firm and not of a partner—Court-fee—In a partnership case defendant entitled to get what is due to him without payment of any Court-fee **250**

Patni Regulation (VIII of 1819), ss. 5, 8 (2), 14 *Sale under Patni Regulation not void but voidable—Title of auction-purchaser, whether can be impeached collaterally after expiry of the period for suit to set aside sale—Costs.*

H., a *patnidar*, sold one-third share of the *patni* to defendant No. 1 who again conveyed it to defendant No. 2. *H.* then sold the remaining two-thirds share to defendant No 4. The transferees did not register their names in the *zemindar's sherista* and there was default in the payment of rent to the *zemindar*, and the *patni* was sold under section 8, clause (2), of the Patni Regulation in 1894 and defendant No. 5 became the auction-purchaser. Defendant No 4 then brought a suit for reversal of the entire sale under section 14 of the Regulation against the auction-purchaser and the *zemindar*, and made the original *patnidar H.* and also the purchaser of the one-third share, defendant No. 1, parties to the suit. A compromise was effected in that suit between the then plaintiff and the auction-purchaser, and the latter conveyed to the former a two-thirds share of the *patni*. The suit was then dismissed with costs in favour of the *zemindar*. The auction-purchaser then sold his remaining one-third share to the present plaintiff, who being unable to get possession brought this suit for possession in 1906. The defence was that the sale under the Patni Regulation was void and, therefore, no title passed to the vendor of the plaintiff or to the plaintiff:

Held, that a sale under the Patni Regulation is not void but voidable; that so long as the *patni* sale stood unreversed and as any suit if now commenced would be barred, the title of the auction-purchaser could not be impeached collaterally, and that the suit must be decreed.

Obiter:—In deciding the question of costs, a Court is entitled to consider not merely the conduct of the parties in the actual litigation, but also matters which led up to the litigation. RAM SONA *v.* NABA KUMAR SINHA, 13 C. L. J. 404 **90**

Patni Regulation—concld.

——— ——— ——— **ss. 8 (2), 14** **90**

——— ——— ——— **ss. 15, 27**—*Sale for arrears—Confirmation by Court, if necessary—Suit to set aside sale—Limitation, starting point of—Limitation Act (XV of* 1877*), Sch. II, Art.* 12.

Article 12 of the Second Schedule of the Limitation Act of 1877 means that time begins to run from the date of the confirmation of the sale, only in those cases in which such confirmation is required by the law under which the sale is held, and in other cases from the date on which the sale becomes otherwise final and conclusive by the law under which it is held.

Therefore, since sales under Regulation VIII of 1819 of *Patni* tenures for arrears of rent do not require confirmation, time begins to run from the date when the sale becomes final and conclusive, that is, on payment by the purchaser of the fuil amount of the purchase-money. And a suit to set aside *patni* a sale should be brought within one year from the date when the full amount of the purchase-money was paid by the purchaser. BHUBAN MOHUN *v.* GIRISH NARAIN, 13 C. L. J. 339 **87**

——— — ——— **s. 27** **87**

Pattas. *See* LANDLORD AND TENANT.

Patwari's papers—*Presumption as to correctness—Rebuttable presumption.*

There may be a presumption that what is entered in the *patwari's* papers is correct but that presumption is rebuttable. KINNO JATTI *v.* BIRJ NANDAN LAL **280**

Pauper application · · Revision — Order granting leave to sue in *forma pauperis* — Powers of High Court **471**

Payment to one of joint creditors—Whether operates as a discharge of the debt—Payment to one in fraud of the rest—Whether valid discharge **874**

——— —— by wife of husband's debt during his life-time—Voluntary payment—Wife, whether entitled to pay herself by sale of husband's property after his death—Proof that husband or estate liable to pay—Burden of proof **274**

Pedigree *filed in Settlement Court, admissibility of—Proof of such pedigree, elements necessary for—Special means of knowledge of the person filing the pedigree—Evidence Act (I of* 1872*), s* 32, *cl* 5.

A pedigree produced in a Settlement Court is admissible in evidence under section 23, clause 5, of the Evidence Act, upon proof that the person making the statement contained in the pedigree was dead and had a special means of knowledge. KASHI SINGH *v.* BALRAJ SINGH **193**

Penal Code (Act XLV of 1860), ss. 2, 3, 4—Offence committed on high seas **705**

——— **s. 71**—*Double punishment for same offence.*

Where the accused was convicted and sentenced for the offences under sections 354 and 506, Indian Penal Code, to three months' rigorous imprisonment for each offence:

Held, that the intimidation by throwing a knife formed part of the assault in this case, consequently

Penal Code—contd.

the sentence under section 506 was illegal and must be set aside. EMPEROR *v.* NGA LU NYUN, 4 BUR. L. T. 67 **771**

——— —— **ss. 71, 147, 149, 323, 332**—*Separate sentences for rioting and causing hurt—Offence of rioting not complete till hurt is caused—Public servant not acting in public capacity—Applicability of s.* 332, *Indian Penal Code—Criminal Procedure Code (Act V of* 1898*), s.* 408—*Some members of unlawful assembly sentenced to various terms exceeding four years in aggregate—Appeal lies to the Chief Court—Appeal presented to Sessions Court—Duty of Sessions Judge to return appeal for presentation to proper Court—Power of Sessions Judge to report case to Chief Court.*

The appellants, five in number, drove off the cattle of certain canal officials. On their way to the cattle pound they were overtaken by the owners who tried to rescue their cattle, but failing in this gave up the idea of using violence and began to take down the names of the accused with a view to instituting legal proceedings against them. At this the accused got excited and attacked their pursuers causing simple hurt to two of them. The accused were tried, convicted and sentenced as follows:

Two accused ... (*i*) Two years under section 147, Indian Penal Code,
(*ii*) One year under sections 323/149, Indian Penal Code,
(*iii*) Three years under sections, 332/149, Indian Penal Code,

One accused ... (*i*) The same as above in (*i*),
(*ii*) Six months under sections 323/149, Indian Penal Code,
(*iii*) The same as above in (*iii*).

Two accused ... (*i*) One year under section 147 Indian Penal Code,
(*ii*) Six months under sections 323/149, Indian Penal Code,
(*iii*) 18 months under sections 332/149, Indian Penal Code.

An appeal was presented to the Sessions Judge who reported the case to the Chief Court:

Held, (1) that the appeal lay to the Chief Court, and that the Sessions Judge instead of reporting the case should have returned the appeal petition for presentation to the Chief Court.

Queen-Empress v. *Jai Singh*, 12 P. R. 1900 Cr.; P. L. R. 1900, p. 56, Cr., followed.

(2) that, as an unlawful assembly becomes one guilty of rioting when violence is used, and in this case the unlawful assembly rioted when two of the pursuers were attacked, the members of it cannot be convicted and sentenced separately for rioting and causing hurt.

Bhagwan Singh v. *Emperor*, 4 P. R. 1901 Cr.; 52 P. L. R. 1901 (F. B), followed.

(3) that section 332, Indian Penal Code, had no application to the case inasmuch as the cattle was the private property of the canal officials, who in attempting their rescue, were acting as private individuals. HARDIT SINGH *v.* EMPEROR, 161 P. L. R. 1911 **278**

——— ——— **s. 75** **241**

——— ——— ——— **s. 114** **804**

Penal Code—contd.

——— ——— s. 121A—*Conspiracy to wage war against the King—Dacoities committed as part of conspiracy—Conviction, acquittal and discharge, effect of—Evidence of approver—Corroboration—Rule not technical—'Conspiracy,' meaning of—Necessary elements—Charge of one conspiracy—If accused may be found guilty of another—Evidence Act (I of 1872), s. 30—Confession of co-accused—Retracted confession—Photograph of under-trial prisoner—Practice condemned—Association in play or pastimes—Gymnastic exercise*—Lathi *play—Exercise performed publicly—Sinister motive not to be ascribed—Criminal Law Amendment Act (XIV of 1908), object of.*

The principal charge against several persons was, under section 121A of the Indian Penal Code, of conspiracy to wage war against His Majesty the King-Emperor. As a part of the conspiracy, it was alleged by the prosecution, that many crimes, *e. g.*, dacoities were committed and that these formed the subject of judicial investigation which resulted in some of the accused being convicted, and others being acquitted or discharged:

Held, that, where there was an acquittal, it was conclusive, for a judgment of not guilty fully establishes the innocence of an accused.

The convictions also were similarly conclusive.

As to those who were discharged, no steps were taken to have the order of discharge set aside, nor was any further evidence adduced, but on the contrary some evidence which was adduced before the Magistrate and which was favourable to the accused, was not even adduced: *Held*, that the guilt of these accused had not been proved, nor had any connection been established between the dacoity and the alleged conspiracy.

The rule that the testimony of an approver must be corroborated not only as to the crime, but also as to the identity of each accused person and that the corroboration must ordinarily proceed from an untainted source, is not a technical rule, but is one founded on long judicial experience.

A charge of conspiracy to wage war against His Majesty the King-Emperor under section 121A of the Penal Code may, to the lay mind, imply a political situation of the gravest character and it is partly for this reason that the Legislature has prescribed that a charge of this description should not be entertained except upon complaint made by order of Government. The provisions of the law, however, are comprehensive and no very formidable elements, either in men or means, are required to satisfy its definition of a conspiracy to wage war. No act or illegal omission is necessary; the agreement of two or more will suffice, so that the determination by a Court that a conspiracy to wage war has been established would not imply the existence of a serious menace to the constitution or the stability of constituted authority in India.

When several persons are charged with the same conspiracy, it is a legal impossibility to find some guilty of one conspiracy and some of another. Any accused not shown to be a member of a particular conspiracy is entitled to demand an acquittal, however bad his record may be and however much he may be suspected of this or that offence.

Penal Code—contd.

The true effect of section 30 of the Evidence Act is that the Court can only treat a confession as lending assurance to other evidence against a co-accused. A conviction on the confession of a co-accused alone would be bad in law. Further, that only can be taken into consideration which is a confession, in the true sense of the term, of the offence for which the persons are then being jointly tried. It would be most unsafe to place any reliance on the confession of a co-accused, which was subsequently retracted.

There is no warrant or justification for the practice of taking photographs of under trial prisoners.

To attach a sinister significance to the mere association in play or pastime such as music, gymnastic exercises and *lathi* play of those who live in the same village or attend the same school, is dangerous, especially when there is a complete absence of secrecy and rather a courting of publicity in the preformance of these exercises

The application of the Procedure of Act XIV of 1908, which was intended "to provide for the more speedy trial of certain offences," to a case of this kind which resulted in the detention in custody of the accused for many months without any access to legal advice, could hardly have been contemplated at the passing of the Act. EMPEROR *v.* NONI GOPAL, 15 C. W. N. 593; 38 C. 559 582

——— ——— s. 124A 948

——— ——— ss. 141, 146 852

——— ——— s. 147 281, 278

——— ——— s. 148—*Rioting Existence of common object before fight unnecessary—Criminal Procedure Code (Act V of 1898), ss. 237, 238, 423 (b) Competency of Appellate Court to alter finding of lower Court.*

To sustain a charge of rioting under section 148 of the Indian Penal Code, it is not necessary that all the accused should have had a common object before fighting begins. It is quite enough if some of the accused adopted the object of other accused when they joined the latter. And it is immaterial that the idea of inflicting injury was conceived suddenly after the accused went to the scene of offence.

Section 423 (*b*) of the Criminal Procedure Code does not restrict the powers of an Appellate Court to convict an accused person of an offence of which he is acquitted only in cases falling under sections 237 and 238 of the Code. Sections 237 and 238 provide that in the cases to which they apply, an accused person may be convicted of an offence with which he is not charged. The finding which an Appellate Court may alter under section 423 (*b*) may relate either to an offence with which the accused was separately charged in the lower Court or to one of which he might be convicted without a distinct charge. In cases not falling under sections 237 and 238, the Appellate Court cannot convict a person of an offence with which he was not charged in the first Court, but where he has been charged and the first Court has recorded a finding on the charge, it is competent for the Appellate Court to alter the finding.

Satis Chandra Das Bose v. *Queen-Empress*, 27 C. 172; and *Queen-Empress* v. *Jobanulla*, 23 C. 975, referred to. GOLLA HANUMAPPA *v.* EMPEROR, 10 M. L. T. 66; (1911) 2 M. W. N. 106 372

——— ——— s. 149 278, 852

Penal Code—contd.

——— ———**ss. 149, 304**—*Culpable homicide not amounting to murder—Unlawful assembly, offence committed by a member of.*

B. reported to the Police that she had been assaulted by *F.* and others. The Police declined to take action and referred her to a Magistrate. The accused *F.* and his companions went to *B.'s* house to taunt her on her failure to obtain any satisfaction from the Police. A tenant of *B.*, who was in *B.'s* house at the time, took up a stick and came out and abused and threatened the intruders but *F.* struck him on the head with a *chhavi* from which he died. *F.* was convicted under section 304, Indian Penal Code, and his companions under section 149 read with section 304 of the Indian Penal Code:

Held, that *F.* was rightly convicted but that his companions must be acquitted, because none of them took any part in the assault at *B.'s* house. Their going to *B.'s* house to jeer at her did not make them members of an unlawful assembly. FAUJA SINGH *v.* EMPEROR, 55 P. L. R. 1911; 10 P. W. R. 1911 CR.
643

———— ———**s. 153A** 948

———— ———**s. 153A**—Intention to provoke feelings of enmity between Christians and Buddhists—Rights and duties of religious preachers.
789

———— ———**ss. 161, 165**—Illegal gratification
156

———— ———**s. 163** 577

———— ———**s. 193**—Perjury—Contradictory statement explainable
121

———— ———**s. 193**—*Perjury—Criminal Procedure Code (Act V of 1898), s. 195—Sanction to prosecute—Incorrect statement in answer to irrelevant question—Intention—Mistake.*

A witness was prosecuted and convicted for having made a false statement in which he disclaimed knowledge of a report previously made by a *zaildar* in another matter two months previously. He had then made a statement to the *zaildar* in an inquiry under section 202 of the Criminal Procedure Code, ending in dismissal of the complaint under section 203. When called to account later on, he at once admitted that he had made a mistake:

Held, that the conviction must be set aside. In such cases sanction to prosecute should not be given. The answer given by the witness may have been literally true. He could not be punished for not giving a more detailed answer even if he remembered the circumstances of the *zaildar's* inquiry, which he might well have forgotten for the moment when confused by questions having no immediate bearing on the point as to which he was being examined. If the Court thought that there was a suppression of truth on the witness's part, it ought to have cleared the matter up at once by giving him an opportunity of explaining more fully and pointing out that he seemed to be making a mistake. There was clearly no intention of giving false evidence. Intention was the essence of the offence and could not be presumed in this case. RATTAN SINGH *v.* EMPEROR, 72 P. L. R. 1911; 14 P. W. R. 1911 CR.
840

———— ———**s. 196** 616

Penal Code—contd.

———— ———**ss. 210**—*Fraudulent execution of decree—Sanction to prosecute—Criminal Procedure Code (Act V of 1898), s. 195.*

In an application for execution of a decree the decree-holder (accused) made no mention of having received a certain sum of money from the judgment-debtor three days previous to the application. The Court executing the decree sanctioned prosecution of the decree-holder for an offence under section 210 of the Indian Penal Code. It was contended that the sanction should be revoked for (1) the sum of money was made over to the decree-holder merely as a deposit, (2) the warrant applied for was never in fact issued and the judgment-debtor suffered no loss and was put to no disgrace and the interests of justice did not require a prosecution and (3) in any case there was no completed offence under section 210, Indian Penal Code:

Held, that the sanction was properly granted. CHIMAN LAL *v.* GHULAM MOHI UD-DIN, 59 P. L. R. 1911
646

———— ———**ss. 283, 114**—*Obstruction—Public street—House-holder—Reasonable right to carry on trade.*

Ordinarily, every shop-keeper has a right to exhibit his wares in any way he likes in his shop, but he must exercise the right so as not to cause annoyance or nuisance to the public.

The manner of the exhibition complained of as a nuisance must be necessary for the purposes of business in the sense that without it the business could not be carried on reasonably.

In a case of doubt or difficulty, the private reasonable right of a house-holder to carry on his business must yield to the public right or user of the street. EMPEROR *v.* NOOR MAHOMED, 13 BOM. L. R. 209
804

———— ———**ss. 299, 300**—*Culpable homicide not amounting to murder—Provocation.*

Where a person came out in a challenging manner to meet the accused and they had a fight in the course of which the father of the accused and himself were stabbed, whereupon the accused struck the challanger a blow which caused his death:

Held, that the offence committed was culpable homicide not amounting to murder, as there was grave provocation enough to deprive the accused of self-control and there was great probability that the accused acted while he had lost his self-control. MULUGAYA KADAN *v.* EMPEROR, 2 M. W. N. 275; 9 M. L. T. 480
262

———— ———**s. 300** 262, 852

———— ———**s. 302** 852

———— ———**s. 302**—*Murder—Killing by repeated blows—Husband murdering wife on suspicion of misconduct—Punishment—Transportation.*

The fact that a person is killed with repeated blows conclusively negatives the plea that there was no intention to kill the deceased or that the deceased was killed by her mistake.

A. murdered his wife. He alleged that he caught her in the act of adultery with one *S.* whom only he intended to kill. From the evidence it appeared that there was doubt about the immediate circumstances under which the crime was committed and that there was indication of misconduct on the part of the deceased wife:

Penal Code - contd.

Held, that although the accused should be convicted of murder, the Court was justified in the circumstances in not imposing the capital sentence. RAKHIA v. EMPEROR, 157 P. L. R. 1911 **119**

——— ——— **s. 304**—Culpable homicide not amounting to murder **643**

——— ——— **s. 304** **852**

——— ——— **s. 323** **278**

——— ——— **s. 325** **852**

——— ——— **s. 332** **278**

——— ——— **s. 341** —*Emigration agents refusing to permit intending emigrant to leave emigration depôt—Offence—Wrongful restraint.*

Prosecution Witness No. 1 was presented as an emigrant at Messrs. Binny and Co.'s Emigration Depôt and he was treated as such, receiving meals and an advance of money.

When he desired to leave the Depôt, the accused, a watchman in the employ of Messrs. Binny & Co., prevented him from leaving:

Held, that the accused was guilty of wrongful restraint under section 341, Indian Penal Code. PUBLIC PROSECUTOR *v.* SHEIK AHMAD, 21 M. L. J. 439; 2 M. W. N. 369 **107**

——— ——— **s. 355** **959**

——— ——— **s. 361** — *Kidnapping — "Lawful guardian," meaning of—Purchaser of a minor girl from her husband is a lawful guardian.*

The husband of a minor girl, under 16 years of age, sold her to one *S.*: while she was living with *S.* she was persuaded by the petitioner to leave his house:

Held, that for the purposes of section 361, Indian Penal Code, *S.* was the lawful guardian of the minor girl and that the petitioner was consequently guilty of kidnapping her from lawful guardianship

The term "lawful guardian" does not include a person who has himself gained possession of the minor by an offence under section 361, Indian Penal Code. But it does include not only the parents or relations, in whose house the minor lives and is brought up, but any other person with whom the minor resides by the consent, express or implied, of those who have the higher legal right.

Empress v. *Pamentle*, 8 C. 971, applied.

Queen v. *Baldeo*, 2 N.W.P.H.C.R. 286, distinguished. FATTI *v.* EMPEROR, 7 P. R. 1911 CR; 31 P. W. R. 1911 CR. **97**

——— ——— **ss. 362, 366**—*Abducting with intent to cause defilement.*

A person who compels a girl to go with him with intent to have sexual intercourse with her commits an offence punishable under sections 366 and 362 of the Indian Penal Code. EMPEROR *v.* RALI UDAYAN, 9 M. L. T. 406 **290**

——— ——— **s. 363** — *Kidnapping — Lawful guardian—Complaint by* de facto *guardian.*

A *de facto* guardian of a minor, whose guardianship is not against the wishes of the *de jure* guardian, is a lawful guardian within the meaning of section 363, Indian Penal Code.

Therefore, a charge of kidnapping is sustainable on the complaint of the father of a minor, alleged to have been kidnapped, the father acting as the minor's *de facto* guardian and such guardianship not having been proved to be against the wishes of the husband of the minor. VELAGUPUDI APPAYYA *v.* EMPEROR **281**

Penal Code—contd.

——— ——— **ss. 363, 355**—*Kidnapping committed in British territory and offence of shoe-beating committed in Nepal territory—Certificate granted by Political Officer in Nepal only in respect of kidnapping—Magistrate convicts the accused under s.* 355 *only—Jurisdiction—Criminal Procedure Code (Act V of* 1898), *ss.* 188, 227.

K. was kidnapped in British India and shoe-beaten within the territory of Nepal The Political Officer in Nepal granted a certificate under section 88, Criminal Procedure Code, to the effect that a charge under section 363 of the Penal Code ought to be inquired into against the accused in British India. The Magistrate who tried the case acquitted the accused under section 363 but convicted him of shoe-beating under section 355 of the Code:

Held, that the Magistrate had jurisdiction to convict the accused under section 355. The certificate granted by the Political Officer under section 188 of the Criminal Procedure Code, in respect of a certain set of facts, covered every charge which the facts disclosed in the proceedings would suffice to sustain. The Magistrate was not restricted to the section which was mentioned in the certificate. KRISHNANATH TEWARI *v.* EMPEROR, 8 A. L. J. 525 **959**

——— ——— **s. 366** **290**

——— ——— **s. 395** **282**

——— ——— **ss. 395, 396 and 400**—*Dacoity—Habitual association for purposes of committing dacoity—Criminal Procedure Code (Act V of* 1898), *s.* 239—*Joint trial—Same transaction—Sentence.*

Fourteen persons were tried at one trial and convicted of an offence under section 400, Indian Penal Code, for having formed a gang for the purpose of habitually committing dacoity. Between the 7th March 1908 and 15th December 1909, four serious dacoities were committed at four different places and in two of these, dacoity was accompanied by murder. The accused, it was alleged by the prosecution and found proved, took part in one or more of these dacoities:

Held, that the joint trial of all the accused for the offence under section 400, Indian Penal Code, though not illegal, was improper. It would have been better to try separately the accused persons for having committed offences under sections 396 and 397, Indian Penal Code, in respect of dacoities in which it was alleged they took part.

If it is established that a gang, however small in number, was formed for the purpose of habitually committing dacoity, all persons who thereafter joined that gang in one or more cases come within the purview of section 400 of the Indian Penal Code.

In cases under section 400 of the Indian Penal Code against a gang consisting of desperate men prepared to proceed to all lengths in carrying out their crimes, the heaviest possible sentences should be passed. In awarding sentences the Court ought to consider not so much whether particular offenders were concerned in only one or more of the dacoities committed by the gang, as whether it was clearly established that they did in fact join a recognised gang. GHULAM MUSTAFA *v.* EMPEROR, 68 P. L. R. 1911 **833**

Penal Code—concld.

——— —— **s. 396** **684, 833**

——— ——**s. 400**—Habitual association for the purpose of committing dacoity. **833**

—— ——**s. 401**—*Gang associated for habitually committing theft or robbery—Proof—Wandering tribe—Liability of individual members—Parents and children.*

For the purposes of section 401 of the Indian Penal Code it must be clearly established, either by direct evidence or by facts from which the inference may be legally drawn that the members composing a gang have combined or come together for the purpose of habitually committing theft or robbery.

The fact that several members of a gang of a wandering tribe were dishonest and did commit thefts and other crimes is not in itself sufficient to show that the purpose for which they had combined was to habitually commit theft.

Dukharan v *King-Emperor*, 7 O. C. 163; *The Public Prosecutor* v. *Bonigiri Pottigadu*, 32 M 179; 5 M. L. T. 10; 9 Cr. L. J. 567; 2 Ind. Cas. 307, referred to

The mere fact that the women and children belonging to such gang lived with adult males of the gang, is insufficient for a Court to hold that they were associated with their husbands and parents for the purpose of habitually committing theft. The fact that some of the members of such gang were guilty of theft and burglary does not establish that the association of the gang was one which was brought about for the purposes contemplated by section 401, Indian Penal Code. AJITA *v.* EMPEROR **32**

——— ——— **s. 420** **114**

——— ——— **s. 471** **616**

——— ——— **s 482**—*Merchandise Marks Act (IV of 1889), s.* 15—*Prosecution time-barred - Interpretation of statutes.*

The accused was prosecuted once in 1908 and then in 1910 under section 482, Indian Penal Code, for using a false trade-mark, the charge against him being that he sold oil which was not oil manufactured by the Burma Oil Company, Limited, in second-hand tins of that Company's make without obliterating the Company's trade-mark on the tins and he was both times acquitted. When the Company by their Agent lodged a fresh complaint alleging the commission of a fresh offence by the accused:

Held, that the complaint was barred under section 15 of the Merchandise Marks Act.

When the language of a statute in its ordinary meaning and grammatical construction leads to a manifest contradiction of the apparent purpose of the enactment, a construction may be put upon it which modifies the meaning of the words.

The intention of the Legislature will be frustrated if it is held that the owner of a trade-mark can stand by for several years while his trade-mark is being infringed continuously and then bring a criminal complaint in respect of some recent instance in which there has been an infringement. To interpret the section in that way would reduce its provisions to a nullity, for it would entirely remove the bar of limitation except in cases where the series of infringements has actually ceased.

Ruppel v. *Ponnusawmy Teran*, 22 M. 488, followed. MAHOMED JEWA *v.* WILSON, 4 BUR L. T. 83 **787**

——— ——— **ss. 499, 500** **682**

Penalty—Enhanced rate of interest to be paid from the date of execution of bond under certain circumstances—Penal enhanced rate not to be disallowed entirely—Reasonable compensation to be allowed **572**

——— ——— ———Mortgage—Stipulation in the bond postponing the period of redemption in case the mortgagor fails to redeem within a specified period—Valid agreement **243**

Pensions Act (XXIII of 1871), ss. 4, 6—Muafi *land since British Government—Pension—'Grant of land revenue,' meaning of—Alienation.*

A village, granted to the ancestor of the defendant by a Hindu Raja long prior to the establishment of the British Rule, was held as *muafi*. The defendants mortgaged the village to the plaintiff, and on his suing, on foot of the mortgage, the defendants pleaded that the suit was not maintainable without a certificate under section 6 of the Pensions Act, 1871.

Held, that the grant of the village was neither a pension nor a grant of land revenue within the meaning of the Pensions Act, 1871, that it was an ordinary *muafi* which could be transferred by sale or mortgage and that the Pensions Act did not apply.

Ganpat Rao v. *Anand Rao*, 28 A. 104; *Lachmi Narain* v. *Mukund Singh*, 26 A. 6 7, referred to. MANNU LAL *v.* FAZAL IMAM, 8 A. L. J. 692 **353**

——— ———**s. 6** **353**

Perjury. *See* PENAL CODE, s. 193.

Personal inspection Judge not bound to record his view—The better procedure to record facts **914**

Photograph of under-trial prisoner—Practice condemned **582**

Plaint, amendment of. *See* AMENDMENT OF PLAINT.

——— ———not amended—Petition treated as part of plaint—Agreement to be specifically performed to be definite—Degree of certainty—Extrinsic evidence—Claim of specific performance found to be excessive—Where original claim found to be unsustainable **503**

——— ———Joinder or misjoinder of parties, whether justifies rejection of plaint **212**

——— ———Signing and verification—Plaintiff company incorporated in foreign country Signature and verification by person holding general power-of-attorney—"Principal officer." **141**

——— ———*Signature by plaintiff essential—Defect in signature, effect of—Appeal—Defect in signature no ground for interference—Amendment—Effect on limitation—Civil Procedure Code (Act V of* 1908), *s.* 99, *O. VI, r.* 17, *O., VII, r.* 14—"*Jurisdiction*", *meaning of.*

A plaintiff who resides within the jurisdiction of the Court in which he brings a suit must sign the plaint.

Gokul Das v. *Mullu*, 16 C. P. L. R. 103; *Chandramal* v. *Ganpat Rai*, 4 N. L. R 1 7, referred to.

The word "jurisdiction" in section 99 of the Civil Procedure Code judged from the point of view of locality, pecuniary value or the subject-matter of a suit, is equivalent to competency to try.

Matra v. *Hari*, 17 C. 155; *Mohesh* v. *Jamiruddin*, 28 C. 324, followed.

Where a suit is in fact filed with the knowledge and by the authority of the plaintiff, a defect in the signature is a mere irregularity which is no ground for interference in appeal.

Plaint—concld.

Basdeo v. *Smidt*, 22 A. 55 and *Rakhal* v. *Secretary of State for India*, 10 C. W. N. 841; *Maharaja of Rewah* v. *Swami Saran*, 25 A. 635, followed.

The want of a proper signature is not included in Order VII, rule 11, among the circumstances which necessitate rejection of a plaint; and Order VI, rule 17, enables amendment of a plaint to be effected at any stage of the proceedings. The inference from these provisions is that a plaint cannot be considered as void and inadmissible until the defect in signature is removed.

Basdeo v. *Smidt*, 22 A. 55; *Maharaja of Rewah* v. *Swami Saran*, 25 A. 635, followed.

The date of amendment of a plaint is immaterial for purposes of limitation, unless the time expressly allowed by the Court for amendment has been exceeded.

Maharaja of Rewah v. *Swami Saran*, 25 A. 635, followed. DURGAGIR v. KOLLU, 7 N. L. R. 33 **731**

Pleader's fee, method of calculating—Pre-emption suit **38**

——— **right** to appear in an inquiry under s. 476, Criminal Procedure Code **740**

Pleadings—Assignment admitted by assignor—When can be impugned by a third party **226**

——— Mortgage Purchaser of equity of redemption—Whether entitled to plead unconscionable bargain in a suit by mortgagee **14**

——— ——— Power of Court to add fresh issue—New plea should not be allowed after remand **230**

——— ——— Practice—Amendment of plaint—Contradiction—Raising an objection by Court **991**

——— ——— *Onus on defendant—Plaintiff producing his evidence without waiting for the evidence of the defendant—Whether plaintiff can rely upon the plea that defendant has not discharged his onus.*

Where the onus is upon the defendant to prove a certain fact but the plaintiff without waiting for the defendant's evidence takes upon himself to prove it, he cannot subesquently say that the defendant did not discharge his onus.

Makand v. *Bahori Lal*, 3 A. 824, followed. SAJAN KUNWAR v. JOTI PRASHAD **223**

——— *Plaint and written statement both defective—Proper course—Fraud must be pleaded specially—Transfer of Property Act (IV of 1882, s. 53—Fraudulent transfer—Intent to defeat or delay creditors*—Mala fide *sale.*

When both a plaint and written statement are defective, the proper course is to either return the plaint for amendment and require a fresh written statement in reply to the amended plaint, or to examine the parties in Court with a view to framing proper issues.

A party who relies upon fraud must both plead and prove it. He is bound to give particulars of the alleged fraud and can succeed upon proof of the fraud as alleged and not of any other kind of fraud.

Where, however, the question as to the *bona fide* nature of a sale was not raised in the pleadings: *Held*, the lower Appellate Court did not exceed its powers in framing issues on this question which, though not raised in the pleadings, had governed the case from the first.

Pleadings—concld.

Where a judgment-debtor soon after a money-decree had been passed against her sold her land for an inadequate price to an employee of her Advocate's father who lent the money for the purchase, it is clear that her intention in selling the land for a sum considerably less than its value was to delay or defeat the claim of her judgment-creditor: according to the provisions of section 53 of the Transfer of Property Act, the sale was voidable at the option of the creditor so defeated.

Bhagwant v. *Kedari*, 25 B. 202; *Hakim Lal* v. *Mooshahar Sahu*, 34 C. 999; 6 C. L. J. 4 0; 11 C. W. N. 889, relied upon. MG. LU GALE v. VENKATACHELLAM CHETTY, 4 BUR. L. T. 118 **922**

——— ——— *Suit for money—Objection to maintainability of suit—Defendant's consent while giving evidence to plaintiff's recovering the amount, whether validates suit—Issue not framed—Right of Appellate Court to adjudge on questions, not the subject of an issue.*

Where in a suit an issue is framed as to plaintiff's right to maintain it, the mere consent of the defendant, while being examined as a witness, to plaintiff's recovering the amount, will not be sufficient to entitle the plaintiff to maintain the suit.

Where no issue on a matter is raised by the pleadings and the Court of first instance has not dealt with it, it is competent to the Appellate Court to entertain the question in appeal. MALAIKOLANDU CHETTIAR v. PERIA PILLAY **351**

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Possession. *See* ADVERSE POSSESSION

——— Title—*Jungle* lands **376**

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——— Decision on issue of fact—No specific issue framed **291**

——— Framing of issues **805**

——— ——Joinder of causes of action and parties—Suit for possession as heir—Impleading of different alienees in one suit—Trial of separate issues—Interlocutory judgment—Amendment of plaint **48**

——— Misjoinder of causes of action and parties—Defendants not prejudiced by misjoinder—Appeal **515**

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——— Onus on defendant—Plaintiff producing his evidence without waiting for the evidence of the defendant—Whether plaintiff can rely upon the plea that defendant has not discharged his onus **223**

——— Review—Privy Council Appeal **683**

——— ——— Revision—Preliminary order not contested till final orders passed in the case—Final order itself not contested—Preliminary order whether can be revised **183**

——— ——— Suit, proper trial of—First Court not taking defendant's evidence and dismissing suit—Lower Appellate Court decreeing claim upon the same evidence—Irregularity **441**

Practice—concld.

——— *Adjournment of cases—Consent of parties.*

A Court is bound, and ought at all times, to consider the convenience of parties and any contingency which may necessitate the postponement of a hearing. It is not, however, for the parties to decide when their suit shall be heard, as the regulation of its procedure is entirely the business of the Court. MADHOW PRASAD *v.* AJUDHYA PRASAD, 13 Bom. L. R. 161 **748**

——— *Personal inspection—Judge not bound to record his view—The better procedure to record facts.*

In a suit to establish a right of easement, witnesses examined for the plaintiff deposed that the passage as to which there was a dispute was still visible to the eye and that it could be seen at any moment, by any one visiting the spot. Both parties thereupon requested the Judge to visit the spot and see for himself whether the passage was still visible. The Judge visited the spot and in the presence of the Pleaders of the parties satisfied himself that the passage in question was not visible, he, therefore, disbelieved the plaintiff's witnesses and disallowed the claim without examining any of the defendant's witnesses.

On appeal to the High Court, it was urged that the Judge had erred in two respects,—

(1) that he put his view in the place of the evidence, which the law did not warrant;

(2) that he decided the case without putting on record the result of his view so as to give the plaintiff an opportunity of meeting the impressions formed by the Judge by his inspection:

Held,

Per *Chandavarkar, J.*—That there was no error in the procedure adopted by the Judge and there is no law which bound him to record his view and explain it to the parties before deciding the case.

Where the case is obscure and the evidence can be best understood by a personal view, it is the eyesight of the Judge that is the ultimate test.

Kossowji Issur v. *G. I. P. Railway Company*, 31 B. 381; 11 C. W. N. 721; 6 C. L. J. 5; 4 A. L. J. 461; 2 M. L. T. 435; 9 Bom. L. R. 671; 17 M. L. J. 347, distinguished.

Per *Heaton, J.*—It would be much better, though it is not necessary, that the Judge should record the circumstances which are observed at a local inspection, but he should record only facts and not impressions or inferences from facts. LUKMIDAS *v.* BHAIJI KHUSHAL, 13 Bom. L. R. 333 **914**

——— **(Criminal)**—Magistrate dealing with accused under s. 562 on conviction under s. 420—Re-trial not necessary—Remand of case for passing lawful sentence—Appellate or Revisional Court not competent to pass sentence **114**

Pre-emption. *See* PUNJAB PRE-EMPTION ACT.

——— Decree in favour of plaintiff on payment of certain specified sum—Judgment-debtor liable to costs—Set-off **454**

——— *Lis pendens*—Sale by vendee to person having equal right with the pre-emptor on latter's filing suit **842**

——— *Custom or contract*—Wajib-ul-arz, *evidentiary value of—Entry in* Wajib-ul-arz *of doubtful character—Whether such entry alone sufficient to establish custom—Burden of proof—Presumption.*

Pre-emption—contd.

In a suit for pre-emption, the plaintiff must establish the custom upon which he bases his claim. A doubtful entry in a *Wajib-ul-arz* as to pre-emption unsupported by any corroborative evidence is insufficient to establish the custom of pre-emption.

Returaji Dubain v. *Pahalwan Bhagat*, 7 A. L. J. 1049; 7 Ind. Cas. 680, referred to.

There is no class of evidence that is more likely to vary in value according to circumstances than that of *Wajib-ul-araiz*.

Thakur Anant Singh v. *Thakur Daya Singh*, 37 I. A. 191; 14 C. W. N. 770; 7 A. L. J. 764; 12 C. L. J. 36; 12 Bom. L. R. 504; 8 M. L. T. 79; 1 M. W. N. 324; 20 M. L. J. 604; 32 A. 363; 6 Ind. Cas. 787; *Mohammad Imam Ali Khan* v. *Hussein Khan*, 25 I. A. 161; 26 C. 81 *Parbati Kunwar* v. *Chandrapal Kuar*, 36 I. A. 125; 6 A. L. J. 767; 10 C. L. J. 246; 13 C. W. N. 1073; 11 Bom. L. R. 890; 2 O. C. 304; 31 A. 457; 4 Ind. Cas. 25; 5 M. L. T. 427; 19 M. L. J. 605, referred to. HARDWARI MAL *v.* BALDEO SAHAI, 8 A. L. J. 632 **448**

——— *Custom*—Mohalla Sathan, *in Lahore City—Conversion of house into* Dharmsala *subsequent to date of sale—Character of property at date of sale—Punjab Pre-emption Act (II of 1905), s. 13 (2).*

The custom of pre-emption in respect of houses obtains in *Mohalla Sathan* in the City of Lahore.

The character of the property at the date of sale determines the question whether sub-section 2 of section 13 of the Punjab Pre-emption Act applies to the property or not. If at the date of the sale, the property sold is a house, it is quite immaterial for the purposes of the sub-section whether subsequently to that date the house was converted into and used as a *Dharmsala*. KIRPA SINGH *v.* MAYA RAM, 22 P. R. 1911; 187 P. L. R. 1911 **848**

——— *Decree in favour of plaintiff on payment of certain specified sum—Judgment-debtor liable to costs—Set-off.*

In a pre-emption suit plaintiff's suit was decreed on payment of Rs. 324-12. The decree provided that if payment was made within a month, the plaintiff would get Rs. 9-11 as costs from the judgment-debtor. The plaintiffs paid Rs. 324 within the time fixed:

Held, that he was entitled to set-off the balance of annas 12 against the costs payable to him.

Ishri v. *Gopal Saran*, 6 A. 354; *Parmanand Raot* v. *Gobardhan Sahai*, 28 A. 676; A. W. N. (1906) 198; 3 A. L. J. 804, followed. BECHAI SINGH *v.* SHAMI NATH **454**

——— *Decree for pre-emption not providing for payment into Court—Payment of purchase-money out of Court, validity of—Oudh Laws Act (XVIII of 1876), s. 15.*

Under section 15 of the Oudh Laws Act a pre-emptor is bound to pay the purchase-money specified in the decree into Court; this obligation is independent of the question whether the decree does or does not expressly provide for payment into Court.

Bijju Singh v. *Madho Singh*, 8 O. C. 57, referred to. LATIF-UN-NISA *v.* ACHAMBHIT LAL, 14 O. C. 85 **721**

——— Lis pendens—*Exchange during pendency of suit—Transferee having superior right—Right time-barred on the date of exchange.*

The doctrine of *lis pendens* applies to an exchange of land, effected during the pendency of a suit, in favour of a person who has a superior right of pre-

Pre-emption—contd.

emption but whose pre-emptory rights have become extinguished on the date of exchange by lapse of time.

Mahmud v. *Khuda Bakhsh*, 26 P. R. 1908; 39 P. W. R. 1908, 145 P. L. R. 1908, distinguished. KARAM ALI *v.* SULTAN, 30 P. R. 1911; 187 P. L. R. 1911 **1007**

——— ——— ———Lis pendens—*A person having equal or superior right to pre-emptor buying property during pendency of suit—Application of the doctrine of* lis pendens *Punjab Pre-emption Act (II of 1905) s.* 14, *application of.*

The doctrine of *lis pendens* does not apply to a case where a person, having an equal or superior right to a plaintiff pre-emptor, asserts that right out of Court while the plaintiff's claim is pending in Court and the vendee-defendant re-sells the property to the former by a private sale in recognition of that right.

Section 14 of the Punjab Pre-emption Act applies only to cases in which several pre-emptors, in respect of one particular sale, are found by the Court to be equally entitled to the right of pre-emption. It does not apply to a case in which a pre-emptor is claiming to enforce his right of pre-emption by suit against an original vendee or a second vendee who has an equal right of pre-emption with such pre-emptor.

A. sold some land to *B.* on 12th June 1906. *B.* sold it to *C.* on 17th June 1907. On 9th June 1908 *D.* sued to pre-empt the sale in favour of *C*, on 11th June 1908 *C.* re-sold the land to *A.* in recognition of *A's* right of pre-emption. *A.* and *D.* had equal rights to pre-empt the sale to *C.* *A.* was impleaded as defendant in *D.*'s suit:

Held, (1) that as *A*'s right of pre-emption existed prior to the institution of *D*'s suit and as the re-sale in *A.*'s favour was effected in recognition of that right, the rule of *lis pendens* had no application.

Muhammad Khan v *Khuda Bakhsh*, 26 P. R. 1903, *Muhammad Khan* v. *Sardar*, 7 P. R. 1900; 5 Ind. Cas. 249, followed.

Ghasitey v. *Gobind*, 30 A. 467, not followed.

(2) That as there was only one pre-emtor *D.* before the Court, section 14 of the Pre-emption Act did not apply. SUNDAR SINGH *v.* SAJJAN SINGH, 164 P. L. R. 1911 **367**

——— ——— ———Lis pendens—*Sale by vendee to person having equal right with the pre-emptor on latter's filing suit—Punjab Pre-emption Act (II of 1905), s.* 14—*Vendor's right to select pre-emptor.*

Where on a pre-emptor filing a suit for pre-emption, the vendee sells the property to a person who possesses equal right of pre-emption, the doctrine of *lis pendens* does not apply, if the right of the subsequent vendee subsists at the date of sale to him, and is not time-barred, for no new right is created by the sale. In such cases, the provisions of section 14 of the Punjab Pre-emption Act may be used by the Court trying the case.

Mahmad Khan v. *Khuda Bakhsh*, 26 P. R. 1908; 145 P.L R. 1908; 39 P. W. R. 1908, followed.

Faiyaz Husain Khan v. *Prag Narain*, 29 A. 339; 5 C. L. J. 563; 17 M. L. J. 263; 9 Bom. L. R. 653; 2 M. L. T. 191; 10 O. C. 344; 4 A. L. J. 344; 11 C. W. N. 561, not followed. KARAM ILAHI *v.* HIRA, 74 P. L. R. 1911 **842**

Pre-emption—contd.

——— ——— ——— *Muhammadan Law*—Talab-i-istishad—*Declaration that* talab-i-mowasibat *had been performed—Omission fatal*

A pre-emptor in making the *talab-i-istishad* or formal demand before witnesses should refer expressly to the fact of *talab-i-mowasibat* or immediate claim having been duly made, for that is an essential condition of the validity of the assertion of the pre-emption.

Rujjab Ali v *Chundi Churn*, 17 C. 543 (F. B.) and *Jadu Singh* v. *Butan Singh*, 2 Ind. Cas. 207, followed. RATAN MANDAL *v.* AZIM MANDAL **352**

——— ——— ——— *Muhammadan Law*—Talab-i-mowasibat, *essentials of.*

To say "I am pre-emptor and my right extends to the land" is not sufficient to constitute a *talab-i-mowasibat* within the meaning of the Muhammadan Law. Such claim must be found in the words which constitute the *talab-i-mowasibat* either in express terms or by implication.

A mere expression or declaration of his right does not of itself go to show that the plaintiff wishes to enforce his right. MUHAMMAD ABDUL RAHMAN *v.* MUHAMMAD KHAN, 8 A. L. J. 270 **770**

——— ——— ——— *Muhammadan Law*—Talab-i-mowasibat—"Mera shufa", *whether constitutes valid demand.*

The words "*mera shufa*" repeated twice do not by themselves constitute a valid *talab-i-mowasiabat* under the Muhammadan Law.

Ahsanulhuq v. *Kalan*, 6 A. L. J. 15; 1 Ind. Cas 85; *Ahmad Shah Khan* v. *Abadi Begam*, A. W. N. (1897) 23; *Muhammad Yunis Khan* v. *Muhammad Yusuf*, A. W N. 1897) 93, distinguished. MAKHDUM BAKHSH *v.* MUHAMMAD NAZIR KHAN **143**

——— ——— ——— *Preferential rights of pre-emptors inter se—Classes of pre-emptors mentioned in the* Wajib-ul-arz alaltartib—*Construction of* Wajib-ul-arz.

In a *Wajib-ul-arz* the different classes of pre-emptors were mentioned '*alaltartib*', *i. e.*, one after another:

Held, that the right of pre-emption existed between the different classes of pre-emptors *inter se*, *i. e.*, one class of pre-emptors excluded another. SHEO BARAN SINGH *v.* BANWARI AAL **442**

——— ——— ——— *Refusal by pre-emptor to purchase at price offered under the belief that price was unreasonable - Loss of pre-emptive right.*

A pre-emptor does not lose his right by merely refusing to purchase at the price at which the property is offered to him because he honestly believed that that price was in excess of the real price.

Lajja Prasad v. *Debi Prashad*, 3 A. 236; *Amir Chand* v. *Ishar Das*, A. W. N. (1882) 46; *Bholi Bibi* v. *Fahima Bibi*, A. W. N. (1882) 137; *Karim Bakhsh* v *Khuda Bakhsh*, 16 A. 247, referred to. SRI KISHAN SINGH *v.* BACHA PANDE, 8 A. L. J 700 **626**

——— ——— ——— Wajib-ul-arz—*construction — Partition—Custom or contract—Variation—Rights* inter se.

The *Wajib-ul-arz* of 1853 of a village gave the right of pre-emption to three categories of persons: *First*, to the own brothers of the vendor or nephews having a common ancestor; *second*, to a co-sharer in the *patti*, and *third*, to co-sharers in another *patti*. The *Wajib-ul-arz* prepared in 1873, which was headed

Pre-emption – contd.

"Right of co-sharers *inter se* based upon custom or contract" provided as to pre-emption in the following terms: "If a share-holder wishes to transfer, he shall do so to his own brother, then to near relations, if they refused, then to co-sharers of the *patti* and after them to co-sharers in the village." After the preparation of the *Wajib-ul-arz* of 1873, the village was divided by partition. The pre-emptor was the brother but not a co-sharer of the vendor: *Held*, that he had no right of pre-emption.

Per *Stanley, C. J.*—The usage recorded in the two *Wajib-ul-araiz* was not the same. Consequently, as a custom must be constant and invariable, the *Wajib-ul arz* of 1873 did not record a custom of pre-emption. Therefore, no right of pre-emption existed after the expiry of the period of the Settlement of 1873.

Per *Banerji, J.*—The rights of pre-emption recorded in the *Wajib-ul-arz* of 1873 related to co-sharers *inter se*. The first category of pre-emptors must, therefore, be persons who not only fulfil the condition of being the own brothers of the vendor but must also be co-sharers of the vendor. JWALA SINGH *v.* SUMER CHAND, 8 A. L. J. 515 **1003**

——— Wajib-ul-arz—*Construction* — *Preferential rights between a near relation and a member of the same caste.*

A *Wajib-ul-arz* provided as follows:—"the right of pre-emption is given (1) to co-sharers who are near in blood to the vendor, (2) to other co-sharers of the same caste, (3) lastly to the co-sharers of the village:"

Held, that under the *Wajib-ul-arz* near relations had a preferential right over persons of the same caste. BHAGWAT DIN *v.* SHEO DIAL **40**

——— —Wajib-ul-arz—*Custom or contract —Presumption — Rebutting evidence—Register of transfers, whether admissible in evidence to prove the fact of transfers—Evidence.*

A register of transfers is admissible in evidence to prove the fact of transfers entered therein. The mere entry, however, in such a register that there have been transfers or sales, is not sufficient to rebut the presumption arising out of an entry in the *Waijb-ul-arz* regarding the prevalence of the custom of pre-emption in the village.

Returaji Dubain v *Pahalwan Bhagat*, 7 A. L. J. 1040; 7 Ind, Cas. 680, referred to. BADLI DAS *v.* PAJAN **225**

———Wajib-ul-arz, *evidentiary value of —Custom or contract.*

There is no class of evidence that is more likely to vary in value according to circumstances than that of the *wajib-ul-arz*.

In a suit for pre-emption based on custom the plaintiff produced only a *Wajib-ul-arz* which was not a clear record of custom, but on the contrary appeared on the face of it to be a record of a number of arrangements between the co-sharers adopted for the first time at the Settlement at which it was prepared:

Held, that it was not sufficient to establish the custom of pre-emption which the plaintiff wanted to set up.

Thakur Anant Singh v. *Thakur Durga Singh*, 37 I. A. 191; 14 C. W. N. 770; 7 A. L. J. 764; 12 C. L. J. 36; 13 O. C. 163; 32 A. 363; 6 Ind. Cas. 721; *Tofaluddi Peada* v. *Mohara Ali Shah*, 26 C. 78; *Muhammad Imam Ali Khan* v. *Hussain Khan*, 25 I. A. 161; 26 C. 81; *Parbati Kunwar* v. *Chandrapal Kunwar*, 36 I. A.

Pre-epmtion—concld.

124; 31 A. 457; 12 O. C. 104; 19 M. L. J 605; 10 C. L. J. 216; 6 A. L. J. 767; 13 C. W. N. 1073; 11 Bom. L. R. 890; 5 M. L. T. 427; 4 Ind. Cas. 25, referred to. DHIAN KUAR *v* DIWAN SINGH, 8 A. L. J. 786 **558**

——— Wajib-ul-arz – *Presumption—Custom or contract—Evidence rebutting presumption, sufficiency of.*

In a pre-emption suit the plaintiff relied upon two *Wajib-ul-araiz* of 1833 and 1860 which were *prima facie* evidence of custom. The defendant in order to rebut the presumption arising out of the *Wajib-ul-araiz* produced a *patwari* who deposed that he had been a *patwari* for 18 years and that he had never heard of the existence of a custom of pre-emption in the village:

Held, that such evidence was altogether insufficient to rebut the presumption. HARNARAIN NATH *v.* TILAK DUBE **233**

——— Wajib-ul-araiz—*Presumption as to custom or contract*—Kaifiat sarishta nizamat—*Rebutting evidence, sufficiency of.*

In a suit for pre-emption the plaintiff produced two *Wajib-ul-araiz* of 1833 and 1860 respectively, which *prima facie* raised a presumption in favour of the custom of pre-emption. The defendant to rebut that presumption produced a *kaifiat sarishta nizamat* which showed that prior to the preparation of the *Wajib-ul-arz* of 1833, the village was owned by a single proprietor. It, however, contained no entry as regards the Settlements of 1210 and 1213 *F.* The columns were blank and there was nothing to show whether there was any proprietor in those two years:

Held, that the information contained in *kaifiat sarishta nizamat* was not such as to enable the Courts to hold that it rebutted the *prima facie* evidence as to custom afforded by the *Wajib-ul-arz*. CHHOTKI *v.* RUDRA PRASAD **323**

———suit—Pleader's fee—Method of calculating **38**

——— Sale ostensible in favour of one person—Real purchaser another person—Active concealment—Fraud Limitation **114**

Prescription—Encroachment by tenant on landlord's lands not included in the lease—Landlord's knowledge of encroachment, whether necessary **575**

Presidency Small Cause Courts Act (XV of 1882), s. 38—*Application to Full Bench of Small Cause Court—Revision petition to High Court direct from a decision of a Presidency Small Cause Court Judge, whether lies—Civil Procedure Code (Act V 1908), s 115.*

The High Court will not, except in very special cases, interfere in revision with the decision of a Judge of the Presidency Small Cause Court, unless the party aggrieved has first applied to the Full Court of the Presidency Small Cause under section 38 of the Presidency Small Cause Courts Act, 1882.

Anglo v. *D'Angelis*, C. R. P. No. 81 of 1908, followed. *Pachai Perumal Chettiar* v. *Sampathu Chetty*, L. P. A. No. 60 of 1910, distinguished. SEETHAPATHY NAIDU *v.* LAKHSHMANA CHETTY **551**

———ss. 71, 75 **201**

Presidency Towns Insolvency Act (III of 1909), s. 15—*Insolvency Act (11 and 12 Vic. C. 21), s. 47—Debtor obtaining personal discharge—Right to apply again in respect of fresh debts.*

The petitioner who had filed an insolvency case in 1904 and had been granted his personal discharge, again filed a fresh petition of insolvency in respect of debts contracted subsequent to his personal discharge:

Held, that there was nothing in the Insolvency Act or in the new Act of 1909 to prevent an undischarged debtor from filing a fresh petition in respect of fresh debts.

Morgan v. *Knight*, (1864) 33 L. J. (C. P.) 168; 15 C. B. (N. S.) 669; 9 L. T. 803; 12 W. R. 428; *Ex parte Watson*, E. L. R. 879 (C. D.) XII P. 380; *Dossa Gopal* v. *Bhanji Damji*, 26 B 171, relied upon CHARLES STEVENS, *In the matter of*, 4 BUR L. T. 87 **792**

Presumption. *See* AGRA TENANCY ACT, s. 158; HINDU LAW.

——— ——— ———as to the correctness of *Patwari's* papers **280**

——— ——— ———of fixity of rent **163, 164**

——— ——— Possession—Tenant-in-common **554**

——— ——— ——— Trespasser—Constructive possession - Trespasser of a part not a trespasser of the whole **742**

Principal and Agent—*Gumasta*—Acknowledgment after master's death—Death not known to the creditor—Estate of master bound by act of *gumasta* **858**

——— ——— ———Husband and wife—Presumption that husband is the agent of the wife so long as they live together—Presumption rebuttable **919**

——— ——— ———Money directed by vendee to be paid to a third party—Waiver of portion by payee, whether enures for the benefit of the person authorising payment **93**

Partnership — Lender and borrower—Contract — Construction — Conduct of parties **250**

——— ——— ——— ———Transfer of non-transferable holding—Acceptance of rent by *gomasta* of landlord from transferee - Whether landlord bound by receipts—Authority of *gomasta*—Burden of proof—Scope of agent's authority—Decision on particulars facts **456**

Printer and Publisher—Responsibility for seditious article—Absence when article published—*Bona fides* **954**

Printing Presses and Newspapers Act (XXV of 1867), s. 7—*Printer and publisher—Responsibility for seditious article - Absence when article published*—Bona fides.

The declared printer of a newspaper is responsible for seditious articles published therein unless he can establish that in fact he had nothing to do with them.

The editor of a newspaper was committed to jail on December 22nd, 1907, and the appellant in this case gave his declaration on June 16th, 1908. The editor was released on December 22nd, 1908, and resumed his work. The appellant was absent from the place of publication on August 28th, 1909, and thirteen days after one seditious article was published. The appellant returned on November 29th, 1909, but three days previously another seditious article appeared. The appellant took no interest in the paper and was occupied in his own business as a photographer; he, however, allowed his name to remain as the printer:

Held, that he had failed to establish the *bona fides* of his absence from the place of publication and that legally he was guilty under section 124A, Indian Penal Code; SURENDRA PROSAD *v.* EMPEROR, 38 C. 227 **954**

Priority—Title of un-registered purchaser—Purchaser at rent sale **899**

——— ——— ———Unregistered mortgage—Subsequent registered sale--Vendee having no notice of the mortgage **233**

——— ——— **of title**—Mortgage decree by landlord **54**

Private International Law—*Kuri* chit conducted in British India—Foreigner a chit holder—Pledge of receipt in foreign territory—Sale of pledged interest by foreign Court—Valid **665**

——— ——— ———Promissory note executed in a Native State—Stamp affixed according to the laws of that State—Admissibility in evidence in British Indian Court **247**

Privy Council Appeal—Consolidation of suits—Pecuniary value **967**

——— ——— ———Pecuniary valuation—Foreclosure suit—Subject-matter **990**

——— ——— ———Receiver, order appointing—Certificate—Fit case for appeal **439**

——— ——— ——— *Civil Procedure Code (Act V of 1908), s. 09 clauses (a) and (c), O. XLI, r. 5—Order refusing to stay execution—"Final order passed on appeal" "Fit case for appeal to His Majesty"*

An order of the High Court under rule 5 of Order XLI, refusing to stay proceedings in execution of a decree, is not a final order passed on appeal by the High Court within the meaning of clause (*a*) of section 109 of the Civil Procedure Code.

Under the circumstances of the case, the High Court were of opinion that it did not involve any question of such special, public or private importance as would justify a certificate under clause (*c*) of section 109 of the Civil Procedure Code. SRINIBASH PROSAD SINGH *v.* KESHO PROSAD SINGH, 13 C. L. J. 681 **444**

——— ——— ——— ———*Practice—Review.*

The Privy Council allowed a review of their first judgment which they set aside. ISHWAR SHYAM CHAND JIU *v.* RAMKANAI GHOSE, 15 C. W. N. 417; 9 M. L. T. 448; 8 A. L. J. 528; 13 BOM L. R. 42 : 33 A. 526; 14 C. L. J. 238 **P. C. 683**

Probate and Administration Act (V of 1881) **130**

——— ——— ——— ———, scope and object of **993**

——— ——— ——— ——— **s. 50** **717**

——— ——— ——— ———**s. 90** **269**

Probate Court—Power of Court to give possession **993**

Promissory note silent as to rate of interest—Admissibility of oral agreement **315**

Promissory note—concld.

——— —— ——— ——— *executed in a Native State —Stamp affixed according to the laws of that State—Admissibility in evidence in British Indian Courts—Private International law.*

A promissory note executed in favour of His Highness the Nawab of Rampur at Rampur on an unstamped paper was *prima facie* in favour of His Highness in his capacity of Nawab of Rampur, and was, therefore, admissible in evidence in a suit brought upon it in British India as it was in accordance with the law in existence at Rampur where it was executed. AMINA BEGAM *v.* NAWAB OF RAMPUR, 8 A. L. J. 566 **247**

——— ——— ——— ——— ——— ——— *Partial discharge—Burden of proof.*

The *onus* of proving partial discharge of the amount due under a promissory note is on the person pleading such partial discharge. VENNAM PITCHAYYA *v.* GOGINENNI RAMAKRISHNAYYA, 9 M. L. T. 314 **674**

——— ——— ——— ——— ——— *Subsequent written agreement not to enforce it—Payee bound by agreement—Negotiable Instruments Act (XXVI of 1881), ss. 32, 120.*

The payee of a promissory note, if he has made a contract to the contrary with the maker, is not entitled to sue on the note unless he has performed the conditions of the contract. The maker can set up against the payee a subsequent written agreement by the latter not to enforce it.

Somasundaram Chettiar v. *Narasimha Chariar*, 29 M. 212 at p. 216; 16 M. L. J. 103, dissented from.

Thimbleby v. *Barrow*, 7 L. J. Ex. 128; 3 M. and W. 210 and *Raw* v. *Jones*, 34 L. J. C. P. 306; 19 C. B. (N. S.) 416; 11 Jur. (N. S.) 812; 12 L. T. 737; 13 W. R. 1018, not applied. SHAIKH IMAM *v.* ISHAK ALI, 7 N. L. R. 39 **734**

——— ——— ——— ——— ——— *Suit on unstamped pro-note —Construction of the word "Than"—No cause of action as for money lent.*

Where a loan and the execution of a pro-note are contemporaneous and constitute one transaction, a suit based on the original consideration, if the pro-note is inadmissible for insufficiency of stamp, is not maintainable.

Pothi Reddi v. *Velayuda Sivan*, 10 M. 94, referred to and followed.

Held, on a construction of the document in this case, that the word '*Than*' meant 'you' and that the document was a pro-note. CHINNAPPA PILLAI *v.* MUTHURAMAN CHETTY, 9 M. L. T. 281 **669**

Provincial Insolvency Act (III of 1907), ss. 16 (4), 44 (2) (c)—*Property—Personal earnings—Earnings between adjudication and discharge.*

The word 'property' in section 16 (4) of the Provincial Insolvency Act (III of 1907) is not intended to exclude personal earnings, over and above what is necessary for the debtor's adequate support.

In re, Roberts, (1900) 1 Q. B. 122; 69 L. J. Q. B. 19; 48 W. R. 132; 81 L. T. 467; 16 T. L. R. 29; 7 Manson 5 and *In the matter of, C. M. J. Donghue*, 19 B. 232, referred to.

Under section 44 (2) (*c*) the Court when giving an order of discharge may make conditions as to future earnings, and *a fortiori* the Court can make an order as to earnings after adjudication but before discharge. JAMNADAS *v.* VINAYAK, 7 N. L. R. 19 **698**

——— ——— ——— ——— ——— **s. 44 (2) (c) 698**

Provincial Small Cause Courts Act (IX of 1887), s. 23—Defect of order **267**

——— ——— ——— ——— **s. 25 847**

——— ——— ——— ——— **s. 25**—Power of High Court **8**

——— ——— ——— ——— **Sch. II, art. 31**—*Suit for account, what is—Account between silk merchant and dyer and dresser of silk.*

If in order to grant relief to the plaintiff, it is necessary to take accounts, the suit is one for accounts within the meaning of Article 31 of the Provincial Small Cause Courts Act, although the plaintiff may have chosen to put a definite money value upon his claim.

The plaintiff, a silk merchant, advanced money to the defendant from time to time. Out of the money so advanced the defendant purchased materials for dyeing and dressing and retained the balance as remuneration for work done. The plaintiff kept an account book. The accounts were not adjusted. The plaintiff brought this suit for recovery of Rs. 307, on the allegation that upon settlement of accounts that sum would be found due from the defendant:

Held, that the suit was one for account within the meaning of Article 31 and that the Small Cause Court had no jurisdiction. KAILAS CHANDRA *v.* KIRENENDA GHOSE **883**

Punctuation, inference from, in interpreting statutes **487**

Punishment—*Sentence—Effect of previous convictions—Sentence for a fresh offence—Offence of a petty nature.*

Where the aggregate value of property stolen by the accused was only Rs. 3 but, on account of his previous convictions, he was sentenced to 7 years' transportation:

Held, that the offence was of a very petty kind, and the sentence of 7 years' transportation was altogether disproportionate even after taking the accused's previous convictions into account. NGA PO HNYIN *v.* EMPEROR, 4 BUR. L. T. 68 **772**

——— ——— ——— *Sentence—Wounds inflicted with a dah—Application for compromise and the complainant's treatment as an out-door patient considerations for reduction of sentence.*

Where, in the course of a trivial quarrel, the accused inflicted a *dah* wound on the complainant's right buttock and was sentenced to 4 months' rigorous imprisonment and on appeal the senior Magistrate reduced the sentence to one month's imprisonment, merely on the grounds (1) that a petition to compound the offence was filed by the complainant and (2) that the complainant was treated as an out-door patient:

Held, that the original sentence was appropriate and the senior Magistrate was ill-advised in reducing the sentence. EMPEROR *v.* MYA DIN, 4 BUR. L. T. 69 **773**

Punjab Courts Act (XVIII of 1884), s. 70 (1) (a) 133, 725

——— ——— ——— ——— ——— **s. 70 (1) (a), (b) 36**

Punjab Land Revenue Act (XVII of 1887), s. 16 299

——— ——— ——— ——— ——— **s. 111** — *Partition — Adhsalidar, right to partition—Not a joint owner or tenant where original proprietor known—Adhsali, definition of.*

Where the original proprietor of a holding is known

Punjab Land Revenue Act—concld.

an *adhsalidar* in the Kangra District is neither a joint owner nor a joint tenant within the meaning of section 111 of the Punjab Land Revenue Act. Consequently, he is not entitled to seek a partition of the holding, even if he was erroneously recorded as proprietor in some revenue records.

Bhagwat Sahai v. *Bipin Behari Mitter*, 37 C. 918 (P.C.); 14 C.W. N. 962; 12 C. L. J. 240; 8 M L.T. 228; 1 M. W. N. 691; 7 A. L J 1137; 12 Bom. L R. 997; 20 M. L. J. 907; 7 Ind. Cas. 549, referred to.

Adhsali implies partnership in payment of revenue only. GADDU *v.* RIJHA **147**

——— — — — — **Chap. IX, s. 117** **902**

——— — — — — — **s. 158 (XVII) 902**

Punjab Pre-emption Act (II of 1905), ss. 4 and 5—*Custom, inquiry into, precluded - Sale - Nature of transaction—Creation of occupancy-rights—Pre-emption.*

Section 5 of the Punjab Pre-emption Act precludes inquiry into custom where agricultural land is concerned, while section 4 of the Act further expressly limits pre-emption to cases of sales. The initial question to be determined in cases of pre-emption, therefore, is whether the particular transaction is or is not a sale as contemplated by the Act.

No right of pre-emption can be set up in cases where a proprietor grants occupancy-rights to his tenants or even to a stranger. HAJI *v.* GAULAM SHAH, 121 P. L R. 1911; 37 P. R. 1911; 104 P. W. R. 1911 **4**

——— — — — — — **s. 5** **4**

——— — — — — — **s. 6**—*Custom of pre-emption*—Mohalla *Acharjian*, *Gumti* Bazar, *Lahore city*—*Relative value of instances in which custom is admitted or found to be established and in which custom is denied but the dispute is compromised.*

The custom of pre-emption does not obtain in *Mohalla* Acharjian which is part of the recognised sub-division of *Bazar* Gumti, in Lahore City.

Cases in which vendees admit the existence of a custom of pre-emption are as valuable as cases in which the Court finds the existence of such custom established. But between such cases and those in which the vendee after denying the existence of the custom eventually is induced to come to terms with the pre-emptor and to compromise the dispute there is a very substantial distinction. A litigant may be confident that he is in the right and that the other party has no just claim against him but he may nevertheless think it prudent to accept an amicable settlement of the dispute. DURGA DEVI *v.* RAMZAN, 127 P. L. R. 1911 **330**

——— — — — — — **s. 6**—*Custom of pre-emption of houses*—Mohalla Mimaran *or* mohalla Pansarian in *Kaithal*—*Sub-division*—*Evidence Act (I of 1872)*, *s.* 13—*Instances of pre-emption in the neighbouring* mohallas, *what may indicate*—*Uncontested instances, value of.*

The custom of pre emption of houses exists in *Mohalla* Mimaran, identical with *Mohalla* Pansarian, a sub-division of Kaithal.

Instances of pre-emption in the neighbourhood of a *mohalla* may indicate the existence of the custom of pre-emption in that *mohalla*.

Dhan Devi v. *Kanshi*, 38 P. R. 1906; 89 P. L. R. 1906; *Maman* v. *Ghaunsa*, 99 P. R. 1906; 130 P. L. R. 1906; *Abdulla Beg* v. *Walaiti Begam*, 120 P. R. 1906; *Manohar Lal* v. *Paras Ram*, 67 P. R. 1907; 51 P. L. R. 1907; 38 P. W. R. 1907 and *Allah Ditta* v. *Raj Kumar*, 138 P. R. 1907, followed.

Punjab Pre-emption Act—concld.

Uncontested instances are by no means worthless evidence of the existence of a right to pre-empt.

Muhammad Nawaz Khan v. *Musammat Bobo Sahib*, 44 P. R. 1903; 75 P.L.R. 1903 and *Than Singh* v. *Tara Singh*, 26 P. R. 1907, followed. MUHAMMAD HUSAIN *v.* GHULAM MUHAMMAD, 138 P. L R. 1911 **240**

——— — — — — **ss. 13(1), seventhly, and 13 (2) (a)**—*Owner of a shop, whether entitled to claim pre-emption—Pre-emptor executing an agreement to sell his own property, effect of.*

The fact that shops are excluded from pre-emption by section 13 (2) *(a)* of the Punjab Pre-emption Act does not disentitle the owner of a shop from claiming pre-emption by virtue of being its owner.

"Immoveable property" in section 13 (1), *seventhly*, of the Act includes a shop.

While a pre-emptor may lose his right of pre-emption if he parts with the property as owner of which he claims the right, a mere agreement to sell such property does not destroy his right. GHULAM HUSSAIN *v.* GANGA SINGH, 93 P. W. R. 1911 177 P. L. R. 1911 **404**

——— — — — — **s. 14** **842**

——— — — — — **s. 14,** application of **367**

Purchase by third party in execution—Rent-decree by landlord—Purchase by landlord in execution of rent-decree **54**

Quasi-contract—Goods supplied to wife not approved of by husband—Liability of husband to pay for goods purchased by wife—Authority of wife, express or implied, to purchase goods—Goods concealed from husband, liability to pay the price of **9**

——— — — — — Money deposited in Court *in usum jus habentis*—Withdrawn by person not entitled to it—Liability **730**

Question of fact—Acquisition of title by widow by presumption **63**

——— — — — — Whether one tenant represents tenancy **116**

Railways Act (IX of 1890), s. 77—*Suit for compensation against Railway Company for non-delivery of goods—Notice of claim, proof of—Offer by Railway Company to pay — Waiver — Estoppel — Limitation Act (IX of 1908), Sch. I, art. 31.*

In a suit for compensation for non-delivery of goods consigned to a Railway Company for carriage, the plaintiff must prove that the defendant Company was served with notice of his claim as contemplated in section 77 of the Indian Railways Act. The fact that an offer was made by the Railway Company to pay a certain amount in satisfaction of the plaintiff's claim would not estop the Railway Company from raising the plea of notice.

Great Indian Peninsula Railway Company v. *Chandra Bai*, 28 A. 552; A. W. N. (1906) 101; 3 A. L. J. 329, referred to.

Article 31 of the Limitation Act, 1908, would apply to a suit against a Railway Company for compensation for non-delivery of goods. GREAT INDIAN PENINSULA RAILWAY *v.* GANPAT RAI, 8 A. L. J. 543 **122**

Rangoon Police Act (IV of 1899), s. 30, cl. (c)—*Summary trial—Record must show ingredients of offence charged—Venue of trial material only where accused is prejudiced—Criminal Procedure Code (Act V of 1898), s. 531.*

Where an accused person was charged under section 30 (*c*) of the Rangoon Police Act for "being found between sunset and sunrise with his face covered and being unable to give a satisfactory account of himself" and where the record was silent as to what account, if any, the accused at the time of his arrest gave of himself and as to any reason there may be for considering such account to be unsatisfactory:

Held, that the record omitted a most essential ingredient of the offence of which the accused was convicted and that this omission was fatal.

The record in summary trials, however brief, should show the necessary ingredients of the offence charged.

Kuchi v. *King-Emperor*, 3 L. B. R 3; 2 Cr. L. J. 375, followed.

Where it was contended that the accused was found within Municipal limits and not within Cantonment limits and that his trial by the Cantonment Magistrate was, consequently, illegal:

Held, that there would be no ground to interfere unless it could be shown that failure of justice had in fact been occasioned by the error of venue. KET FOON *v.* EMPEROR, 4 BUR. L. T. 17 **921**

Receiver—*Leave to sue Receiver—Application.*

It is not necessary in every case to sue a Receiver as such but where any right is established by a decree in the suit to the property in the hands of a Receiver, then the Court may, on an application by the party in whose favour the right is established, make an order directing the Receiver to satisfy the decree. ADMINISTRATOR-GENERAL OF MADRAS *v.* DASAI GOUNDEN, 9 M. L. T. 300 **673**

—— — — *Mortgage suit—Mortgagor taking money from Receiver as accommodation loan—Refusal to pay—Power of Court to compel payment.*

A Receiver was appointed in a mortgage suit from whose officer the judgment-debtor took a sum of money as accommodation loan out of the funds of the Receiver in his hands. The officer was dead and the judgment-debtor refused to repay the amount:

Held, that the Court had power to direct the judgment-debtor to deposit the money in Court within a fixed time; and that in default of such deposit the Receiver was entitled to execute the order of the Court as a decree CHANDRA SEKHAR PROSAD *v* HARI HARENDRA SAHI **898**

Recognition of adoption - Estoppel—Whether bars right to claim as reversioner—Mistaken impression of law as to validity of adoption, effect of—Title by prescription **194**

Redemption, *suit for—Mortgagor and mortgagee, relation between—Payment of a portion of mortgage-money, effect of—Discharge of a portion of mortgaged property by a proportionate payment of the mortgage-money—Arrangement to hand over property other than the mortgaged property for payment of the mortgage-money, effect of, when unregistered—Verification or modification of the terms of contract, what amount to—Evidence Act (I of 1872), s. 92, cl. (4).*

K., *D.*, and *S.* each owned a third share in the property in dispute. On the 15th June 1880 *K.* and *D.* mortgaged with possession their 2/3rds share in favour of the defendant. On the death of *S.*, he was succeeded by his widow *J.*, who on the 7th July 1885 mortgaged her ⅓rd share to the same defendant excepting the village *B.* On the 5th June 1901 *K.* alone mortgaged with possession his ⅓rd share excepting the village *B.* Half the mortgage-money due under the deed of 1880 was set off as part of the consideration of this mortgage. After the death of the widow, the sons of *D.* sued for redemption of the mortgage of 1885 as her heirs. They contended that by the mortgage of 5th June 1901 *K.*'s share in the mortgage of 1880 had been paid up and the latter mortgage, so far as it related to *K.*'s share, had been discharged. They also alleged that about 6 years ago the mortgagor and the mortgagee entered into an arrangement by which the share of *J.* in village *B.* as also the share of *K.* in the said village had been placed in the possession of the mortgagee, on the understanding that he was to collect the rents and the profits thereof and apply them to the reduction of the principal amount due on his mortgage. The questions for decision were whether *K.*'s liability under the mortgage of 1880 had been discharged and whether the arrangement alleged by the plaintiff could be proved in law under section 92, clause 4, of the Evidence Act, in the absence of a registered document to evidence the same:

Held, that the mere fact that *K.*'s share on account of the mortgage of 1880 was set off against the amount secured under the latter deed of 1901 was not enough to show that any part of the mortgaged property had been released from liability for the remainder of the money due under the deed of 880. In the absence of an express contract to the contrary, the mortgagee was entitled to retain the whole of the property mortgaged as security for what was due to him:

Held, further, that the arrangement relied upon by the plaintiff did not require registration as it would not in any way affect the mortgagee nor could such an arrangement modify or vary the terms of the mortgage and that, therefore, it could be proved in spite of section 92, clause 4, of the Evidence Act. KEDAR SINGH *v.* SUMER SINGH **196**

Reference to High Court—Competency of subordinate Courts to refer a question to High Court in a proceeding, not a suit or appeal **879**

Reformatory Schools Act (VIII of 1897), s. 8—*Applicability of the section to cases where fine alone is inflicted.*

Where a boy under 12 years was convicted of stabbing a companion with a knife and sentenced to pay a fine of Rs. 100 or in default of payment to go to the Reformatory School for 3 years:

Held, the order was illegal.

Under section 8 of the Reformatory Schools Act, before such an order is passed, the offender must have been sentenced to transportation or imprisonment and not to mere fine. NGA PO TOK *v.* EMPEROR, 4 BUR. L. T. 69 **773**

Registration—Document containing separable parts—How far necessary - Agreement by mortgagee to get salary out of profits—Not registrable **748**

Registration—concld.

——— ——— ——— Endorsement of payment of mortgage-money **846**

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——— ——— ——— Notice—Non-possessory hypothecation of moveables—Subsequent transfer **869**

——— ——— ——— *Qabuliat* **314**

——— ——— ——— Will—Family arrangement—Immediate operation—Final and irrevocable—Whether document is Will **285**

——— ——— ——— *Endorsement—Statement by executant made to the Registering Officer—Certificate of the registering Officer, admissibility of—Registration Act (III of 1877), ss. 52, 58 and 60—Evidence Act (I of 1872), ss. 91 and 92.*

The endorsement of a Registrar on an unconditional deed of gift contained the following statement purporting to have been made to him by the executant, "*agar mohub lahu roti kapra denge to hiba jaiz hai warna najaiz samjha jaega*":

Held, that the endorsement could not be said to have been made under section 52 or 58 of the Registration Act and, therefore, the certificate of the Registering Officer could not be admitted under section 60 of the Act.

Held, further, that the record of the statement could not be admitted in evidence under sections 91 and 92 of the Evidence Act. MUNNI *v.* SHYAM BIHARI, 14 O. C. 80 **718**

——— ——— ——— *Evidence—Admissibility—Compromise filed in a mutation proceeding but not acted upon and not registered—Whether admissible in evidence—Registration Act (III of 1877), s. 17.*

A compromise dealing with property exceeding Rs. 100 in value was entered into between the parties to a mutation proceeding. Subsequently, one of the parties repudiated the compromise and the Revenue Court, therefore, ignored it in its mutation order. The compromise was not registered:

Held, that, in a subsequent civil suit, the compromise was not admissible in evidence to prove the agreement set out in it. The admission of such a compromise in evidence would contravene the provisions of the Registration Act as neither the compromise, nor any of its terms, was embodied in any decree or order.

Sadaruddin Ahmed v. *Chhajju*, 31 A. 13; 5 A. L. J. 717; A. W. N. (1908) 264; 1 Ind. Cas. 558; *Kashi Kumbi v. Sumer Kumbi*, 32 A. 206; 7 A. L. J. 204; 5 Ind. Cas. 234, referred to. BHAGWAN SAHAI *v.* HARCHAIN, 8 A. L. J. 309 **843**

——— ——— ——— *Release—Formal relinquishment of claim.*

A document containing consent to a disposition of property and a formal renunciation of a claim, which the party relinquishing is entitled to put forward, whether legally correct or not, is a release, and when pertaining to immoveable property of the value of Rs. 100 or over requires registration.

Wazir Ali v. *Asaram*, 95 P. R. 1894; *Indraj* v. *Mouja*, 97 P. R. 1895 and *Abdool Hoosein* v. *Goolam Hoosein*, 30 B. 304; 7 Bom. L. R. 742, distinguished. ATMARAM *v.* LALA, 7 N. L. R. 36 **733**

Registration Act (XX of 1866), s. 17 **314**

——— ——— ——— **(III of 1877), s. 17** **843, 846**

——— ——— ——— **ss. 17, 47**—*Registration Act (XX of 1866), s. 17—Kabuliat, whether registration cumpulsory—Evidence—Admissibility.*

A *kabuliat* was executed in 1871 while Act XX of 1866 was in force. In it the executant stated that he had taken a certain house from the owner upon a yearly rental of Rs. 30. No term was fixed, but there was a further stipulation that if called upon he (executant) would yield such services to the *Zemindar* as the *Zemindar* required, and that in the event of his (executant's) either failing to pay the rent or yeilding such services, he would be liable to ejectment:

Held, that registration of the document was not compulsory under the Registration Act then in force and that it was admissible in evidence.

Desai Motilal Mungalji v. *Desai Parshotam Nandlal*, 18 B. 92, *Ram Koomar Singh* v. *Kishori*, 9 C. 68; 11 C. L. R. 318, referred to. INTIZAM FATIMA *v.* ALI BAKHSH, 8 A. L. J. 609 **314**

——— ——— ——— **s. 47** **314**

——— ——— ——— **s. 50**—*Unregistered mortgage—Subsequent registered sale—Vendee having no notice of the mortgage—Priority.*

A subsequent registered sale will take effect against a prior unregistered mortgage if the vendee had no notice of the mortgage.

Ishan Chandra Das Sirkar v. *Bishen Sirdar*, 24 C. 825; 1 C. W. N. 665; *Hakim Lal* v. *Mooshahar Sahu*, 34 C. 999; 6 C. L. J. 410; 11 C. W. N. 889; *Divan Singh* v. *Jado Singh*, 19 A. 145; *Bhikhi Rai* v. *Udit Narain Singh*, 25 A. 366; *Khiali Rai* v. *Himat*, 5 A. L. J. 607; 30 A. 2 8; A. W. N. (1908) 99, referred to. BACHCHA LAL *v.* HANUMAN **233**

——— ——— ——— **ss. 52, 58** **718**

——— ——— ——— **s. 60**—Admissibility of certificate of registering officer **718**

Regulation V of 1799, s. 57—*Rejection of application to be put in possession of the estate of the deceased—Appeal.*

During the course of a proceeding under Regulation V of 1799, the appellant applied under sections 5 and 7 of the Regulation that the property of the deceased intestate might be handed over to him on the ground that he was the heir. The Court dismissed the application:

Held, that the order rejecting the application was not appealable. BHURE LAL *v.* SECRETARY OF SATATE FOR INDIA **414**

——— ——— **(VII of 1817)** **301**

——— ——— **(XI of 1825), s. 4**—*Alluvion—Submersion of land under water—Re-appearance on its old site—Sufficient identification—Ownership.*

Land belonging to the plaintiff which had submerged under a river re-appeared on its old site and was sufficiently identified to be the plaintiff's land. It had not come out by gradual accretion nor by sudden cutting off by the action of the river:

Held, that the plaintiff was entitled to the land, that section 4 of Regulation XI of 1825 did not apply to the case.

Lopez v *Madan Mohan Thakur*, 5 B. L. R. 521; 14 W. R. (P.C.) 11; 13 M. I. A. 467, referred to. BHAGWAN RAI *v.* GOPI RAI **311**

——— ——— **(VII of 1832), s. 9** **477**

Rejection—Dismissal—Non-joinder or misjoinder of parties, whether justifies rejection of plaint. **212**

Release—Formal relinquishment—Registration **733**

—— —— Suit to set aside a release deed—Failure of consideration—Burden of proof **501**

Religious endowment—*Suspension of* archaka *by trustee—Right to suspend pending allegations of misconduct—Suspension without notice, whether valid—Jurisdiction of Civil Courts.*

The position of a hereditary *archaka* of a temple in relation to the trustee is different from the position in which the trnstee stands to the temple committee.

A hereditary *archaka* can be dismissed by the trustee, but only for good reasons which are liable to examination by a Court of justice.

Kristnasamy Tatacharry v. *Gomatum Rangacharry*, 4 M. H. C. R. 63; *Bhavani Shankar* v. *Timmanna*, 30 B. 508, referred to.

No notice is required for an *ad interim* suspension pending inquiry into a complaint against a servant entitled to hold office during good behaviour or for life.

Where the order of suspension passed on an *archaka* by the trustee is not passed as a punishment of which he was found guilty, but was an *ad interim* order preventing him from performing his office pending the investigation of the charges of misconduct against him, the order of suspension is not invalid simply because it was passed without notice to the *archaka*.

Seshadri Aiyangar v. *Nataraja Aiyer*, 21 M. 179, explained and distinguished.

Bartan v. *Taylor*, L. R. 11 A. C. 197; 55 L. T. 158; 55 L. J. P. C. 1, referred to.

In any event, the Courts will not set aside the order of suspension where, after inquiry, it has been found that it was proper and justifiable under the circumstances.

The King v. *Mayor of London*, 100 E. R. 96 and *Vijayaragava* v. *Secretary of State for India*, 7 M. 466, referred to. SESHADRI AIYANGAR *v.* RANGA BHATTAR, 21 M. L. J. 580; 10 M. L. T. 14 **548**

Religious preachers, rights and duties of **789**

Remand—Addition of new issue after remand **230**

—— —— *for fresh evidence, when not to be allowed.*

Where it would be dangerous, in the opinion of an Appellate Court, to allow the production of fresh evidence on a point in respect to which the necessary proof ought to have been adduced in the lower Court, and a remand, if allowed, would open the door to the production of false evidence, the request for a remand should be refused. KISHORE CHAND *v.* GURDITTA MAL, 165 P. L. R. 1911 **315**

—— —— (**Criminal**)—Irregularity—No record of reasons for remanding case—Call for findings instead of for evidence **290**

Rent—Revision—Government revenue remitted **1002**

Re-purchase, condition for, cannot be enforced against a *bona fide* transferee **779**

—— —— ——, condition of - Personal covenant **814**

Residence, right of. *See* HINDU LAW—WIDOW.

Res judicata. *See* CIVIL PROCEDURE CODE, 1882, s. 13; CIVIL PROCEDURE CODE, 1908, s. 11.

—— —— —— Contribution—Question left open by Court **819**

—— —— —— Decree—Execution—Application pending—Appeal—Intermediate application barred **811**

—— —— —— Evidence—Tenancy in one year—No proof of tenancy in another year **329**

—— —— —— Execution of decree—Construction of decree **632**

—— —— —— Issue on disputed point in rent suit **382**

—— —— Mortgage—Redeem up and foreclose down—Decree in general terms—All the intrinsic evidence may be looked into—Decree *nisi* **748**

—— —— —— *Decree for rent—Relationship of landlord and tenant.*

A decree for rent operates as *res judicata* upon the question of the existence of the relationship of landlord and tenant between the parties.

Radha Madhub v. *Monohur*, 15 C. 756; *Kasiswar* v. *Mohendra*, 25 C. 136 and *Ekabbar* v. *Hara Bewa*, 8 Ind. Cas. 660; 13 C. L. J. 1; 15 C. W. N. 335, referred to. JOY KALI ROY *v.* HEMANGINI DEBI **363**

—— —— —— —— *Former decision that plaintiff purchased plot A only—Second suit that he purchased A and B, whether lies.*

The plaintiff purchased a certain plot of land which had been previously mortgaged to the defendant. The plaintiff instituted a suit for redemption and obtained a decree. It was decided in execution of that decree, on the objection of the defendant, that the plaintiff had purchased property A only. He subsequently brought a suit for possession of property B on the strength of the same sale:

Held, that the suit was barred as *res judicata*. BOHRA GAJADHAR SINGH *v.* GIRDHARI LAL **453**

—— —— —— —— *Plea finally decided between the parties by a single Judge of Chief Court—Incompetency of Division Bench to question the opinion of the single Judge in revision of the orders on which it was based—Review of order on review not allowed—Civil Procedure Code (Act V of 1908), O. XLVII, r. 9.*

A plea of *res judicata* having been accepted, though erroneously, previously between the parties by a single Judge of the Chief Court, the question cannot be re-opened afterwards by a Division Bench of that Court in an application to revise the orders of the Courts below upon which the judgment of the single Judge was based, as a revision of these orders would not benefit the party against whom the single Judge ruling subsists.

Amir Chand v. *Durga Das*, 211 P. W. R. 1908, cited.

A second review of an order is barred by rule 9 of Order XLVII of Act V of 1908, where it is practically for the review of the order passed on review. DURGA DAS *v.* AMIR CHAND, 25 P. W. R. 1911 **679**

—— —— *Suit decreed in part—Plaintiff's appeal in so far as his claim dismissed—Defendant's appeal in so far as plaintiff's claim decreed—Plaintiff's appeal dismissed and that of defendant decreed—Plaintiff's further appeal only in so far as defendants' appeal allowed, effect of—Limitation Act (IX of*

Res judicata - concld.

1871), *s.* 20—*Acknowledgment by one of several joint mortgagees, effect of.*

In the *khewat* of a certain year the names of certain persons were recorded as mortgagees and of certain persons as mortgagors. The *Wajib-ul-arz* in which a reference was made to this *khewat* was signed by one of the mortgagees:

Held, that the mere signing of the *wajib-ul-arz* which referred among other things to the *khewat* could hardly be considered an acknowledgment of the title of the mortgagor within the meaning of the Limitation Act.

An acknowledgment by one of several joint mortgagees does not save limitation against the other mortgagees.

In a redemption suit the Court decreed redemption of one-third of the property. The plaintiff appealed in respect of the remaining two-thirds while the defendant appealed in respect of the one-third redemption of which had been decreed in plaintiff's favour. The lower Appellate Court dealt with the two appeals in one judgment and dismissing the plaintiff's appeal decreed the defendant's appeal. The plaintiff appealed to the High Court in so far as the defendant's appeal had been allowed by the lower Appellate Court. The plaintiff's appeal in the lower Appellate Court was No. 28 and that of defendant was No. 32:

Held, that plaintiff's Appeal No. 28 was *res judicata* to the extent of two-thirds of the property, but not in respect of the remaining one-third.

Zahari v. *Dibia*, 7 A. L. J. 861; 7 Ind. Cas. 156, referred to. CHUNNI v. HUKUM SINGH, 8 A. L. J. 605 **238**

Restitution of conjugal rights - Detention of wife in prison—Discretion of Court **177**

Revenue - Assignment of Government revenue —Right of Government to remit such revenue — Assignee bound by remission **144**

—— —— **Authority** - Claim for restoration of property dedicated to monastery—Decision of Revenue authorities **995**

—— —— **Jurisdiction Act (X of 1876), s. 11**—*Suit, right of, where the law gives an appeal*—Order *of ejectment appealable - Cause of action, whether* order *or* actual *ejectment—Appeal in the former case and suit in the latter--Suit on title—Limitation Act* (*IX of* 1908), *Sch I, art.* 14.

The *order* of a Collector directing the ejectment of a person being appealable under the Revenue Jurisdiction Act, no suit would lie where the cause of action is only such *order*. But where a person is actually ejected by the Collector a suit would lie, as there is no provision in the Act for an appeal from a physical act of ejectment.

Sakharam v. *Secretary of State for India*, 28 B. 332, referred to.

Obiter.—Article 14 of the Limitation Act does not apply to suits on title.

Balvant Ramchandra v. *Secretary of State*, 29 B. 480; 7 Bom. L. R. 497, referred to SULTAN MAHOMED SHAH v. SECRETARY OF STATE. 5 S. L. R. 46 **223**

—— — **Sale Law (Act XI of 1859), s. 37**—*Portion of* taluq *existing at Permanent Settlement*—Chitta—*Distributing public revenue at partition—Public document - Evidence Act (I of 1872), s.* 74.

Revenue Sale Law Act—concld.

A *taluq* derived and descended from an ancient *taluq* existing from before the Permanent Settlement, and recognised by the landlord, must be deemed to have existed from before the Permanent Settlement and to be protected from annulment under section 37, excep. 1 or 2, of the Revenue Sale Law.

A *chitta* prepared at the time of partition for the purpose of distributing in equal manner the public revenue on the separate shares, is a document of a public nature and of the state of affairs then existing, and is, therefore, admissible in evidence—NOBENDRA KISHORE ROY v. DURGA CHARAN, 15 C. W. N. 515 **287**

Review—Decree on alleged compromise—Allegation by one party that he did not consent—Application for review—Court's power to review and recall order **894**

—— —— Judgment based on a decision of the Revenue Court—Revenue Court decision upset in appeal —Whether good ground for review **244**

—— — of order passed on review not allowed **679**

—— —— Privy Council Appeal—Practice **683**

—— —— *Revision—Order rejecting an application for review of judgment—Final—Application of new or old Code of Civil Procedure—Civil Procedure Code* (*Act XIV of* 1882), *s.* 629—*Civil Procedure Code* (*Act V of* 1908), *O. XLVII, r.* 7—*Punjab Courts Act* (*XVIII of* 1884), *s.* 70 (1) (a).

An order rejecting an application for review is final under section 629 of Act XIV of 1882, and is not open to appeal or revision.

Ram Lal v. *Ratan Lal*, 26 A. 572; and *Kessowji Issar* v. *Great Indian Peninsular Railway Co.*, 31 B. 381; 11 C. W. N. 721; 6 C. L. J. 5; 4 A. L. J. 461; 2 M. L. T. 435; 9 Bom. L. R. 671; 17 M. L. J. 347, followed.

The provisions of the Civil Procedure Code of 1908 cannot be invoked in aid of a petitioner whose application for revision was presented before that Code came into force. SEWA DAT PERSHAD v. KARM CHAND, 35 P. W. R. 1911 **725**

Revision—*Civil cases—Power of Chief Court*—(*Act XIX of* 1841)—*Proceedings under section* 3—*Declaration—Solemn affirmation by agent.*

Ordinarily, the Chief Court ought not to interfere on the revision side in cases under Act XIX of 1841, but where plainly an erroneous order has been passed, which is likely to seriously prejudice a party and to cause serious embarrassment and difficulty in the future, intervention is right and proper.

A statement on solemn affirmation by the agent of a *pardanashin* lady is a sufficient 'declaration' within the meaning of section 3 of Act XIX of 1841.

Where it was shown that the defendant had in a very high-handed manner taken forcible possession of a furniture shop and there was every likelihood of his proceeding to greater lengths unless sharply checked:

Held, that the District Court was right in taking action under the Act.

Musammat Japoji v. *Manmohan Nath*, 7 P. R. 1904; 37 P. L. R 1904; *Rajji* v. *Lal Chand*, 138 P. R. 1906; 116 P. L. R. 1908, referred to. GHURKU MAL v. DURGA DEVI, 65 P. L. R. 1911 **820**

Revision—concld.

——— *Order granting leave to sue* in forma pauperis—*Powers of High Court.*

An order granting leave to sue *in forma pauperis* is not open to revision.

Muhammad Ayub v. *Muhammad Mahmud*, 32 A. 622; 7 A. L. J. 741; 6 Ind. Cas. 831, followed.

The power of revision by a High Court cannot be invoked to correct every illegal order made by a Court subordinate to it, but only in cases which have been decided and in which no appeal lies to the High Court. SITAI *v.* TANAI, 7 N. L. R. 49 **471**

——— **(Civil).** *See* CIVIL PROCEDURE CODE, 1908, s. 115

——— Application filed before new Civil Precedure Code came into force—New Code not applicable **725**

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——— Revision petition to High Court direct from a decision of a Presidency Small Cause Court Judge, whether lies **551**

——— Revision petition treated as memorandum of appeal **542**

——— *Material irregularity—Dismissal of suit on technical construction of a statutory provision—Punjab Courts Act (XVIII of* 1884*), s.* 70 (a).

The dismissal of a suit solely on a technical construction of section 83 of the Negotiable Instruments Act constitutes 'material irregularity' under section 70 (*a*) of the Punjab Courts Act. KHAN CHAND v. GOLAB RAM, 142 P. L. R. 1911; 39 P. R. 1911 **133**

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Revival of suit—Consent decree—Reversal—Excess of pleader's authority—Set aside by same Court—Revival of original suit **355**

Revocation *of Letters of Administration—Right of persons standing by though cognizant of proceedings for grant of Letters of Administration—Probate and Administration Act* (*V of* 1881), *s.* 50.

A party who is cognizant of proceedings for Letters of Administration or Probate but chooses to stand by and allows the proceedings to be concluded in his absence, cannot be allowed afterwards to come in and have the grant revoked.

In the Goods of Bhaggobutty Dasi, 27 C. 927; 4 C. W. N. 757; and *In the matter of the Will of Pitamber Girdhar Soorji Jivandas*, 5 B. 638, referred to. SHEO BOPAL *v.* SHEO GULAM, 14 O. C. 77 **717**

Right of suit—*Plaintiff's decree against defendant's landlord—Attachment of rent due to landlord—Suit for rent by plaintiff—Whether suit is for rent—Attachment of debt—Right to sue debtor—Small Cause Court jurisdiction.*

The plaintiff alleges that in execution of a decree held by him against the landlord of the defendant, he attached the rent which had already accrued due, and he seeks to recover in this suit the money payable by the defendant to his landlord, the plaintiff's judgment-debtor:

Held, that the suit was not one for rent, but for money due to the plaintiff, and the Small Cause Court had jurisdiction to try the suit.

Obiter dictum.—Mere attachment of a debt does not prevent the judgment-debtor from suing his debtor, though he is not entitled to receive payment form his debtor unless the claim in respect of which the debt is attached has been satisfied.

Shib Singh v. *Sita Ram*, 13 A. 76 and *Beti Maharani* v. *The Collector of Etawah*, 17 A. 198; 22 I. A. 94, referred to. AMRITA LAL *v.* SHYAMA CHARAN **569**

Right to sue—Occupancy-holding—Mortgage—Fraudulent relinquishment while question of mortgage *sub judice*—Void—Suit for declaration in Civil Court—Maintainable **573**

——— Plaintiffs co-sharers—Arrangement to collect rent separately—Subsequent joint suit for rent, whether maintainable **891**

——— Right of share-holders to sue in company's name **515**

——— Unstamped pro-note executed for unpaid consideration—Suit on pro-note—Decree on original transaction **177**

——— *Quasi-contract—Money deposited in Court* in usum jus habentis—*Withdrawn by person not entitled to it—Liability.*

Money deposited in Court *in usum jus habentis* and withdrawn by a person not entitled to it may properly be held to be received for the use of the person entitled to it.

Litt v. *Martendale*, 18 C. B. 314; 4 W. R. 465, referred to. MAHDI HUSAIN *v.* SUKH CHAND, 8 A. L. J. 230; 33 A. 450 **730**

Riparian owners, rights of **181**

——— *Flow of water through natural channel obstructed—Obstruction caused by silting up of a river—Riparian owner, whether bound to clean natural channel—Damages—Contributory negligence.*

An owner of land through which a river or other natural channel flows is not bound to clean it out from time to time so that the amount of water that can pass down it may not be diminished, though he

Riparian owners—concld.

is bound within certain limits as between himself and other riparian owners not to do anything which shall obstruct the flow of water or materially interfere with their rights. If from natural causes a river or channel passing through *A.*'s land silts up with the result that more water is thrown into another river or channel running through *B.*'s land and *B.* blocks up the river or channel on his land so as to throw the water back on to and flood *A.*'s land, *A.* cannot be held to have contributed to the result. The inundation of *A.*'s land must be regarded as being due to *B.*'s action alone and *B.* is *prima facie* responsible for the consequences, though he may show that he had acquired a right to block up the channel partly. BALDEO SINGH *v.* JUGAL KISHORE, 8 A. L. J. 640 **564**

Sale. *See* VENDOR AND PURCHASER.

——Application to set aside sale—Compromise between decree-holder and judgment-debtor behind back of auction-purchaser, to have sale set aside, if valid—Appeal—Right of auction-purchaser to appeal **148**

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—— —— —— —— —— of rent-decree—Some of costs entered in sale proclamation, not really due, effect of—Unregistered purchaser—Title—Superiority—Purchaser at rent sale **899**

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Sanction to prosecute. *See* CRIMINAL PROCEDURE CODE, ss. 35, 195.

—— —— —— —— Incorrect statement in answer to irrelevant question—Intention—Mistake **840**

Sanyasis—*Succession to* Mahantship—*Custom—Burden of proof—Election as* Mahant—*Jurisdiction of Court to interfere—Nomination of successor to successor for a* mahant.

Amongst *Sanyasis* it is usual for a *mahant* to appoint his successor, and the nomination must be made during the life-time of the *mahant*. When there has been no such nomination, an election must be held and the election confirmed by the neighbouring *mahants* and members of the sect.

Where a person claims a *mahantship* he must, in order to succeed, prove the custom of the *Math* whereby he is entitled to recover the office and the property appertaining thereto. A claimant who fails to prove his installation or confirmation is not entitled to a decree for the office and property against a person alleging himself to have been a *chela* who, whether with or without title, is in possession.

Genda Puri v. *Chatarpuri*, 9 A. 1; 13 I. A. 100; *Atma Nund* v. *Atma Ram*, (1861) S. D. A. N. W. P. Vol. I, 309; *Nirunjun Barthee* v. *Padaruth Barthee* and *Khooshai Barthee*, 1 S. D. A N. W. P. 512, referred to.

Where the neighbouring *mahants* elect a person as *mahant* of a certain *Math* according to custom, a Court cannot set aside such election.

A *mahant* has no right to nominate a successor to his successor. RAJBANS BHARTHI *v.* KARYA BHARTHI, 8 A. L. J. 286 **824**

Search—Ward Headmen and Block-Elders not qualified to be witnesses of search **796**

Secondary evidence—Whether newspaper is secondary evidence of a letter not found and not proved to have been written by accused **832**

Sedition—Printer and publisher—Responsibility for seditious article—Absence when article published—*Bona fides* **954**

—— —— *Newspaper article—Single expression—Penal Code* (*Act XLV of* 1860), *ss.* 124*A*, 153*A*—*Attempt to incite one class against another.*

One single expression that the people of Bengal are trodden under the feet of strangers, used in a newspaper article which is innocent in other respects, does not make the whole article seditious.

A newspaper article which imputes wholesale bribery to the ministerial officers of Courts and to the lower officers of the Police force, and expresses doubts as to whether Government ever inquire into the truth of the grievances, so much is it occupied with investigations of boycott, dacoity and seditious matters, published at a time when the seeds of sedition are being sown broadcast and the minds of people are under excitement, cannot be taken to have been actuated by loyal motives.

Where in a newspaper article, both *Babus* and *Meahs* are inveighed against, as robbing the poor Mohamedan *raiyats*, and Christian missionaries are referred to as illustrating their treatment of converts, it cannot be said that there was an intention to create enmity between them and any other subjects of the King, nor was it a deliberate attempt to incite one class against another, consequently, a conviction in respect of such article under section 153A of the Indian Penal Code is bad. JOY CHANDRA SARKAR *v.* EMPEROR, 38 C. 214 **948**

Service—Affixing of notice to defendant's house **118**

Service of summons—Defendant absent from home—Endorsement by father, how far effective **242**

Sessions trial—Application for adjournment—Application made after reading the charge—'Before the commencement of the hearing', meaning of **380**

—— —— —— *Concerted action by accused—Acts forming part of same transaction—Misjoindor of charges—Criminal Procedure Code* (*Act V of* 1898), *s.* 239.

Where a number of accused persons are charged with having associated themselves to commit an offence

Sessions Trial—concld.

and having done acts forming part of the same transaction, it is not necessary, in order to sustain the charge, to prove that all of them acted together from start to finish in order to make their acts parts of one single transaction. It is enough to show that as each batch of them joined the principal accused they adopted his intention.

Chorayudi Venkatadri v. *Emperor*, 33 M. 502; 7 M. L. T. 299; 1 M. W. N 65; 5 Ind Cas. 847; 11 Cr. L. J. 258 and *Emperor* v. *Duttu Hanmant Shahapurkar*, 30 B. 49; 7 Bom. L. R. 633; 2 Cr. L. J. 578, referred to. MADASAWMY CHETTY *v.* EMPEROR, 10 M. L. T. 23 **349**

'Shade right'—Right running with the land cannot be dissociated from the land **689**

Sind Encumbered Estates Act (XX of 1896), s. 29—*Alienation beyond life-time invalid—No title in such alienation after death.*

Under section 29 of the Sind Encumbered Estates Act the share of a person, who is under the protection of the manager, cannot be alienated beyond the term of his natural life. A sale of such share is invalid as to any period after his death.

A. was entitled to a share in certain survey numbers and was under the protection of the Manager, Encumbered Estates in Sind. After discharge from management, he acquired the rest of the survey numbers and then sold the whole survey numbers to *B. B.* subsequently sold ⅓rd share of the survey numbers to *C.*

Upon the death of *A.* his heirs sued *B.* and *C.* to recover the shares which belonged to *A.* while the property was under management. The claim against *C.* was given up and the suit as against him dismissed. As against *B.* plaintiffs' claim was decreed. *B.* contended that the share awarded to plaintiffs should be reduced by ⅓rd, the share sold to *C*:

Held, that the contention was untenable. The ⅓rd share sold to *C.* must have been out of the residue of the survey numbers, which *A.* acquired subsequent to discharge from management and to which also *B.* had an absolute title. Therefore, the sale to *C.* did not operate as an alienation of the share sued for by plaintiffs. TEKOOMAL *v.* DIN MAHOMED **550**

Small Cause Court—*Jurisdiction—Suit for damages for unlawfully taking away goat sacrificed at altar of idol—Right of plaintiff as* shebait*—Return of plaint—Provincial Small Cause Courts Act (IX of* 1887), *s.* 25*—Charter Act, s.* 15*—Revision—Power of High Court.*

The plaintiff, as *shebait* of an idol, brought a suit in the Small Cause Court for damages for unlawfully taking away a goat sacrificed at the altar of an idol. The defendant disputed the title of the plaintiff as *shebait*. The Court returned the plaint for presentation to the proper Court:

Held, that the suit was triable by the Small Cause Court, that the order of the Court could be revised by the High Court either under section 25 of the Small Cause Courts Act or section 15 of the Charter Act.

Subairam Dutt v. *Jagadananda Majumdar*, 13 C. W. N. 403; 1 Ind. Cas. 288, referred to. UMESH CHANDRA *v.* RAKHAL CHANDRA, 15 C. W. N. 666; 14 C. L. J. 118 **8**

Small Cause Suit—Plaintiff's decree against defendant's landlord—Attachment of rent due to landlord—Suit for rent by plaintiff—Whether suit is for rent **569**

——— ——— ——— Suit for account between silk merchant, dyer and dresser of silk **883**

——— ——— ——— Suit for damages for unlawfully taking away goat sacrificed at altar of idol—Right of plaintiff as *shebait*—Return of plaint **8**

——— ——— ——— Suit for recovery of price of lands **267**

——— ——— ———*Suit to recover the price of skins of animals.*

A suit to recover the price of skins of certain animals alleged to belong by custom to the plaintiff is not excepted from the cognisance of a Small Cause Court. BILLA *v.* CHHUTA, 159 P. L. R. 1911 **35**

Specific performance—Contract to sell land—Sale of land subsequent to contract **678**

——— ——— ——— ——— Suit for possession is not a suit for specific performance **190**

——— ——— ———*Addition of defendant—Plaint not amended—Petition treated as part of plaint—Agreement to be specifically performed to be definite—Degree of certainty—Extrinsic evidence—Claim of specific performance found to be excessive—Where original claim found to be unsustainable—Specific Relief Act (I of* 1877), *s.* 22*—Discretion of Court, what means.*

The plaintiffs brought this suit against defendant No. 1 for the specific performance of a contract. Subsequently, they prayed that defendant No. 2 might be added as a defendant, because he had, with full notice of the prior contract in favour of the plaintiffs, taken a conveyance of the property from defendant No. 1. The application was granted and defendant No. 2 was added as a defendant. The plaint, however, was not amended. It was objected on the part of defendant No. 2 that as the plaint stood it did not disclose any cause of action against him and ought to be dismissed:

Held, that as no objection was taken on this ground by defendant No. 2 in his written statement, and as the application may be treated as part of the plaint the suit should not be dismissed against defendant No. 2 on that ground.

All agreements in order to be executed in a Court of equity must be certain and definite. But that is sufficiently certain which can be made certain. Therefore, the principle is that the description must be such as to enable the Court to determine with certainty, with the aid of such extrinsic evidence as is admissible under the rules of evidence, what property was intended by the parties to be covered thereby.

Where the plaintiff has asked for specific performance of an agreement and it is found that the claim was excessive, he may be allowed to succeed on the basis of an alternative claim for a more limited right. But if the plaintiff gives evidence in support of the original claim which is found unsustainable, he cannot succeed on a different claim contrary to his own evidence.

Section 22 of the Specific Relief Act provides that the jurisdiction to decree specific performance is discretionary; but the discretion is neither arbitrary nor capricious but a sound judicial discretion regulated by the established principles of equity.

Specific performance—concld.

The circumstances stated in section 22 are illustrative and not exhaustive.

A contract which although not illegal, is detrimental to the public welfare, should not be enforced in equity.

The relief lies in the discretion of the Court only in so far as it must necessarily judge whether, under the circumstances of the case, the contract is or is not an equitable one, but if it is determined that the contract is fair and reasonable, and that the conduct of the plaintiff has not been unconscious, there is no room for the application of judicial discretion. GAJ KUMAR CHAND v. LACHMAN RAM **503**

Specific Relief Act (I of 1877), s. 9—

Dispossession of tenant, whether amounts to dispossession of landlord.

The dispossession of a tenant is a dispossession of the landlord for which the landlord can bring a possessory suit under section 9 of the Specific Relief Act.

Bindubasini Chowdhrani v. *Jahnavi*, 13 C. W. N. 302; 1 Ind Cas. 150; *Bindubasini Chowdhrani* v. *Janhobi Chowdhrani*, 13 C. W. N. 307 *note*; 1 Ind. Cas. 5; *Janoki Nath Roy Chowdhury* v. *Dinamoni Chowdhrani*, 13 C. W. N. 305; 1 Ind. Cas. 152; *Shyama Churn Ghosh* v. *Mahomed Ali*, 13 C. W. N. 837; 3 Ind. Cas. 466; 10 C. L. J. 20 and *Nobin Das* v. *Kailash Chandra Dey*, 7 Ind. Cas. 924; 12 C. L. J. 483; 15 C. W. N. 294, followed.

Sonaton Shome v. *Sheikh Helim*, 6 C. W. N. 616, dissented from. AKHIL CHANDRA DEY v. AKHIL CHANDRA BISWAS, 15 C. W. N. 715 **455**

——— **s. 9**—*Suit based on title cannot be decided on possession alone—Occupancy-holding sold as fixed-rate tenancy—Validity of sale—N. W.-P. Rent Act (XII of 1881), s. 9.*

An occupancy-holding was mortgaged by the defendant or his predecessor-in-title as a fixed-rate holding and was purchased as such by the plaintiff at a Court-sale. Plaintiff was subsequently dispossessed by the defendant and now sued to recover possession:

Held, that the suit was not maintainable, the holding being an occupancy-tenancy had not been validly sold to the plaintiff and the defendant was entitled to deny that the holding was a fixed-rate tenancy.

Ashu Tosh Sikdar v. *Bihari Lal Kirtania*, 35 C. 61; 11 C. W. N. 1011; 6 C. L. J. 320; *Madho Lal* v. *Katwari*, A. W. N. (1888) 4'; 10 A. 130, referred to.

Held, further, that a plaintiff suing for possession on the basis of title cannot get a decree for possession under the first paragraph of section 9 of the Specific Relief Act.

Lachman v. *Sambhu Narain*, 7 A. L. J. 1078; 7 Ind. Cas. 495, followed. PAL AHIR v. ASGHAR HUSAIN, 8 A. L. J. 404 **145**

——— **s. 14**—*Specific performance—Contract to sell land—Sale of land subsequent to contract.*

A. agreed to sell land mentioned in a sale proclamation but before he could do so, a portion of it had been alienated: *Held*, that specific performance of the contract could not be enforced. KOTA KRISHNAYYA v. MATOORI SUBARAYYA, 9 M. L. T. 318 **678**

——— **s. 22** **503**

Specific Relief Act—concld.

——— **ss. 39, 42**—*Suit for declaration of title and that a certain sale-deed is in operative—Plaintiff out of possession—Consequential relief not claimed—Suit liable to be dismissed.*

The plaintiff sued for a declaration (*i*) that she owned a half share in a certain house, (*ii*) that the sale made by the second defendant in favour of the first defendant in respect of the house was inoperative as regards her half share. It was found as a fact that the plaintiff was not in possession of the house at the time of the institution of the suit:

Held, that the suit was barred by section 42 of the Specific Relief Act and could not be maintained.

Kunj Bihari v. *Keshavlal Hiralal*, 28 B. 567, distinguished.

The suit could not be considered as one for the cancellation of a document under section 39, as the deed was a good deed as between its executant and the person in whose favour it was executed. KEDAR SAHU v. BHAGWANTI, 8 A. L. J. 462 **1000**

——— **s. 42** **531**

——— **s. 42**—Suit for declaration of title and cancellation of instrument—Plaintiff out of possession **1000**

——— **ss. 45, 46**—Mandamus *not to issue where general law sufficient—Title to property not to be tried in* mandamus *proceedings—High Court, Original Side Rules, Rule* 483—*Service of Rule on party interested.*

A *mandamus* will never be granted to enforce the general law of the land which may be enforced by action.

Therefore, where a plaintiff has got a decree for possession and has the ordinary legal remedy of an execution, a *mandamus* on the defendant for delivery of possession to the plaintiff will not lie.

The title to property will not be tried in *mandamus* proceedings, and the writ will not issue when it is necessary to try or decide complicated or extended questions of fact.

Obiter dictum.—Every Rule issued under section 46 of the Specific Relief Act upon an application under section 45 shall call not only on the public servant, Corporation, or inferior Court, but also on any other person who may be affected by the act to be done or forborne, to show cause. KESHO PRASAD SINGH v. SLACKE, 13 C. L. J. 390; 15 C. W. N. 503; 38 C. 553 **253**

——— **s. 46** **253**

——— **ss. 54, 56** **192**

Stamp—Promissory note executed in a Native State Stamp affixed according to the laws of that State—Admissibility in evidence in British Indian Courts **247**

Stamp Act (II of 1899), ss. 32, 37, 57, rule 16—*Collector's certificates—Civil Court's power—Stamp of improper description—Rejection of a document not duly stamped—Valuation—Appeal—Court's duty.*

Section 32 of the Indian Stamp Act makes the Collector's certificate final as to the admissibility in evidence of a document, so far as its admissibility depends on its being duly stamped.

A Civil Court has no power to revise the Collector's action under sections 32 and 37 except on reference under section 57 of the Act by the Chief Controlling Revenue Authority.

Stamp Act—concld.

When the duty payable on an instrument has been fully paid in the form of a Government stamp, whether judicial, postal, forest, or telegraph, the instrument should not be classed as unstamped, simply because the stamp used is not of the description which, under the Indian Stamp Act and Rules, should be used for the instrument in question. Such an instrument bears a stamp of sufficient amount but of improper description within the meaning of rule 16 of the rules under the Stamp Act, and can, as such, be validated by the Collector.

In view of the retrospective effect given to the Collector's validation by section 37 of the Indian Stamp Act, the rejection of a document subsequently validated is a good ground of appeal, notwithstanding the fact that the order of rejection when made was correct.

Where a document forming the basis of a plaintiff's suit is not duly stamped and may be validated under rule 16 so as to make it admissible in evidence, the plaintiff should be given an opportunity of asking the Collector to validate it, before his suit is dismissed on the ground that the document is inadmissible in evidence. If no such opportunity is given, it will form a good ground of appeal. TUKARAM *v.* SONAJI, 7 N. L. R. 26 **702**

——— ——— **ss. 37, 57** **702**

——— ——— **Rule 16** **702**

Stanom—*Suit for declaration of title—Suit for mere dignity, whether maintainable—Amendment of plaint.*

A suit for a mere declaration that the plaintiff is entitled to a *stanom*, to which no properties are attached, is a suit relating to a mere dignity and is not maintainable.

The plaint in this case was allowed to be amended by mentioning the properties attached to the *stanom*. MUNDANCHERI KOMAN *v* MUNDENCERI PUVAYIL, 2 M. W. N. 353 **110**

Statutes, interpretation of. *See* INTERPRETATION OF STATUTES.

Step-in-aid of execution of a decree, meaning of—Effect of depositing process fees **152**

Subrogation of mortgage. *See* MORTGAGE.

Succession Act (X of 1865), s. 242 **987**

Succession Certificate Act (VII of 1889)—*Minor representative—Right of guardian to apply for certificate—Application through next friend not competent.*

The legal guardian of a minor has the right of management of the minor's estate and has, therefore, an interest in a debt due to the minor and a right to collect it.

Ex parte Gangadhur, 28 B. 344, followed.

Whenever a succession certificate is required to collect a debt due to the estate of a deceased person and the representative is a minor, the requirements of the Succession Certificate Act are sufficiently complied with if the application is made by the legal guardian of the minor.

A certificate cannot be granted on an application made by a minor himself through his next friend.

Harjus Rai v. *Rameswar*, 20 A. 354, dissented from.

Mohori Bibi v. *Dharamdas*, 30 C. 539, referred to.

In the matter of DANBAI, 4 S. L. R. 266 **931**

——— ——— ——— **s. 4** **263**

Succession Certificate Act—concld.

——— ——— ——— ——— **ss. 4, 6**—*Certificate taken by Hindu widow in respect of husband's estate—Death of widow—Certificate by husband's heir.*

G. a Hindu died many years ago. His widow *M.* took out a succession certificate. After *M.*'s death, some of *G.*'s heirs applied for a succession certificate in respect of the estate of *G.*, for (1) a sum in deposit as compensation money awarded in a case under the Land Acquisition Act, (2) a sum payable as arrears of rent for non-agricultural lands from the tenant of certain premises comprised in the estate of *G.*, and (3) a Government Promissory Note standing in the name of *M.* as the certificate-holder of the estate of *G.* The Court below dismissed the petition on the ground that as *G.* died many years ago, the petition could not be entertained, and it suggested that the petitioners might ask for a succession certificate to the estate of *M.*, or obtain Letters of Administration to the entire estate of *G*:

Held, that, although *G.* died many years ago, his estate was in his widow's possession as a qualified owner, and when succession opened out after her death, the reversionary heirs took the estate as if the limited estate taken by the widow had not intervened, and that a certificate may be granted to the applicant in respect of each of the three items. ABINASH CHANDRA PAL *v.* PROBODH CHANDRA PAL, 15 C. W. N. 1018 **357**

——— ——— ——— **s. 6** **357**

——— ——— ——— ——— **s. 16** **263**

Sufficient Cause. *See* LIMITATION ACT, 1908, s. 5.

——— ——— ——— ——— Carelessness of Pleader **433**

Suit for damages—Distraint—Cause of action, when accrues—Knowledge of plaintiff—Limitation **502**

——— , *proper trial of—First Court not taking defendant's evidence and dismissing suit—Lower Appellate Court decreeing claim upon the same evidence—Irregularity.*

In a suit for possession the defendant set up a plea of adverse possession. The first Court recorded the evidence of the plaintiffs, but without taking the evidence of the defendant dismissed the suit on the ground of jurisdiction. The lower Appellate Court upon the evidence on the record proceeded to decide the suit on its merits:

Held, that there was no proper trial of the case and that as the defendant's evidence was shut out by the action of the Court of first instance, the lower Appellate Court had decided the case upon an incomplete record. GANGA SINGH *v.* LACHMAN SINGH **441**

——— *for recovery of price paid for property to which the judgment-debtor has no title—Suit for recovery of price paid for property found to be non-existent—Limitation Act (IX of 1908), Sch. I, arts. 62 and 97.*

A suit for recovery of the price paid at an execution-sale for property to which the judgment-debtor has no title is governed by either Article 62 or Article 97 of Schedule I of the Indian Limitation Act, 1908.

Where the case is not one of sale of existing property to which the judgment-debtor is found to have either no title or a defective title, but is one of sale of non-existent property a suit for recovery of the price would be governed by Article 62 of the Limitation Act.

Suit—concld.

Gurshidawa v. *Gangaya*, 22 B. 783; *Hanuman Kamat* v. *Hanuman Mandar*, 19 C. 123; 18 I. A. 158; *Venkatanarasimhulu* v. *Feramma*, 18 M. 173 and *Venkatarama Ayyar* v. *Venkata Subramaniam*, 24 M. 27, referred to.

Nilkanta v. *Imamsahib*, 16 M. 361, doubted. JOT SINGH *v.* ASNAD ALI KHAN, 14 O. C. 74 **716**

Summary trial—Record must show ingredients of offence charged – *Venue* of trial material only where accused is prejudiced **921**

Surrender. *See* LANDLORD AND TENANT.

Tender. *See* TRANSFER OF PROPERTY ACT, s. 83.

Thak map. *See* MAP.

Title of unregistered purchaser—Purchaser at rent sale **899**

Title for land—*Title not proved—Burden of proof—Admission—Effect of attestation—Claim petition—Order thereon, effect of—Judgment-debtor not a necessary party—Civil Procedure Code (Act VIII of 1859), s. 246, scope of.*

A. sued *B.* and others for recovery of two plots of land on the ground that the lands were held under a demise. *B.* pleaded that the lands were held under *Kanom*:

Held, that the onus of proving the title by demise was on *A.* who asserted it and an attestation by *B.* of an instrument affecting the plots did not amount to an admission of *A.*'s title by *B.*

A judgment-debtor is not necessarily a party to the proceedings under section 246 of the Code of 1859; it must be shown that the judgment-debtor was served with notice of the claim in order that he may be held bound by the order of the Court.

Moidin Kutti v. *Kunhi Kutti Ali*, 25 M. 721; *Krishnasami Naidu* v. *Somasundaram Chettiar*, 30 M. 335; 17 M. L. J. 95; 2 M. L. T. 116 and *Vadapalli Narasimhan* v. *Dronam Raju Seetharama Murthi*, 31 M. 163; 3 M. L. T. 256; 18 M. L. J. 26, referred to.

Under section 246, the right of a claimant to some interest in property in the possession of the judgment-debtor could not be investigated nor could the Court raise an attachment where the judgment-debtor had a possessory interest in the property.

Consequently, where the claimant's right to an equity of redemption was allowed but the judgment-debtor's *otti* rights were directed to be sold under section 246: *Held*, that the order was not one which the judgment-debtor was bound to impeach by a suit within one year or 12 years after it was passed. KURRIYIL PARKUM *v.* VARANAKATH ILLATH GANAPATHI, 9 M. L. T. 423; 21 M. L. J. 550 **424**

Transfer—Transfer of case—Power of High Court to transfer inquiry under Extradition Act **946**

Transfer application—Examination of witness after disposal—Prosecution not legal **622**

Transfer of case—*Grounds—Discretion to refuse bail—Improper exclusion of evidence—Distinction between questions which witness cannot be compelled to answer and those which witness cannot be permitted to answer—Admissibility of the answers where the witness waives his right of not replying—Cross-examination of witness, its scope—Police papers—Evidence Act (I of 1872), ss. 121, 123, 124, 125, 126, 138.*

A Magistrate has discretion to refuse bail and the fact that he has refused bail will not constitute a ground for transferring a case from his board.

Transfer of case—concld.

An error in disallowing certain questions in the cross-examination of a witness does not afford sufficient ground for the transfer of the case.

The question of improper exclusion of evidence is not one which should ordinarily be gone into during the pendency of a case.

A distinction should be drawn between questions which a witness cannot be compelled to answer and those which he cannot be permitted to answer. The latter class of questions might properly be forbidden but questions of the former class are in no way barred; a witness has merely the right of refusing to answer such questions, without any hostile inference being drawn from his refusal. The most, therefore, that a Magistrate can do, in the case of a witness who is ignorant of his privilege, is to warn him that he need not answer. But if the witness elects to waive his privilege of refusing to answer, his answer is admissible in evidence.

Cross-examination need not be confined to matters raised elsewhere in the evidence.

The right of cross-examination given by the Evidence Act is not fettered by the fact that Police papers are in existence but have not been referred to. Section 138 of the Evidence Act gives the defence the right to cross-examine prosecution witnesses at the conclusion of their examination-in-chief and such cross-examination may be on all points and by means of all questions not disallowed by the Evidence Act. Though the defence have the further right to re-call and cross-examine prosecution witnesses after the charge has been framed, they cannot be compelled to so defer all or any of the cross-examination which they are by law entitled to make. To do so is to deprive them of part of the means available for obtaining an order of discharge. MAHOMED ALLY *v.* EMPEROR, 4 BUR. L. T. 113 **917**

Transfer of Property Act (IV of 1882)—*Mortgage – Conditional decree for sale or foreclosure – Interest subsequent to the date fixed—Court rate only allowed.*

Interest subsequent to the date fixed for payment by a conditional decree for sale or foreclosure should be allowed at the Court rate on the whole sum due including costs instead of at the contract rate on the mortgage-money. PYARE LAL *v.* RAM RATAN, 7 N. L. R. 14 **695**

s. 6—*Right to receive Moggu—Assignment thereof—Validity.*

Moggu is an allowance received by a *wargdar* from *walawargdars* who hold lands within the *warg* for which he holds the *patta*. It is the concession paid to the *wargdar* for his trouble in collecting the revenue and paying it over to Government. The right to the *Moggu* allowance is transferable and section 6 of the Transfer of Property Act is not opposed to such transfer. The assignee can only claim payment of the *Moggu* if the *wargdar* has fulfilled his obligation to receive the revenue from the *walawargdar* and pay it to Government. GANPATHI *v.* MANI ANANTHA, 2 M. W. N. 233 **665**

s. 6 (e)—*Breach of contract—Right to sue for damages, whether assignable—Contract for payment of debts—Breach of contract—Repudiation of liability by promisor—Cause of action—Right of promisee to sue promisor—Limitation—Promisee to wait for a reasonable time—Contract Act (IX of 1872), ss. 39, 49.*

Transfer of Property Act—contd.

A mere right to sue for damages for breach of contract is not assignable under the Transfer of Property Act.

Abu Mahomed v. *S. C. Chunder*, 36 C. 345; 13 C. W. N. 384; 1 Ind Cas. 827, followed.

Such a right was not assignable even under the Common Law.

Where there was a personal agreement by the defendant with the plaintiff on 15th January 1898 to pay a certain debt owing by the plaintiff, and on defendant's failure to discharge the debt plaintiff paid the same himself and sued defendant for its recovery on 5th December 1904:

Held, (1) that the cause of action for plaintiff's right of suit did not arise on the repudiation of his liability under the contract by the defendant, nor did time begin to run against the plaintiff from the date of such repudiation;

Hochster v. *De La Tour*, 2 E. & B 678; 22 L J. Q. B. 455; 17 Jur. 972; 1 W. R. 469 and *Frost* v. *Knight*, L. R. 7 Exch. 111; 41 L. J. Ex. 78; 26 L. T. 77; 20 W. R. 471; *Subraya Reddi* v. *Manikka Koundan*, 2 M. W. N. 265; 9 M. L. T. 479; 10 Ind. Cas. 258, referred to.

(2) that the fact of payment of the debt by the plaintiff did not give him a cause of action, but that the plaintiff should show a breach of contract by the defendant to enforce his right of suit;

(3) that the plaintiff should have waited for a reasonable time, after the expiry of which the defendant may be taken to have broken his contract and plaintiff was entitled to sue as for such breach;

Doraisinga Terar v. *Arunachellam Chetti*, 23 M. 441, referred to.

Kumar Nath Bhuttacharjee v. *Nobo Kumar Bhuttacharjee*, 26 C. 241, distinguished.

(4) that the question as to what is reasonable time is a question of fact in each case, and that the reasonable time in this case for plaintiff to wait for performance of the contract by defendant was three years;

(5) that plaintiff's suit was barred. GOPALA AIYAR *v.* RAMASAWMY SASTRIGAL **320**

——— ——— ——— **s. 10** **459**

——— ——— ——— ——— **s. 10**—*Condition restraining alienation—Condition that lessor shall not be able to sell by auction land leased to pay a debt other than arrears of rent - Whether void—No covenant for re-entry—Condition not for benefit of lessor and hence void.*

A lease recited (1) that the lessees shall have no power to transfer in any way the property leased, by sale, gift or otherwise, (2) that the lessor shall not be able to have the said lands sold by auction for any debt other than arrears of rent thereof, nor shall any other creditor be able to cause the same to be attached and sold by auction, and (3) that the lessor does not grant the lessees or their heirs any transferable interest in the property:

Held, that unless there is a covenant for re-entry, a restrictive clause of the type contained in the instrument is inoperative in law; that as the conditions are not for the benefit of the lessor, because there is no covenant for re-entry, the conditions are void under section 10 of the Transfer of Property Act, and that the landlord is not bound by the restriction she placed upon herself, namely, that even she would not be able to have the land sold for any debt other than arrears of rent, and that consequently she may bring to sale the property leased, in execution of a decree not for rent obtained by her against the lessees. MAHANANDA ROY *v.* SARAT MONI DEBI **374**

——— ——— ——— **s. 41**—*Bona fide* transferee—Transferee making no inquiry as to his transferor's title **961**

——— ——— ——— **s. 41**—Re-purchase, condition for—*Bona fide* purchaser for consideration without notice **779**

——— ——— ——— **s. 43**—*Mortgage by unauthorized person—Sale upon that mortgage—Acquisition by transferor of ownership in the property subsequent to the sale upon the mortgage, effect of—Contract of transfer must subsist at the time of acquisition.*

Section 43 of the Transfer of Property Act applies to a case in which the contract of transfer subsists at the time when the property comprised in the transfer was subsequently acquired by the transferor, but the section cannot be applicable when the contract of transfer had come to an end before the acquisition of the property.

Durga Das v. *Muhammed Ismail*, A. W. N. (1908) 155, distinguished.

S. mortgaged his own share as well as the share of his brother *B.* to *D. D.* brought a suit on the mortgage and obtained a decree in execution of which he himself purchased the mortgaged property. Subsequent to the purchase, *B.* died and *S.* inherited his share in the property: *Held*, that *D.* was not entitled to take that portion of the property which belonged to *B.* and which *S.* acquired after the contract of mortgage had ceased to exist. JADU BANS UPADHIYA *v.* SHEOJIT SINGH **443**

——— ——— ——— **s. 52**—Lis pendens, *doctrine of—Mortgage effected during the pendency of a suit, validity of—Sub-mortgagee, rights of.*

In 1880 one *C.* mortgaged a certain share to *R.* and *S.* with possession. Three deeds of further charges were also subsequently executed. One *B.* became entitled to a ¼th of the interest of the mortgage executed by *C.* In 1896 the father and guardian of *B.* sub-mortgaged that ¼th share to the appellant undertaking to put him in possession if the money was not paid within one year. *B.* ratified the deed when he came of age. In 1905 the appellant sued for possession of the property mortgaged to him impleading *B.*, his original mortgagor, and other persons representing the original mortgagees *R.* and *S.* The summons to *C.* in that suit was served on January 22nd, 1905. During the pendency of that case, that is, on February 16th, 1905, *C.* mortgaged his share to the respondents. Subsequently, the respondents redeemed the four mortgages made by *C.* The appellant's suit in the meantime proceeded and he got a decree for possession of the ¼th share as a sub-mortgagee. The respondent brought the present suit for possession of the said share against the appellant:

Held, that under section 52 of the Transfer of Property Act the respondent could not take a valid mortgage and in order to take possession of the share mortgaged to him he must pay to the appellant ¼th of the money due on the basis of the four mortgages. DEBI DIN *v.* MANNU SINGH **16**

——— ——— ——— ——— **s. 53** **906**

Transfer of Property Act—contd.

——— ——— ——— **s. 53**—*Mala fide* sale 922

——— ——— ——— **s. 54** 546, 919

——— ——— ——— **s. 55**—*Conditional decree for possession—Vendor's lien—Interest on purchase-money.*

Section 55, clause (4) (*b*), of the Transfer of Property Act does not give the vendor an absolute right to interest on the purchase-money irrespective of the equities and circumstances of each case.

Leggatt v. *Metropolitan Railway Co.*, (1870) 5 Ch. A. 716; 18 W. R. 1060, distinguished.

The object of the clause is only to give the vendor a lien on the property for unpaid purchase-money, which will enure also for interest if any interest is payable.

It is obviously inequitable in the absence of express and distinct stipulation that either party to the contract should at one and the same time enjoy the benefits flowing from possession of the property and those flowing from possession of the purchase-money; the estate and purchase-money being things mutually exclusive.

Quære:

Whether a decree for possession in favour of a vendee conditional on his paying the purchase-money can be made in the case of registered sale-deeds according to the provisions of the Transfer of Property Act.

Velayutha Chetty v. *Govindaswami Naiken*, 1 M. W. N. 637; 9 M. L. T. 108; 8 Ind. Cas. 354; *Subbramania Aiyar* v. *Sowan*, 27 M. 28, referred to. MUTHIA CHETTY *v.* SINNA VELLIAM CHETTY, 2 M. W. N. 228; 9 M. L. T. 378; 21 M. L. J. 236 662

——— ——— ——— **s. 55 sub-sec. 4 cl. (V)**—*Vendor and purchaser—Vendor's lien for unpaid purchase-money—Money which vendor directed vendee to pay to a third party—Whether lien subsists—Agency—Waiver of a portion of the amount by payee, whether enures for the benefit of the person authorising payment.*

A person, who directs another to pay money to a third person, is entitled to countermand that order before that person has entered into direct relations with the third person and agreed to pay it to him.

Where an agent is directed or authorised by his principal to pay to a third person moneys existing or accruing in his hands to the use of the principal, and he expressly or impliedly contracts with such third person to pay to him, or to receive or hold the money on his behalf, or for his use, he is personally liable to pay such third person, or to receive or hold the money on his behalf, or for his use, as the case may be, even if he has had fresh instructions from the principal not to pay to such third person.

Griffin v. *Weatherby*, L. R. 3 Q. B. 753; 9 B and S. 726; 37 L. J. Q. B. 280; 18 L. T. 851; 17 W. R. 8, referred to.

And if the person entitled to the payment excuses a portion of the amount in favour of the person directed to pay to him, that is a benefit derived by the latter from the creditor for which he is not bound to account to the person by whom he is directed to make the payment.

A vendor's right of lien for unpaid purchase-money can only be lost by an express or implied contract of waiver.

Webb v. Macpherson, 31 C. 57, referred to.

Transfer of Property Act—contd.

A vendor, who has directed the purchase-money or a portion thereof to be paid to a third party, must be taken to have waived by a contract, necessarily implied from his conduct, the right to a lien for any portion of the money to be paid to the third party under the agreement.

Abdulla Beary v. *Mammali Beary*, 7 M. L. T. 376; 33 M. 446; 5 Ind. Cas. 87, referred to.

In such a case the vendee cannot be regarded as holding the money as the vendor's agent. SIVA SUBRAMANIA *v.* GNANASAMMANDA, 21 M. L. J. 359; 10 M. L. T. 71 98

——— ——— ——— **s. 59**—*Sale or mortgage—Application for partition in Revenue Court by mortgagees, whether affects the mortgagor—Redemption—U. P. Land Revenue Act (III of 1901), s. 233K, application of.*

A document purporting to be a sale contained a clause to the effect that if, within six years from the date of the transaction, the amount secured was paid back the sale would become void:

Held, that the document was a mortgage by conditional sale and not an out and out sale.

Balkeshan Das v. *W. F. Legge*, 22 A. 149; 27 I. A. 58; 4 C. W. N. 153, followed.

Ghulam Nabi Khan v. *Niazunnissa*, 8 A. L. J. 119; 9 Ind. Cas. 140, distinguished.

If the mortgagees of certain property make an application in a Revenue Court for partition of the property and the mortgagor raises no objection to the application, the right of redemption is not affected by such partition and section 233*K* of the Land Revenue Act does not preclude the mortgagor from bringing a suit for redemption. BALBHADAR RAI *v.* RIRJRAJ RAI 630

——— ——— ——— **s. 83**—*Tender of mortgage money after suit by mortgagee—Tender in one Court while mortgagee's suit pending in another Court—Invalidity—Duty of mortgagor to put mortgagee in possession—Tender made without putting mortgagee in possession, effect of—Civil Procedure Code (Act V of 1908), O. XXIV, r. 1.*

Sections 67, 86 and 88 of the Transfer of Property Act should be read with section 83.

After one Court has taken cognizance of a suit by a mortgagee for the enforcement of his mortgage, the mortgagor cannot deposit the mortgage amount in another Court under section 83 of the Transfer of Property Act.

When a suit has once been instituted, payment into Court is regulated by Order XXIV, rule 1, of the Civil Procedure Code, 1908, and the circumstance that the mortgagor was not aware of the institution of the mortgagee's suit at date of his deposit under section 83, would not affect the mortgagee's right to proceed with his suit or to enforce his rights as they stood at the date of the suit.

Quære:—Whether a mortgagor can, subsequent to the mortgagee's suit, deposit the mortgage amount in the very Court in which the suit is pending.

Where, under the terms of a mortgage-deed, the mortgagor is bound to put the mortgagee in possession of the mortgaged properties, the former cannot deposit the mortgage amount in Court before first giving possession to the mortgagee.

Ramsonji v. *Krishnaji*, 26 B. 312, referred to.

Transfer of Property Act—contd.

Tani Bhagwan v. *Hari* bin *Bhavani*, (1887) P. J. 315 and *Mulhar Gopal Kulkarni* v. *Anandram* valad *Kunkam Chand*, (1889) P. J. 51, referred to.

Section 83 of the Transfer of Property Act presupposes that the mortgrgor, when he proposes to take action under section 83, has a valid right to redeem and is not attempting to exercise the right of redemption in a manner contrary to the provisions of the contract between the parties. BAYYA SAO *v.* NARSINGHA MAHAPATRO, 10 M. L. T. 57; (.911) 2 M. W. N. 126 **393**

——— ——— ——— **ss. 86 and 87**—*Decree for foreclosure obtained against all the defendants - Order absolute obtained only against some of the defendants, validity of - Payment of the decretal amount by the defendant against whom no order absolute passed, effect of—Foreclosure decree discharged by the payment made by one defendant against all —Decree joint and indivisible against all the judgment-debtors—Redemption by a puisne mortgagee, effect of.*

In 1892 one *B.* mortgaged a portion of his share by way of conditional sale in favour of the respondent. Subsequently, in 1896, after the death of *B.*, his sons mortgaged with possession the entire share to one *K.*, now represented by the appellant. The respondent instituted a suit for foreclosure on his mortgage of 1892 and impleaded *K.*, and the sons of *B.*, as defendants to his suit and obtained a decree for foreclosure. In applying for an order absolute, however, he did not make *K.* a party to the proceedings and obtained the order only against the sons of *B.* Subsequently, on the objection of *K*, it was decided that the order obtained against the sons of *B*, did not bind him and that he should be allowed to deposit the decretal amount and thereby to redeem the property. *K.* deposited the money which the respondent withdrew and thus his mortgage was satisfied. The respondent now, on the basis of the order absolute against the sons of *B.* alone, sought to redeem *K.*'s mortgage of 1896. The question for decision was, whether the order absolute obtained by the respondent could still be considered as subsisting although his decretal amount had been deposited in full and his mortgage-decree satisfied:

Held, that the decree for foreclosure obtained by the respondent was a joint and indivisible decree against all the defendants and there could be only one order absolute affecting all the defendants. The effect of the deposit of money by *K.* who was not a party to the order absolute, was that the respondent's mortgage had been satisfied in its entirety and he could not, therefore, urge that the equity of redemption, which was acquired by him as a complement to the mortgagee-rights under an incomplete foreclosure proceeding, still vested in him. The effect of the payment of the decretal money by *K.* was, that the respondent's rights as mortgagee passed to the redeeming puisne mortgagee whatever they were at the date of such payment.

Hussanbhai v. *Umaji*, 28 B. 153; *Kedar Nath* v. *Syed Hafiz Ali*, 10 O. C. 356, referred to. RAM PARTAP *v.* BACHHU MISRA **174**

——— ——— ——— ——— **s. 87** **174**

——— ——— ——— ——— **ss. 88, 89** **536**

——— ——— ——— ——— **s. 99**—Rule of procedure **815**

——— ——— ——— ——— **s. 100** **919**

Transfer of Property Act—concld.

——— ——— ——— **ss. 130, 131** **510**

——— ——— ——— — **s. 137** **859**

Transferability—Usage or custom of transferability—Ingredients, what are, to prove the custom—Growing usage, if binding upon landlord **325**

Trees—Jurisdiction of Civil Courts to attach and sell trees **473**

Trespasser. *See* ADVERSE POSSESSION.

Trust—Lands set apart for private temples of a *tarwad*—Whether *tarwad* properties **398**

——— ———Mortgaged property—Mortgagee in possession—Attachment as mortgagee's property—Claim by mortgagor - Position of mortgagee **994**

——— — *Hereditary trusteeship—Removal of present trustees—Minor successor—Appointment till minority.*

The dismissal of a trustee for the time being on account of gross neglect and violation of the trust does not entail a forfeiture of the hereditary office which descends to the next heir, if of full age. If the next heir is a minor, some other trustee will be appointed until the minor attains majority.

Samasundra Mudaliar v. *Vythilinga Mudaliar*, 19 M. 235, referred to. MUTHU KUMARA MUDALIAR *v.* PALANIAPPA CHETTIAR, 2 M. W. N. 303; 9 M. L. T. 495 **300**

——— ——— *Religious trust, what constitutes - Madrsa Local Boards Act (V of 1884), s. 51—Power of Board of Revenue to make over management to Local Board —Power to dismiss trustee—Management made over without dismissing trustee—Validity — Regulation VII of 1817—Powers of Board of Revenue under that Regulation—Transfer to* Taluk *Board of the charity properties—Rights of the Local Board under the order of transfer.*

A., a female, constituted three properties, one a *chattram* and two houses, as endowments for carrying out certain charities, *viz.*, (1) to feed 12 Brahmans on *Dwadasi* day in the *chattram* building, (2) to perform *archana* to the goddess in a temple at the cost of one rupee every Friday and (3) to supply *neer moru*, etc., to persons attending the festival of *Molugadi servari* in Tirnvottiyur. She appointed the 1st defendant as trustee along with two others. On his failure to carry out the trust and on his alienating the property to defendants Nos. 2 and 3, the Board of Revenue, acting under Regulation VII of 1817, vested the management of the properties in the *Taluk* Board, Saidapet, without passing an order removing the 1st defendant from office:

Held, that the trust was not of a religious character. The distribution, no doubt, was to be amongst those who attended the festival in the temple but it was not to be an offering to the deity, and it was not any ceremony which was part of the temple festival itself. The small provision for making *archana* would not make the trust a religious one.

Regulation VII of 1817 and Act XX of 1863 are applicable to endowments made both before and after the said enactments.

Sivayya v. *Rami Reddi*, 22 M. 223, followed.

The Board of Revenue had no power to transfer the management of the trust without first dismissing the trustee then in office.

Trust—concld.

Ganapati Ayyar v. *Sri Vedavyasa Alagasinga Bhattar*, 29 M. 534; 16 M. L. J 435; 1 M. L. T. 127, *Sheik Davud Saiba* v. *Husain Saiba*, 17 M. 212, followed.

Venkatesa Nayudu v. *Shirman Phatagopa Shri Shatagopa Swami*, 7 M. H. C. R. 77, referred to.

Under section 51 of Act V of 1884, the Board of Revenue has the power of making over the management of a trust to a Local Board in exercise of its right of superintendence. The Board of Revenue is empowered to make over to a local body both the management and superintendence.

The Chairman Municipal Council, Rajamundry v. *Susurla Venkateswarulu*, 31 M. 111; 3 M. L. T. 241, *Nilaythakshi Ammal* v. *Taluk Board of Mayuvaram*, 20 M. L. J. 885; 1 M. W. N. 12; 8 M. L. T. 341; 8 Ind. Cas. 488, relied upon.

The Board of Revenue can dismiss a trustee for misconduct VENKATACHALA PILLAI *v.* TALUK BOARD, SAIDAPET, 2 M. W. N. 304; 21 M. L. J. 305 **301**

Undue influence. *See* CONTRACT ACT, s. 60.

U. P. Land Revenue Act (III of 1901), s. 233K **630**

U. P. Municipalities Act (I of 1900), s. 94 –Notice—Defendant acting in the capacity of member—Suit for malicious prosecution **1**

Unlawful assembly. *See* PENAL CODE, s. 71.

Use and occupation—Compensation—Fixation of rent of ordinary tenant-at-will – Fair occupation-rent where no rent previously paid **2**

Valuation –Collector's certificates—Civil Court's power—Stamp of improper description—Rejection of a document not duly stamped—Appeal—Court's duty **702**

——— of suit—Suit for declaration that adoption is invalid **816**

——— *Suit for declaration of title and injunction to restrain defendant from collecting rent —Whether plaintiff entitled to value suit arbitrarily—Value of property to be a value of relief—Court Fees Act (VII of 1870), s. 7, sub-s. (41), clauses (a) and (d).*

The plaintiff sued in the Court of a Munsif for a declaration of title and for an injunction restraining the defendant from collecting rent from the cultivating *raiyats*, and valued the reliefs claimed at Rs. 500. The defendant objected that the value of the property in dispute was Rs. 5,000 and that the suit was not maintainable in the Munsif's Court:

Held, that, in substance the plaintiff will obtain possession of the property, as landlord of the cultivating *raiyats*, and that the value of the relief sought is the value of the property in dispute. KRISHNA DAS *v.* HARI CHARAN, 14 C. L. J. 47; 15 C. W. N 823 **865**

Vendor and purchaser—Conditional decree for possession—Vendor's lien—Interest on purchase-money **662**

——— Vendor's lien for unpaid purchase-money—Money which vendor directed vendee to pay to a third party—Whether lien subsists—Agency—Waiver of a portion of the amount by payee, whether enures for the benefit of the person authorising payment **98**

Vendor and purchaser—concld.

——— *Duty of purchaser—Vendor not in possession—Vendee failing to make inquiries—Bound by title of the person in possession.*

It is the duty of a vendee, not merely to rely upon the paper title disclosed by the sale-deed in favour of the vendor, but also to make inquiries of the person in actual possession of the property sold as to the title of that person. If the vendee fails to make any inquiries of the person in possession he would be bound by such title as the said person possesses. VYANKAPPACHARYA SHRINIVASACHARYA *v.* YAMNASANI RADHDASAMI, 13 BOM. L. R. 256: 35 B. 269 **817**

——— *Registration of conveyance and delivery of possession to vendee—Right of vendor to cancel sale—True consideration different from that recited in the sale-deed—Promise by vendee to maintain vendor for remainder of his life—Breach of agreement—Right of vendor—Transfer of Property Act (IV of 1882), s. 54.*

When a deed of sale of immoveable property is registered and possession taken by the vendee thereunder, title to the property passes to the party to whom the conveyance is executed under section 54 of the Transfer of Property Act, and in the absence of fraud, undue influence, coercion or misrepresentation, the vendor is not entitled to have the deed of sale set aside even though the price is not paid or the consideration has failed. His only remedy is to recover the purchase-money.

Sagaji v. *Namdev*, 23 B. 525; *Baijnath Singh* v. *Paltu*, 30 A. 125; *Govindammal* v. *Gopalachariar*, 16 M. L. J 524, referred to.

Where the real consideration for a deed of sale is not payment of money but maintenance of the vendor for his life, and the vendee fails to fulfil such obligation, the vendor has no right to have the sale deed set aside.

The American Law, as stated in Pomeroy's Equity Jurisprudence, Volume VI, paragraph 686, cannot be applied to India. SUBBAIER *v* MONIAM SUBRAMANIA IYER, 10 M. L. T. 51; (1911) 2 M. W. N. 6; 21 M. L. J. 800 **546**

——— *Sale of land—Mutual covenants—Whether purchaser bound to pay purchase-money, before vendor performs his agreement—Earnest-money forfeiture of.*

A purchaser is not bound to pay the balance of the purchase-money till the vendor has put the property in the condition in which it is to be conveyed to him.

Therefore, where the vendor of certain property undertook to shift a door and to put up a fence and the purchaser undertook to pay the balance of the consideration within three months: *Held*, that the purchaser was justified in not paying the balance of the purchase-money until the vendor had carried out his part of the contract, and that the purchaser was entitled to get back his earnest-money as the vendor failed to perform what he had undertaken to do. RASIK LAL *v.* CHANDRA BHUSHAN **525**

— *Unstamped pro-note executed for unpaid consideration—Suit on pro-note—Decree on original transaction.*

A sale of certain land was effected in consideration of payment of money. In lieu, however, of actual payment the vendor received from the vendee an unstamped promissory note. In a suit by the vendor based on the promissory note to enforce the

Vendor and purchaser—concld.

personal obligation of the vendee, and not based on the transaction of sale to enforce vendor's lien on the property:

Held, that no decree could be passed, though the sale entitled the plaintiff to the payment of the purchase-money and the law gave him a lien on the property for that amount.

Where a document which cannot be used in evidence is executed to prove a complete pre-existing right, a suit may be maintained on the original right itself unless it be shown that it was entitled to merge the right in the document, but where at the time that an obligation comes into existence, a document is executed as the evidence and record of that obligation, a suit to enforce it can be only on the document itself.

Pothi Reddi v. *Velayuda Sivan*, 10 M. 94; *Yerlagadda Veeraragaviah* v. *Gorantla Ramayya*, 29 M. 111; 15 M. L. J. 484 and *Sheik Akbar* v. *Sheikh Khan*, 7 C. 256, referred to. KODALI MALLAYYA *v.* TARIGOPALA RAMAYYA, 21 M. L. J. 462; 10 M. L. T. 55 **177**

Waiver—Suit for compensation against Railway Company for non-delivery of goods—Notice of claim, proof of—Offer by Railway Company to pay—Estoppel **122**

Wajib-ul-arz. *See* PRE-EMPTION

———————, interpretation of **186**

Ward Headmen and Block-Elders not qualified to be witnesses of search **796**

Water rights—*Riparian owners, rights of—Injunction restraining the riparian owner from erecting a dam across the river—Rights of such owners to the flow of water not absolute and exclusive but relative—Injunction allowable only so far as to stop the flow of the stream or cause material injury to the other owners.*

The respondents owned a village on the bank of the river Sai and the appellants some other villages about 12 miles higher up the river. The appellants built a dam across the river and the respondents, thereupon, sued to obtain a permanent injunction restraining them from hereafter building a dam across the river which would prevent the water from flowing down to the respondents' village or materially reduced the amount of the water that flows down. The Courts below granted an injunction restraining the appellants altogether from erecting a dam of any kind in future:

Held, that the terms of the injunction granted were too wide. According to the ordinary law each owner has a right to the usufruct of the river or stream which passes through his land. That means not an absolute or exclusive right to the flow of the water but subject to the similar right of all the proprietors of the banks on each side to the reasonable enjoyment of the same; in short, a riparian owner has a right to use and consume the water for irrigating the land abutting a natural stream, provided that he does not thereby cause a material injury to other like owners. The decree of the Courts below was, therefore, modified and an injunction granted restraining the appellants from damming up the river in such a way as to stop the flow of the stream or cause a material injury to the respondents.

Dinkar v. *Narain*, 29 B. 357; 7 Bom. L. R. 265; *Debi Prasad* v. *Joynath*, 24 C. 865; 24 I. A. 60 (P. C.), referred to. SHEO NARAIN SINGH *v.* CHANDRABHAL **181**

Widow. *See* HINDU LAW—WIDOW.

Will—*Execution—Prior Will—Genuineness.*

On 1st August 1904, the testator executed a Will and two days later another Will was set up as having been executed by him under circumstances which made it highly improbable that he had executed it:

Held, that the latter Will was not genuine. CHINNA BASAVAYYA *v.* EALAMANCHILI BAPAMMAD, 9 M. L. T. 354 **420**

——— *Family arrangement—Immediate operation—Final and irrevocable—Whether document is Will—Inconsistency in pleadings—Costs.*

An instrument which was a family arrangement arrived at by the mediation of certain gentlemen who were old friends of the family, and which was intended to be operative immediately and to be final and irrevocable, was *held* to be a non-testamentary instrument, and, therefore, void as regards immoveable property, because it was not registered.

Notwithstanding conflicting views presented by the appellants, their Lordships gave effect to the real character of the instrument, but did not allow costs to the successful appellants. UMRAO SINGH *v.* LUCHHMAN SINGH, 15 C. W. N. 497; 8 A. L. J. 465; 13 C. L. J. 519; 9 M. L. T. 507; 13 BOM. L. R. 404; 21 M. L. J. 637; 33 A. 344 **285 P. C.**

——— *Gift—Construction—Bequest in favour of two brothers living jointly, whether creates joint or separate interest—Joint tenancy unknown to Hindu Law.*

A gift and a Will were made in favour of two brothers living jointly as members of an undivided Hindu family. There was nothing either in the Will or in the deed of gift which gave any indication as to whether the testator or the donor intended that the two brothers should hold as undivided co-parceners or as tenants-in-common with separate interests. Moreover, both at the execution of the Will and of the deed of gift the father of the donees was also living with them jointly: *Held*, that both the Will and the deed of gift conveyed separate interests to the donees.

The principle of joint tenancy is unknown to Hindu Law except in the case of co-parcenary between the members of an undivided family.

Jageshur Narain v. *Ram Chandra*, 23 C. 670; 23 I. A. 37; *Venkattagyyama Garu* v. *Venkataramayamma Garu*, 25 M. 678; 4 Bom. L. R. 657; *Kurupai Nachiar* v. *Sankaranarayanan*, 27 M. 300; *Vydinada* v. *Nagammal*, 11 M. 258; *Mankama Kunwar* v. *Balkishen Das*, 28 A. 38; A. W. N. (1905) 170; *Gopi* v. *Jaldhara*, 33 A. 41; 7 A. L. J. 941; 7 Ind Cas. 697; *Bai Devali* v. *Patel Bachardas*, 26 B. 445, referred to. KISHORI DUBAIN *v.* MUNDRA DUBAIN, 8 A. L. J. 757 **565**

——— *Original not forthcoming—Presumption—Revocation.*

Where an original Will is not forthcoming the presumption is that it was destroyed by the testator with a view to revoking it. SOHAN BIBI *v.* HIRAN BIBI **230**

——— *Probate—Questions to be decided by Court—Limitation—"Disposing mind"—Proof—Burden of proof—Probate and Administration Act (V of 1881)—Limitation Act (IX of 1908), Sch. I, Art. 181.*

In proceedings under Act V of 1881 when Probate of a Will is sought, the Court is bound to grant Probate unless it finds that the Will was not executed by the testator or that he was not in a state of mind competent to exercise his testamentary powers or that the Will was not the testator's own voluntary act. The Court has no concern with the questions whether the Will, if proved, will be effectual or valid, or whether it can affect certain parts of the property with which it purports to deal.

Will—contd.

The mere fact that a Will, if proved, might, in view of a previous decree of a Civil Court, prove ineffectual is no ground for refusing to grant Probate; nor is the Court competent to consider the question whether the Will is a valid disposition of property by the testator.

Musammat Bali v. *Musammat Hussaini Bibi*, 55 P. R. 1894, followed.

Hormusji v. *Dhanbaiji*, 12 B. 164; *Parat Parshotam* v. *Bai Muli*, 18 B. 749, referred to.

The provisions of Article 181 of the Limitation Act, 1908, have no application to petitions for Probate. Consequently, an application for Probate made 4 years after the death of the testator is not time-barred.

Kashi Chundra Deb v. *Gopi Krishna Deb*, 19 C. 48, followed.

The mere execution of a Will raises a presumption that the maker of it knew and approved of its contents.

Woomish Chunder Biswas v. *Rasomohini Dassi*, 21 C. 270, relied upon.

But the mere fact that a testator understands that he is making a Will and by it giving the whole of his property to one object of his regard is not sufficient proof that he had "a disposing mind." He must also have capacity to comprehend the extent of his property and the nature of the claims of others whom, by his Will, he is excluding from all participation in his property. He must be able to dispose of his property with understanding and reason. He must be able to understand his position; to appreciate his property, and to form a judgment with respect to parties whom he chooses to benefit by it.

Harwood v. *Baker*, 3 Moore P. C. 282, *Sefton* v. *Hopwood*, 1 F. and F. 578, followed.

In the case of an unofficious Will, made behind the back, and to the detriment of, of one of the legal heirs and at a time when the testator was practically at death's door, the burden of proving that the testator had a "disposing mind" lies upon the propounder of the Will.

A Hindu lady, who had been ill for about a year before her death, executed a Will within a few hours of her death. At that time she was practically unable to speak and had to communicate her wishes by signs. She left all her property to a child who had been adopted a few days before her death. The person who had a great deal to do with the drawing up of the Will was adverse to the legal heir. The testatrix had no reason to favour the child to the prejudice of the heir. An application for Probate was not made till after the expiry of four years from the date of her death:

Held, that when the testatrix executed the Will, she had not sufficient understanding to comprehend the extent and consequences of her act that by the Will she was depriving one of the heirs of all participation in the property. The petition for Probate was consequently refused. INDAR NARAIN v. ONKAR LAL, 141 P. L. R. 1911 **130**

—— *Proof—Execution— Handwriting — Government expert not cited and not cross-examined—Opinion not admissible.*

The propounder of a Will should prove to the satisfaction of the Court beyond all possible doubt that it

Will—concld.

was executed in accordance with law and that the testator at the time of the execution was in a state of mind and body to be able to execute the Will and to fully appreciate what he was doing in the disposition of his property.

The opinion of the Government expert in handwriting who was not called and, therefore, not cross-examined, is inadmissible in evidence. PADMA PRIYA DEBYA v. DHARMA DAS, 15 C. W. N. 728 **965**

Withdrawal of suit. *See* CIVIL PROCEDURE CODE, 1908, O. XXIII.

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VOLUME X.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 11 OF 1911.

March 24, 1911.

Present:—Sir John Stanley, KT., Chief Justice, and Mr. Justice Banerji.

JUGUL KISHORE AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

Pandit JUGAL KISHORE—DEFENDANT—RESPONDENT.

Defendant acting in the capacity of a member of a Municipality—Malicious prosecution, suit for—Notice—U. P. Municipalities Act (I of 1900), s. 49.

The defendant, who was a member of a Municipal Board and was charged with supervising the sanitation of the town, reported to the Secretary of the Board that dirty water was allowed to flow from a house of the plaintiffs. The Secretary ordered the prosecution of the plaintiffs but they were acquitted, whereupon they brought a suit for damages for malicious prosecution: *Held*, that as the defendant had acted in his capacity as a member of the Municipal Board he was entitled to a notice under section 49 of the Municipality Act before institution of the suit.

Muhammad Saddiq Ahmad v. *Panna Lal*, 26 A. 220; distinguished.

Bakhtawar Mal v. *Abdul Latif*, 29 A. 567, A. W. N. (1907) 170, referred to.

Letters Patent Appeal against the dercee of the Hon'ble Mr. Justice Karamat Husain, dated the 5th of November 1910, in S. A. No. 90 of 1910.

Dr. *Tej Bahadur Sapru* (with him Mr. *Damodar Das*), for the Appellant.

JUDGMENT.—This appeal arises out of a suit for damages for alleged malicious prosecution. The defendant is one of two members of the Municipal Board of Banda, who were charged with the supervision of the sanitation of the town. He made a report to the Secretary of the Municipal Board to the effect that dirty water was found by him to be issuing from a house of the plaintiffs, thereby causing danger to the public health. The Secretary of the Board directed the prosecution of the plaintiffs, with the result that the *Tahsildar* before whom the case was heard acquitted the accused. They thereupon instituted the suit out of which this appeal has arisen. The first Court gave a decree in the plaintiffs' favour and awarded them damages; upon appeal, the learned District Judge held that the defendant was entitled to the notice prescribed by section 49 of the Municipalities Act, (Act I of 1900), and that no such notice was served and accordingly dismissed the suit. Section 49 of the Municipalities Act prescribes that "no suit shall be instituted against a Board or against any member, officer or servant of a Board in respect of any act purporting to be done in its or his official capacity until after the expiration of two months next after notice in writing has been, in the case of the Board, left at its office and in the case of a member, Officer or servant delivered to him.". In this case the lower Appellate Court has found that the defendant was a member of the Municipal Board; that he reported to the Secretary of the Board that dirty water was allowed to flow from the plaintiffs' house into a public road. This was a matter of sanitation which the Board had deputed the defendant and another member of the Board to look after. The learned District Judge finds that the defendant purported to act in his capacity as member of the Board, and that the notice prescribed ought to have been served.

We are of opinion that the District Judge was right in the view which he took. It is clear on the facts that the defendant purported to act in his official capacity. He merely gave notice to the Secretary of the Board of what he considered a nuisance or objectionable, affecting the sanitation of the

town. Upon this report the Secretary of the Board took action. Whether or not the plaintiffs were rightly acquitted on the charge brought against them, it is not for us to consider. We have only to decide whether or not the defendant purported to act in his capacity as Municipal Officer, and if we find that he did so purport to act, then it appears to us that he was clearly entitled to the notice prescribed by section 49. We are not called upon to decide whether or not the defendant rendered himself liable to damages for malicious prosecution if he acted with malice or without reasonable or probable cause. All that we decide is that he was entitled to the notice prescribed by the Act; and not having received that notice the suit is not maintainable. The case is unlike the case which has been relied upon by the learned Advocate for the appellants, namely, that of *Muhammad Saddiq Ahmad* v. *Panna Lal* (1). In that case the defendant did not purport to act in good faith in pursuance of the law but he took advantage of his position as a Police Officer to commit illegal and tortious acts, maliciously and without cause. That is a different case from the one now under consideration. In this case undoubtedly, the defendant did purport to act as member of the Municipal Board charged with supervision of the sanitation of the town of Banda. The case is more like the case of *Bakhtawar Mal* v. *Abdul Latif* (2). We, therefore, dismiss the appeal with costs.

Appeal dismissed.

(1) 26 A. 220.
(2) 29 A. 567; A. W. N. (1907) 170.

OUDH JUDICIAL COMMISSIONER'S COURT.

RENT APPEAL NO. 3 OF 1911.
March 29, 1911.
Present:—Mr. Piggott, A. J. C.

RAM DULARE AND OTHERS—PLAINTIFFS—APPELLANTS

versus

HAIDAR ALI—DEFENDANT—RESPONDENT.

Oudh Rent Act (XXII of 1886), ss. 124B, 124C, and 124D—Fixation of rent of ordinary tenants-at-will—Fair occupation-rent where no rent previously paid—Compensation for use and occupation.

At the time of partition of a village certain lands, which were the *khud kasht* of the respondent, were thrown into the *mahal* of the appellants and it was agreed that the respondent would have the rights of an ordinary tenant-at-will. No contract was made regarding the amount of rent, or whether it was to be paid in kind or in cash. The appellants sued the respondent for arrears of rent claiming half the produce. The first Court decreed the suit but the lower Appellate Court dismissed it, holding that no contract express or implied as to the amount of rent or the method of payment of rent had been proved:

Held, that there being no provision in the Oudh Rent Act for the fixation of rent of ordinary tenants-at-will, the appellants were entitled to a fair occupation-rent as compensation for use and occupation of the land in suit.

Musammat Raj Kuar v. *Nabi Bakhsh*, 9 O. C. 296; *Mohammad Hasan* v. *The Deputy Commissioner of Bahraich as Manager, Court of Wards, Nanpara Estate*, 9 O. C. 362, followed.

Appeal against the order of the District Judge of Sitapur, dated 24th November 1910, reversing that of the Assistant Collector, Kheri, dated 16th August 1910.

Pandit *Gokaran Nath Misra*, for the Appellants.

Syed *Zahur Ahmad*, for the Respondent.

JUDGMENT.—In this case the defendant-respondent was formerly proprietor of the entire village of Katri, in which the plaintiffs appellants acquired, by mortgage and foreclosure, a four-fifths share. The latter subsequently obtained perfect partition of their share by means of proceedings before the Revenue Courts with effect from July 1st, 1907. During these proceedings it was found that the present respondent was in actual cultivation of *khud kasht* lands much in excess of his rateable share. A portion of these lands had been cultivated by him continuously for twelve years or more at the date of the partition; these were assigned to his *mahal* on partition and with them we are not now concerned. There was, however, in addition, an area of 183·63 acres in the cultivation of the present respondent in respect of which his cultivation had not reached the statutory limit of twelve years. Provision was made for these lands in paragraph 10 (2) of the partition proceeding. An area of 121·14 acres out of the total of 183·63 acres above-mentioned was assigned to the present appellants; it was expressly laid down that the respondent would have no rights of ex-proprietary tenure therein, and it was provided that if the respondent chose to continue cultivating these lands or any portion of them, he should do so as a mere tenant-at-will. The present suit is to recover rent for the years 1316 and 1317 *F.* on account of an area of 41·59 acres which admittedly formed

part of the total of 121·14 acres which passed to the *mahal* of the appellants under the terms of the partition above referred to. It is not denied that the respondent cultivated this land during the years in suit, and it is clear beyond question that he did so as tenant of the appellants. The latter succeeded in obtaining from the Rent Courts an appraisement of the produce of the lands in question during the years in suit, presumably under the provisions of sections 31 and 32 of the Oudh Rent Act; and the Assistant Collector in whose Court this suit was instituted gave the said plaintiffs a decree for the amount claimed on the basis of these appraisements. The learned District Judge of Sitapur, on appeal, held that no agreement to pay rent in kind was established by the evidence, and that as no rent had ever been fixed there could be no decree for arrears of rent under section 108 (2) of the Oudh Rent Act. He, therefore, dismissed the plaintiff's suit altogether, and the latter came to this Court on second appeal.

It is contended on their behalf, in the first place, that they are entitled to a decree for the money equivalent of rent payable in kind, as claimed. If this case were before me on first appeal it might be my duty to examine the record in detail with a view to ascertaining whether the evidence as a whole sufficed to raise a presumption that the defendant cultivated during the years in suit on an implied understanding that he would pay rent-in-kind in the proportion usual in the village. In second appeal I do not think such contention is open to the plaintiffs. I take it as found against them on first appeal that no agreement express or implied has been proved which binds the defendant to pay rent at any particular rate.

On this finding the learned District Judge was probably right in holding, regard being had to the definition of an "arrear of rent" in section 12 of the Oudh Rent Act, that a suit for arrears of rent under that Act will not lie. There is, however, authority for the proposition that the District Judge should have further considered the equities of the case, with special reference to the provisions of section 124B, 124C and 124D of the Oudh Rent Act, and might have given the plaintiffs a decree for a sum of money on account of compensation for use and occupation of the land in suit. I refer to *Musammat Raj Kuar* v. *Nabi Buksh* (1) and *Mohammad Hasan* v. *The Deputy Commissioner of Bahraich, as Manager, Court of Wards, Nanpara Estate* (2). On this point the appeal must, in my opinion, prevail. The case is really a stronger one than either of those above referred to. The proceedings at the partition created a tenancy between the parties, and the defendant was the person who actually cultivated the land under this contract of tenancy. On the other hand, this is not a case in which the Oudh Rent Act or the Land Revenue Act provides any machinery by which the plaintiffs could get a rent determined, as is the case where an ex-proprietary tenure is created. The plaintiffs have no remedy unless equity can be done to them, by way of a decree for compensation; they might, no doubt, eject the defendant, but the case set up by the latter involves the contention that because the plaintiff acquiesced in his occupying a portion of their land under a contract of tenancy which neglected to specify the annual rent to be paid, there exists no law under which he can be made to pay at all. If it is not open to me to find that there was an implied contract to pay rent at any particular rate, I am still of opinion that the existence of a tenancy implies a contract to pay some rent, and that in the present case there is no reason why the plaintiffs-appellants should not get a decree for compensation on account of the use and occupation of their land.

I remit the following issue to the lower Appellate Court: —

What would be a reasonable rent for the land in suit during the years in suit, regard being had both to the classification of the soil at the last Settlement and to the rates of rent actually prevailing amongst different classes of tenants for lands of the same quality in the same village?

It appears from paragraph 10, clause (2), of the partition proceeding already referred to, that the distribution of the "*khud kasht*" lands between the two *mahals* was made with reference to the Settlement Officer's soil-classification, but I do not find in the terms of the said partition proceeding anything to support the contention put forward on behalf of the defendant-respondent, as a sort of alternative plea, that the rent payable for the lands in suit is necessarily limited

(1) 9 O. C. 296.
(2) 9 O. C. 362.

to the Settlement Officer's assumed rates for each class of soil. Both parties should be allowed an opportunity of tendering evidence on the issue, and a finding returned within three months. Ten days will be allowed for objections.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 394 OF 1911.

March 28, 1911.

Present:—Sir Arthur Reid, KT., Chief Judge, and Mr. Justice Kensington.

HAJI AND OTHERS—DEFENDANTS—APPELLANTS

versus

GHULAM SHAH—PLAINTIFF—RESPONDENT.

Punjab Pre-emption Act (II of 1905), ss. 4 and 5—Custom, inquiry into, precluded Sale—Nature of transaction—Creation of occupancy-rights—Pre-emption.

Section 5 of the Punjab Pre-emption Act precludes inquiry into custom where agricultural land is concerned, while section 4 of the Act further expressly limits pre-emption to cases of sales. The initial question to be determined in cases of pre-emption, therefore, is whether the particular transaction is or is not a sale as contemplated by the Act.

No right of pre-emption can be set up in cases where a proprietor grants occupancy-rights to his tenants or even to a stranger.

Second appeal from the decree of the Divisional Judge, Attock Division, dated 30th November 1909, affirming that of the Munsif, 1st class, Pindigheb in the District of Attock, dated 5th May 1909.

Messrs. *Badr-ud-din* and *Muhammad Din*, for the Appellants.

JUDGMENT.—This case is before us as an appeal under clause (*b*) of section 70 (1) of the Punjab Courts Act, and should have been entered in the register of appeals. The question of law involved is that stated in the second ground of revision, which alone is pressed, namely, whether under the circumstances of the transaction in dispute it should be held that there has been a sale giving rise to a right of pre-emption. The point is of some importance. The lower Courts have concurred in holding that the plaintiff pre-emptor should succeed, but neither of the judgments indicate clear understanding of the question involved; and, considering the superficial manner in which the case has been dealt with, especially in the lower Appellate Court, we think that there is ample ground for interference on revision.

The supposed sale of May 1903 was really an arrangement by which the proprietors of certain land granted occupancy-rights to their tenants (defendants Nos. 4 to 10) on payment of a very trifling sum. The object of this arrangement clearly was that the tenants should effect certain improvements in the land in consideration of which they were to be allowed fixity of tenure by way of occupancy-right. The proprietors undertook to pay the revenue assessment on the land, while the tenants were to pay to them a moderate grain-rent fixed at $\frac{1}{3}$rd *batai*. The plaintiff a somewhat remote collateral of the proprietors, has chosen to regard the transaction in the light of a sale, and has brought a suit for pre-emption on his own account notwithstanding that his father was still alive. The lower Courts have, for the most part, directed their attention to minor incidents of the suit, though the really important issue in the case was No. 2 covering the question whether there could under these circumstances be a claim for pre-emption. The first Court disposed of this issue in favour of the plaintiff by a brief reference to the commentary at page 32 of Mr. Shadi Lal's Punjab Pre-emption Act, Edition 1907. In the lower Appellate Court the point seems to have been entirely overlooked. There is, indeed, a vague general reference to previous rulings but it is understood that the Divisional Judge was referring to rulings dealing only with the question whether the Punjab Pre-emption Act permits a son to institute a suit independently of his father during the father's life-time. He did not discuss the essential question going to the root of the case though this was again plainly raised by the first ground of appeal. It is to be regretted that the lower Appellate Court did not look into the matter more closely, and we are quite unable to understand why it has been assumed, as a matter of course, that this arrangement between the proprietors and the tenants should be open to attack by way of pre-emption.

The wording of the commentary by Mr. Shadi Lal at page 32 of his work, under sub-section 5 of section 3 of the Pre-emption Act, is to some extent misleading, in so far as it suggests that the Chief Court has decided by a series of rulings quoted that the creation of occupancy-rights by a proprietor in favour of a person amounts to a sale for the purposes of the Act. A reference to these

ulings [*Balaki Shah* v. *Hafiz Esan* (1), *Jehana* v. *Chowdhri Jiwan Khan* (2), *Ghiba* v. *Hayat* (3), *Rukna* v. *Kanh Singh* (4), *Nihal Chand* v. *Rai Singh* (5)], would have made it plain to the lower Court, that the Chief Court has never committed itself to so sweeping an assertion. In the first four cases quoted, it has been laid down at the most that a special custom of pre-emptive right might conceivably be established in cases of a kind, and we are not aware that, as a matter of fact, any such custom has ever been established. In the last case quoted, namely *Nihal Chand* v. *Rai Singh* (5), the right of pre-emption was conceded on a special ground not put forward in any of the previous cases, and not usually established by the terms under which proprietors grant occupancy-rights to their tenants. The gist of these rulings has been more accurately described at page 88 of Mr. Shadi Lal's Commentary, under explanation (1) to section 12 of the Act; but in any case the commentary alone should not have been referred to without consulting the rulings upon which it professes to be based.

The general ground has been cleared since the Punjab Pre-emption Act came into force, as section 5 of that Act precludes inquiring into custom where agricultural land is concerned, while section 4 of the Act further expressly limits pre-emption to cases of sale. The initial question to be determined in cases of the kind is, therefore, whether the transaction is or is not a sale as contemplated by the Act. We may, in passing, note that it would be a distinct hardship to proprietors if such a transaction could be treated as a sale and, therefore, subject to a right of pre-emption. The proprietor may very well have reasons of his own for desiring to confer occupancy-right upon particular tenants or others in whom he has confidence, and may not be willing to allow any one else to occupy the land upon similar terms. We do not say that mere hardship to either the proprietors or the tenants would be a proper ground for refusing pre-emption if the law was clear in favour of the pre-emptor, but it is certainly a ground requiring the lower Courts to look closely into the matter and for doing their best to ascertain what the law really is.

We do not ourselves see any reason for believing that the law on the point is open to serious doubt. Apart from the provisions of the Pre-emption Act, read as they stand, there is a clear pronouncement by their Lordships of the Privy Council at page 167 of the case *Abhiram Gosawami* v. *Shyam Charan Nandi* (6), to the effect that an owner of land who carries a subordinate interest out of his own property thereby grants a lease only and does not annihilate his own interest. In other words, he does not sell the property but leases it, and it is distinctly affirmed that in India a lease may be in perpetuity, such as is recognized in the Punjab by the grant of occupancy-rights. We take this authority as conclusive, but we may also refer to the ruling in *Bhagwan Das* v. *Sidhu* (7), in which the Chief Court arrived at a similar conclusion before the Privy Council ruling had been given in 1909. In *Bhagwan Das* v. *Sidhu* (7) the whole of the rulings quoted by Mr. Shadi Lal have been discussed at considerable length, and a perfectly clear decision was arrived at that no right of pre-emption can be set up in cases such as that before us. It ought not to have been necessary for us to again treat the matter as if it was still open to argument, but we have been obliged to do so owing to the way in which the lower Courts have in this suit disregarded all that was said by the learned Judges in 1907. We think it clear that the 1907 ruling was correct and should be followed. It was there pointed out that the creation of occupancy-right presupposes the non-existence of any transferable right prior to the date on which the grant was made, and it was also pointed out how inequitable to the proprietor any other interpretation of the law would be. The basis of the ruling then given is now further supported by the decision of the Privy Council already referred to, and we trust that after the fresh explanation which we have given the Courts of the Province will not again go wrong on the point through misunderstanding of passages in Mr. Shadi Lal's very

(1) 67 P. R. 1874.
(2) 196 P. R. 1882.
(3) 120 P. R. 1883.
(4) 179 P. R. 1888.
(5) 43 P. R. 1892.

(6) 36 I. A. 148; 10 C. L. J. 284; 6 A. L. J. 857; 11 Bom. L. R. 234; 36 C. 1003; 19 M. L. J. 530; 14 C. W. N. 1; 4 Ind. Cas. 449.
(7) 136 P. R. 1907.

useful commentary on the Punjab Pre-emption Act.

We find that the plaintiff has no right of pre-emption. The appeal is accordingly allowed. The decrees of the lower Courts are set aside and the plaintiff's suit is dismissed with costs throughout to the defendants.

Appeal allowed.

CALCUTTA HIGH COURT.

CIVIL RULES NOS. 4652 AND 4653 OF 1910.

February 17, 1911.

Present:—Mr. Justice Mookerjee and Mr. Justice Teunon.

GOPI LAL AND OTHERS—PLAINTIFFS—PETITIONERS

versus

Lala NAGGU LAL—DEFENDANT—OPPOSITE PARTY.

Civil Procedure Code Act V of 1908), O. XXIII, r. 1, sub-rule (2)—Withdrawal of suit—Leave to bring fresh suit—Condition that costs be paid before institution of fresh suit—Fresh suit by plaintiff and other persons filed without paying costs—Costs paid one month and two days after—Suit, whether validly instituted.

G. brought a suit on a promissory note. Upon his admission that he was a member of a joint family the Court held that the other members ought to join as plaintiffs. *G.* then asked for leave to withdraw from the suit with liberty to bring a fresh suit on the same cause of action. The Court permitted him to withdraw from the suit on condition that "he must pay the defendant's costs before bringing a fresh suit or else this suit shall stand dismissed with costs." The suit was withdrawn. Three days later *G.* with *M.* and *S.* instituted the present suit, but the costs of the previous suit were not deposited till after a month:

Held, that the suit was maintainable; that *M.* and *S.* were not bound by the previous order of the Court and they were entitled to ask that *G.* should be made a defendant; that the suit might be considered as filed on the day on which the costs were paid.

Hare Nath Das v. *Syed Hossain Ali*, 10 C. W. N 8; 2 C. L. J. 480, distinguished.

Rule against the order of the Small Cause Court Judge of Sewan, dated September 5th, 1910.

Babu *Surendra Nath Ghoshal*, for the Petitioners.

Babu *Dwarka Nath Mitter*, for the Opposite Party.

JUDGMENT.—We are invited in this rule to set aside a decree by which a Court of Small Causes has dismissed a suit without trial on the merits. It appears that Gopilal, one of the petitioners before us, instituted a suit on the 25th June 1910 for recovery of money due on a promissory-note. He was examined in support of his claim and stated that he was a member of a joint family; the learned Judge held that the other members ought to join as plaintiffs. Gopilal then asked for leave to withdraw from the suit with liberty to bring a fresh suit on the same cause of action, whereupon the following order was recorded: "The plaintiff be permitted to withdraw from the suit with leave to bring a fresh suit subject to limitation and on condition that he must pay or deposit the defendant's costs before bringing a fresh suit or else this suit shall stand dismissed with costs." On the 25th July 1910 the suit was accordingly withdrawn. Three days later, Gopilal with two other persons, Mewalal and Shamraj Singh, the petitioners before us, instituted the present suit. The costs of the previous suit, however, were not deposited along with the plaint, but were put into Court on the 27th August 1910. The defendant objected that the order of the Court had not been carried out and that the suit could not be maintained. The Small Cause Court Judge gave effect to this objection and dismissed the suit. In our opinion the order of the Small Casue Court Judge is open to objection on more than one ground.

In the first place, it is clear that so far as Mewalal and Shamraj are concerned, they are not bound by the previous order. If, therefore, we assume that Gopilal has not carried out the order of the Court and the suit is liable to be dismissed in so far as he is concerned, it must be tried out in so far as Mewalal and Shamraj claim to recover money from the defendant, and these plaintiffs are clearly entitled to ask that Gopilal should be joined as a party defendant to the suit. In this view the suit could not possibly be dismissed.

In the second place, it is clear that the plaint may very well be treated as filed on the 23rd August 1910. It has been pointed out to us that no question of limitation arises whether the suit is taken as instituted on the 23rd August or the 25th July, under these circumstances, there is no reason why as regards all the plaintiffs the suit should not be taken to have been duly instituted on the day on which the costs were deposited. In support of this view reference may be made to the decision of this Court in *Jeun Muchi* v. *Budhiram Muchi* (1).

In the third place, it is clear upon the

(1) 32 C. 339; 1 C. L. J. 43.

authority of the decision of this Court in the case of *Abul Aziz Mollah* v. *Ebrahim Mullah* (2), that the deposit of the costs on the 27th August 1910 ought to be treated as sufficient compliance with the order made in the previous suit. Our attention, howerver, has been invited to the case of *Hare Nath Das* v. *Syed Hossain Ali* (3) and it has been argued that the principle which underlies that decision cannot be reconciled with the ruling in *Abdul Aziz* v. *Ebrahim Mollah* (2). In our opinion the case of *Hare Nath Das* v. *Syed Hossain Ali* (3) is plainly distinguishable. There the Court fixed the time for payment of costs upon the expiry of which the suit was to stand dismissed, in the event of default. The plaintiff did not deposit the costs within that time with the result that the suit stood automatically dismissed. Consequently, when the second suit was instituted there was a bar to the trial of the cliam of the plaintiff who did not make any attempt even then to carry out the order of the Court or to ask for any extension of time.

The result, therefore, is that this Rule is made absolute and the order of the Court below set aside. The suit will be remitted for trial on the merits. The petitioners are entitled to their costs of this rule. We assess the hearing fee at one gold *mohur*, the costs of the Court below will abide the result.

The same order will govern Rule No. 4653 of 1910, which is also made absolute with costs—one gold *mohur*.

Rule made absolute.

(2) 31 C. 965.
(3) 10 C. W. N. 8; 2 C. L. J. 480.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 120 OF 1910.

January 16, 1911.

Present:—Mr. Chamier, J. C.

PANCHAM TEWARI AND OTHERS—DEFENDANTS—APPELLANTS

versus

RAM UDIT UPADHYA—PLAINTIFF—RESPONDENT.

Redemption suit—Terms of the mortgage, no evidence to prove—Period for which the mortgage is made, effect of, no evidence to prove—Interest to be presumed equal to the profits of the property.

In a suit for redemption the plaintiff, in order to prove the mortgage set up by him, produced a witness whose evidence established the fact of mortgage. In appeal it was contended that as this evidence did not prove the terms of the mortgage, the plaintiff was not entitled to a decree for redemption:

Held, that in the absence of evidence it could not be assumed that the mortgage was made for a period exceeding that alleged by the plaintiff:

Held, also, that in the absence of evidence to the contrary it could not be assumed that the interest, if any was agreed to be paid, exceeded the profits of the property.

Appeal against the order of the Additional Judge, Fyzabad, dated 13th January 1910, reversing that of the Additional Munsiff, Fyzabad, dated 11th September 1909.

Messrs. *H. C. Dutt* and *J. K. Banerjee*, for the Appellant.

Pandit *Gokaran Nath Misra*, for the Respondent.

JUDGMENT.—This was a suit for redemption of a mortgage alleged to have been made by the plaintiff-respondent in favour of an ancestor of the appellants in or about 1888. The appellants denied the mortgage. The first Court found that the mortgage had not been proved and dismissed the suit.

On appeal, the Additional Judge held that the mortgage had been proved and he passed a decree for redemption of the mortgage on payment of the sum of Rs. 50.

In second appeal it is contended that there was no evidence on the record to support the learned Judge's finding. The evidence upon which the learned Judge has acted consists of the statement of one Jaskaran who says that he attested a mortgage of the land in suit made in or about 1888 in favour of the appellants' ancestor Ramnidh; that the mortgage-deed was written out by Sheoratan Patwari who is dead, and that the deed was attested by himself and by one Dulam who is dead. His evidence, if believed, establishes the fact of the mortgage. It is urged that his evidence does not prove the terms of the mortgage. The witness says nothing about the period for which the mortgage was made. In the absence of evidence it cannot be assumed that the mortgage was made for a period exceeding twenty-one years. Nor can it be assumed that the mortgage was made for any definite period. Therefore, the absence of evidence with regard to the period for which the mortgage was made is immaterial. The only other question is with regard to the interest. The appellants do not suggest that the deed contained any provision with regard to the interest; on the contrary, they deny the existence of the mort-

gage and they have suppressed the mortgage-deed. The mortgage appears to have been made for Rs. 50 with possession. Regard being had to the area of the land mortgaged and the amount of the mortgage money it cannot be assumed that the interest, if any was agreed to be paid, exceeded the profits of the property. In my opinion there is sufficient evidence to support the learned Judge's finding that a mortgage now capable of redemption was made by the respondent in favour of the appellants' ancestor and I, therefore, dismiss this appeal with costs.

Appeal dismissed

CALCUTTA HIGH COURT.
CIVIL RULE NO. 428 OF 1910.
January 4, 1911.
Present:—Mr. Justice Mookerjee and Mr. Justice Teunon
UMESH CHANDRA PALADHI—
PLAINTIFF—PETITIONER
versus
RAKHAL CHANDRA CHATTERJEE—
DEFENDANT—OPPOSITE PARTY.

Small Cause Court – Jurisdiction—Suit for damages for unlawfully taking away goat sacrificed at altar of idol—Right of plaintiff as shebait *—Return of plaint—Provincial Small Cause Courts Act (IX of* 1887), *s.* 25—*Charter Act, s.* 15—*Revision—Power of High Court.*

The plaintiff, as *shebait* of an idol, brought a suit in the Small Cause Court for damages for unlawfully taking away a goat sacrificed at the altar of an idol. The defendant disputed the title of the plaintiff as *shebait*. The Court returned the plaint for presentation to the proper Court:

Held, that the suit was triable by the Small Cause Court, that the order of the Court could be revised by the High Court either under section 25 of the Small Cause Courts Act or section 15 of the Charter Act.

Subalram Dutt v. *Jagadananda Majumdar*, 13 C. W. N. 403; 1 Ind. Cas. 288, referred to.

Rule against the order of the Small Cause Court Judge of Amta, District Howrah, dated August 22nd, 1910.

Babu *Monmotho Nath Roy*, for the Petitioner.

Babus *Manmotho Nath Mukherjee* and *Hem Chandra Sen*, for the Opposite Party.

JUDGMENT.—We are invited in this rule to set aside an order made under section 23 of the Provincial Small Cause Courts Act. It appears that the petitioner brought a suit in a Small Cause Court for recovery of money due on account of damages sustained by him because the defendant had unlawfully taken away a goat sacrificed at the altar of the goddess Bhadrakali. The plaintiff claims to be the *shebait* of the goddess, and asserts that the interference of the defendant was wholly unauthorised. The defendant appears to have disputed in the written statement the title of the plaintiff as *shebait*. The Small Cause Court Judge thereupon passed the following judgment: "By this suit the plaintiff seeks indirectly to establish his title as *shebait* of Thakurani Bhadrakali. His status is denied by the defendant. So the question whether the plaintiff is *shebait* or not and whether he has any right to the offerings cannot be determined in this suit. The plaint be returned for presentation to the proper Court where the plaintiff's status and title may be more fully gone into." The plaintiff invites us to set aside the order as made without jurisdiction. In our opinion there is no room for controversy that the order cannot be supported. There is no question of any title to immoveable property or other title upon proof of which the grant of the relief to the plaintiff depends. The plaintiff asserts that he was entitled as *shebait* to the goat which was sacrificed on the particular occasion. That is undoubtedly a question which can be properly tried by the Small Cause Court Judge without any elaborate investigation into the general question of the title of the plaintiff as *shebait* of the goddess Bhadrakali. But the learned Vakil for the opposite party has contended, upon the authority of the decision of this Court in the case of *Subalram Dutt* v. *Jagdananda Mazumdar* (1), that it is not competent to this Court to interfere under section 25 of the Provincial Small Cause Courts Act, because this is not an order made in a case decided by a Court of Small Causes, so as to attract the operation of that section. We are not prepared, as at present advised, to put this narrow construction upon the terms of section 25 nor to adopt the view suggested by the learned Vakil for the opposite party that the term "decide" in section 25 means "to adjudicate finally on the merits." Besides, in so far as the Small Cause Court is concerned, the case has been decided. It

(1) 13 C. W. N. 403; 1 Ind. Cas. 288.

is not necessary, however, to examine in detail this point, because it has not been and cannot be disputed that our powers of interference are very much wider than what is indicated by section 25 and that in this case we may interfere, if not under section 25 of the Provincial Small Cause Courts Act, at any rate under section 25 of the Charter Act.

The result, therefore, is that this rule is made absolute and the order of the Court below set aside. The record will be returned to the Small Cause Court Judge in order that he may proceed to decide the case on the merits. The petitioner is entitled to his costs in this Court. We assess the hearing fee at one gold *mohur*.

Rule made absolute.

OUDH JUDICIAL COMMISSIONER'S COURT.

APPLICATION No. 94 OF 1909.

August 16, 1909.

Present:—Mr. Sundar Lal, A. J. C.

RAM CHARAN—PLAINTIFF—APPLICANT

versus

MR. J. VAN HALTEREN AND MRS. S. J. VAN HALTERN—DEFENDANTS—RESPONDENTS.

Husband and wife—Goods supplied to wife not approved of by husband—Liability of husband to pay for goods purchased by wife—Authority of wife, express or implied, to purchase goods—Goods concealed from husband, liability to pay the price of.

The question in this case was whether a husband was liable for the price of goods purchased by his wife from the plaintiff's firm; it was found that the amount due for the goods exceeded the amount approved of by her husband; that bills for the amount approved by the husband were submitted monthly to him but he was never informed of the goods purchased in excess, nor were bills for such excess purchases submitted to him by the plaintiff's firm:

Held, that although the general principle is that a husband is liable to pay for the price of household goods purchased by the wife, yet it is subject to the condition that the goods so purchased are suitable to his situation in life and position in society and also to the condition that she is either expressly or impliedly authorized by her husband to purchase them.

Where, therefore, it is found that the amount due for goods purchased exceeds the amount approved of by the husband and the fact of purchase is concealed from him and the plaintiff connives at such concealment, he must be taken to have known that he was selling goods in excess of the quantity which the husband had or would have approved and is, therefore, not entitled to a decree against the husband.

Application against the order of Major E. Waller, Judge of the Court of Small Causes, Cantonment, Lucknow, dated the 5th February 1909.

Babu *Gokal Chand Rai*, for the Appellant.

Pandit *Gokaran Nath Misra* and Babu *Jiban Krishna Banerji*, for the Respondents.

ORDER.—The plaintiff, a merchant in Sadar Bazar, Lucknow, sues the defendant Mr. Van Halteren (who is a Traffic Inspector on the Oudh and Rohilkhand Railway) and his wife for the recovery of Rs. 474-13 for goods supplied in 1905, 1906 and part of 1907. The plaintiff alleges that after giving credit for payments made, a sum of Rs. 299-12-9 was due for the value of goods supplied up to 21st December, 1906, for which Mr. Van Halteren signed an acknowledgment. In January, February and March 1907 the plaintiff supplied other goods of the vaule of Rs. 83-12-9. The plaintiff, therefore, claims thus :—

	Rs.	A.	P.
(*a*) for value of goods supplied up to 31st December 1909	299	12	9
(*b*) for value of goods supplied up to March 1903 ...	83	12	9
(*c*) for interest ...	182	1	6
(*d*) for postage on registered letter ...	0	3	6
	565	14	6
Remitted by plaintiff ...	91	1	6
Amount claimed ...	474	13	6

The defendant, Mr. Van Halteren, admits his liability for Rs. 83-12-9 only. The learned Judge of the Cantonment Court of Small Cause has decreed the claim in full against the wife and to the extent of Rs. 83-12-9 against the husband. The plaintiff has applied for revision to this Court under section 25 of the Provincial Small Cause Courts Act (IX of 1887) against so much of the decree of the Court below as dismisses the claim for the balance against the husband. It has been found by the said Court that goods of the value claimed were supplied by the plaintiff to Mrs. Van Halteren who was, as she now is, living with her husband. The claim includes a sum of about Rs. 50 which is made up of small items lent from time to time, with interest thereon, but the balance of the claim is for

value of goods required for consumption in the family. The plaintiff regularly supplied goods the vouchers for which used to be signed by Mrs. Van Halteren. According to the plaintiff a bill for the total quantity of the goods so supplied used to be made up by him at the end of each month and submitted to Mr. Van Halteren who generally paid a sum which fell short of the amount due on such bill. The plaintiff, according to his case, used to prepare another bill which comprised only part of the goods so supplied, the value of which corresponded exactly with the sum paid. This bill duly receipted used to be handed over to the purchaser. The balance of the goods were not carried over to the bill for the next month. The sum of Rs. 299-12-9 claimed by the plaintiff is mainly made up of the balances of goods left unpaid at the end of each month. It was again suggested the goods not paid for were those used by Mr. Van Halteren when on tour. This explanation is not accepted by the Court below. The Small Cause Court Judge is also not inclined to believe the plaintiff's story that a bill showing all the items used to be submitted monthly. He observes thus,—"The question at once arises. Why was this extraordinary procedure followed of omitting certain items in the receipted bills and showing no balances due from month to month? One very palpable reason appears to be that Mrs. Van Halteren at any rate did not want her husband to know that she was running up larger bills than he could afford or larger than he approved of. There appears to be no other explanation." Later on in his judgment he again observes,—"During the whole of this time the plaintiffs did nothing to bring this to the notice of Mr. Van Halteren, a man drawing about Rs. 200 per month all told. It is alleged that monthly bills were submitted showing balances due, but we only have plaintiff's word for this. In any case, it is usual with business firms to call attention to such a state of affairs by a letter or notice, and neither were sent. I consider that the plaintiff-firm in this case connived at and assisted Mrs. Van Halteren in concealing from her husband the fact that she was purchasing more goods than he could afford or that he approved of. The general principle, no doubt, is that the wife in such cases is the agent of the husband and that the latter is responsible for the payment of necessaries ordered by her but this is subject to the condition that they are suitable to his degree and state. It would also be subject to the condition that the supplier does not intentionally deceive or connive at deceiving the husband." A wife living with the husband when managing the domestic affairs is presumed to be acting as agent of the husband. The law on the subject is thus laid down at page 95 in Macqueen's work on the Rights and Liabilities of Husband and Wife: "No doubt, as a rule, the ordinary state of co-habitation between husband and wife does carry with it some presumption and some *prima facie* evidence of an authority to manage certain departments of the household expenditure, and to pledge the credit of the husband in respect of matters coming within that department, regard being had to the situation in life and position in society of the husband. But this authority only relates to such things as ordinarily fall within the domestic department usually confided to the wife, and where the articles bought upon credit are necessaries of such a kind and character as persons in that class of life are in the habit of ordering upon credit. The presumption is not absolute, and may be rebutted by proof that the wife was supplied with "necessaries or with money to pay for such necessaries, or that the husband had forbidden his wife to pledge his credit, or had fixed a limit which she was not to exceed; for otherwise the principles of agency, upon which the liability of the husband is based, would be practically of no effect." Again at page 98 the same author observes:—"The presumption of the authority of a wife to contract as agent for her husband may, however, be rebutted by showing that the husband had given warning to the tradesman not to supply his wife with goods, or that he had forbidden her to pledge his credit, or that she was already sufficiently supplied with articles of the same character as those for the price of which he was sued, and which were supplied to her without his knowledge. But if he knew of the extra commodities supplied upon his wife's order, if his family had had the benefit of them, and if, in fact, he himself, in his own person, had helped to appropriate or consume them,

none of the decisions or dicta imply that he would not be liable. On the contrary, it may be assumed that he would be bound in such a case, although he were to prove that his establishment was, by his own order, sufficiently and even amply supplied with all necessary articles. Even the extravagant nature of the order, although it may not be alone sufficient to rebut the presumption of her agency, yet may be properly left to the Jury as evidence negative of the husband's authority. The proper question for the Jury, even where the husband is living with his wife, is not merely whether the goods, in respect of which the action is brought, were necessaries suitable to her station, but whether upon the facts proved she had any authority, express or implied; to bind her husband by the contract; and where the former question alone was put to the Court granted a new trial." The latest case on the subject is that of *Morel Brothers & Co. Ltd.*, v. *Earl of Westmorland and wife* (1) decided by the Court of Appeal in England. The defendant's case is that he used in the beginning of every month to prepare a list of the goods which would be required in the month and Mrs. Van Halteren was authorised to purchase such goods in quantities approximating to that entered in such list. She, however, purchased goods much in excess of that quantity and to conceal this fact, the monthly bills presented did not include all the goods so supplied, but only a part of them. According to the finding, the plaintiff connived at and assisted Mrs. Van Halteren in concealing from her husband the fact that "she was purchasing more goods than he could afford, or that he approved of." This case is similar in principle to the case I have quoted above. In that case the Earl had fixed an allowance of £2,000 a year for household expenses which was to be paid into a separate banking account to be drawn upon for such expenses only. The Countess, however, made purchases far in excess of that amount. The question was whether the husband was liable for such purchases. The Court of appeal held that the husband was not liable. It is evident from the facts found that Mrs. Van Halteren was purchasing goods much in excess of the value that she was authorized to do by her husband. She concealed the fact from her husband and plaintiff connived at such concealment. He must be taken to have known that he was selling goods in excess of the quantity which the husband had or would have approved.

The goods so supplied have probably been consumed in the ordinary course in the family. The case, therefore, seems to be a hard one at first sight; but the husband was not aware of the fact that the family was consuming goods in excess of the amout the purchase of which he had authorized, nor, indeed, is it shown that they were so concerned in the fact. But to use the language of Lord Justice Mathew in the said case: "There is no real hardship to tradesmen involved in such cases as this. They should understand that the question is always one of agency, and it is incumbent on them to prove the wife's agency. They can easily protect themselves from any great risk in such cases; but if they think it answers their purpose better to go on giving credit for goods ordered by the wife without taking any steps to ascertain whether she has authority to pledge her husband's credit, they must run the risk of its ultimately turning out that she has no such authority."

On the findings, therefore, the decision of the Court below is correct. I, therefore, reject the application for revision but under the circumstances of the case without cost.

Application rejected.

(1) (1903) 1 K. B. 64; 72 L. J. K. B. 66; 51 W. R. 290; 87 L. T. 635; 19 T. L. R. 43.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 410 OF 1909.

June 13, 1910.

Present:—Mr. Lindsay, A. J. C.

SARJU SINGH—DEFENDANT—APPELLANT

versus

GAYA DIN SINGH AND OTHERS—RESPONDENTS.

Limitation Act (IX of 1908), Sch. I, Art. 120—Declaratory suit, limitation for—Cause of action for a suit for declaration—Entry in revenue records, effect of—Order passed by Partition Officer for seeking declaration in Civil Court.

In an application to the Revenue Court for partition the defendant alleged that the share of the plaintiff was ⅓rd and that the partition be made accordingly. The plaintiff filed an objection stating that he was owner of a one-half share. The Revenue Court referred the plaintiff to a civil suit to determine his rights. Immediately after, the plaintiff filed the present suit, in reply to which the defendant pleaded

SARJU SINGH *v.* GAYA DIN SINGH.

that the plaintiff had been recorded both at the settlement and the revision of settlement as owner of a ⅓rd share only, and that the present suit for declaration was barred by time. The entry in the settlement papers had admittedly been made so far back as 1872. It was, however, found that in spite of the entry the plaintiff had been throughout in possession of ½ instead of ⅓rd:

Held, that as the plaintiff had all along been in possession of a half share it was not necessary for him to bring a suit for a declaration and consequently limitation for the present suit could not be reckoned from 1872. The cause of action for the declaratory suit accrued on the date of the order passed by the Revenue Court and as the suit had been brought immediately after the passing of an order by the Revenue Court, it was well within limitation.

Appeal against the order of the Subordinate Judge, Sultanpur, dated 4th September 1909, reversing that of the Munsif, Sultanpur, dated 21st June 1909.

Babu *Ishwari Dayal*, for the Appellant.

Mirza *Samiulla Beg*, for the Respondents.

JUDGMENT.—The facts of this case are as follows:—A suit was brought in the Court of first instance by Gayadin Singh against Sarju Singh and others, for a declaration that he was owner of a half share in *khata khewat* No. 38 of *mouza* Gondwa. The parties are related being descendants from a common ancestor, one Bisram Singh, who died leaving two sons Mangal Singh and Lal Bahadur. The plaintiff Gayadin represents the line of Mangal Singh while the defendants represent the line of Lal Bahadur, there is no dispute as to the pedigree of the parties. It was alleged in the plaint that the property of Bisram Singh descended to his two sons in equal shares and that thirty-six or forty years ago the property was divided by a private partition according to which the descendants of Mangal Singh and Lal Bahadur respectively came into possession of equal shares of the ancestral property. This property, described in the plaint as *mahal* Kotawar, consists of six villages one of which is Gondwa in which is included the *khata* now in dispute. It was stated that in the revenue papers of five out of these six villages the plaintiff is recorded as proprietor of a half share. As regards Gondwa it was stated that the plaintiff was recorded as owner of a half share in *khata* No. 46 but that by some mistake he was entered in *khata* No. 38 as owner of a one-third share only. The defendant Sarju Singh made an application to the Revenue Courts for partition of *khata* No. 38 in *mouza* Gondwa and in that application he alleged that the share of the plaintff was one-third only. The plaintiff filed an objection in the Revenue Court to the effect that he was owner of a one-half and not only of a one-third share. Accordingly, on the 9th December 1908, the plaintiff was directed by the Revenue Court to file a civil suit for the determination of his rights: and this order has led up to the institution of the suit now under consideration. The principal defendant was Sarju Singh who denied that the plaintiff was owner of more than one-third of the *khata* in dispute. He pleaded that both at the Settlement and the revision of Settlement the plaintiff had been recorded as owner of a one-third share only and that his suit for declaration was barred by time.

The Court of first instance dismissed the claim on the plea of limitation. It held that the case was governed by the provisions of Article 120, Schedule I of the Limitation Act. This Article gives a period of six years from the date on which the right to sue accrued. The Court of first instance held that the plaintiff's right to sue was complete at the time the entry he complains of was made in the revenue register: that the said entry had been made both at the regular and revised Settlement with the knowledge of the plaintiff's father and of the plaintiff himself, and that he being thus aware that that entry was erroneous, his suit ought to have been brought within six years from the time he became aware of it.

In appeal before the Subordinate Judge, he was of opinion that the suit was within time and that the plaintiff's right to sue accrued to him from the date of the order of the Revenue Court directing him to file a suit for declaration of the extent of his right in *khata* No. 38 of *mouza* Gondwa. He accordingly gave the plaintiff a decree for the declaration he asked for. The defendant Sarju Singh comes here in second appeal. The memorandum of appeal contains seven grounds; of these grounds Nos. 3, 4, 5 and 7 have not been argued. The first and the second grounds relate to the question of limitation. The sixth ground relates to a finding of the lower Appellate Court on the question of possession. To deal first with the question of limitation; it is admitted by both parties that Article 120 Schedule II of the Indian Limitation Act governs the case. The dispute is as to the date from which limitation

began to run. According to the argument of the learned Counsel for appellant, the right to sue for declaration accrued in 1872, when the entry now complained of was first made in Settlement papers. There can be no doubt that the entry was made in this year and that it was re-produced in the papers prepared at the revision of Settlement which took place about 1893. In support of his contention the learned Counsel relies on the case of *Francis Legge* v. *Rambaran Singh* (1). That case, however, appears to be distinguishable from the one now before me. There the plaintiff came into Court praying for a declaration that they were entitled to possession of and were in possession of certain property in *mouza* Bataura. Their suit was brought on the 15th of May 1895 and the sole cause of action which they alleged was an order made on the 28th of June 1883 by the Settlement Officer by which their names were expunged from the village papers in respect of the property in dispute and by which the name of the defendant was entered as being in possession. It was held in that case that the suit was barred by limitation. The plaintiffs themselves alleged that what gave them their right to sue was the erroneous entry made in the Settlement papers nearly twelve years before the date of suit. In the present case the plaintiff's statement is that his right to sue accrued from the date on which he was ordered by the Partition Court to file a suit for declaration as to the extent of his share in the *khata* in dispute. The Subordinate Judge in dealing with the question of limitation relied upon the case of *Har Dayal* v. *Udit Narain Singh* (2). He also referred to another case reported as *Sripal Singh* v. *Sital Bakhsh* (3) and also to the case reported in *Ilahi Bakhsh* v. *Harnam Singh* (4). The learned Counsel for the respondent also refers to the cases of *Shakur Chatar Dhari Singh* v. *Bhagwan Din* (5), and *Maheshur Parshad* v. *Mohamed Ewaz Ali Khan* (6). In my opinion the decision of the lower Appellate Court on the question of limitation is correct, and I agree that in the present case limitation began to run from the 9th December 1908, the date of the order of the Partition Court.

(1) 20 A. 35.
(2) 8 O. C. 30.
(3) 8 O. C. 303.
(4) A. W. N. (1898) 215.
(5) 7 O. C. 187
(6) 7 O. C. 372.

The lower Appellate Court has found as a matter of fact that the plaintiff has been all along in possession of a one-half share in the *khata* in dispute and he held that in these circumstances the right of the plaintiff was only effected from the date above-mentioned when the Revenue Court instead of accepting his statement that he was owner of a half share directed him to sue for a declaration to that effect. Previous to this date there was nothing in the mere entry of the plaintiff's name as owner of a one-third share to make it necessary for him to sue for a declaration of his right. He was in possession of a half share as found by the Court below. Counsel for the appellant has referred to Exhibit A3, a copy of the petition of the plaintiff Gayadin dated 7th of January 1901. From the contents of this petition it would appear that on that date partition proceedings relating to *mouza* Gondwa were pending before one of the Revenue Courts in the Sultanpur District. Gayadin's petition was to that effect that he was a sharer and a *Lambardar* in that village and that he consented to the application for partition. He prayed that a separate *mahal* might be erected consisting solely of his share in the property as described in the *khewat*. It is claimed that by reason of this petition the present suit brought by Gayadin is barred as he then asked for partition in accordance with the *khewat* entry which he now declares to be erroneous. I do not see how this can affect the question. The amount of the share is not stated in that petition and there is nothing to show that Gayadin believed then that his share was anything less than he now asserts it to be. Nor does it appear that in those partition proceedings his right to a half share of *khata* No. 38 was denied. I hold, therefore, agreeing with the lower Appellate Court, that the suit was within time.

The only other ground of appeal pressed is No. 6 in which it is argued that the Court below ought to have read the evidence of possession in the light of joint ownership and ought to have given a definite finding on it. I am not quite clear what is meant by this. The plaintiff maintained that he had been in possession of a half share of the *khata* in dispute all along, and the Subordiaate Judge has found on this point in his favour. An attempt was made by the defendants to make out that the plaintiff's posses-

sion could not be referred to ownership of a half share. They alleged that if he were in possession of more than a one-third share, he had accounted to them yearly for the profits of any land he held in excess of his one-third share. The learned Subordinate Judge found that this defence was not true and that accounts had not been adjusted in the manner described. His finding on the question of possession is as definite as can be and cannot be challenged in this Court.

The appeal is dismissed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 651 OF 1910.

March 17, 1911.

Present:—Mr. Justice Banerji and Mr. Justice Griffin.

SRI CHAND—DEFENDANT—APPELLANT

versus

NIADAR SINGH—PLAINTIFF—RESPONDENT.

Contract—Interest, high rate of—Unconscionable bargain—Mortgage - Purchaser of equity of redemption—Whether entitled to plead unconscionable bargain in a suit by mortgagee—Pleadings.

The mere fact that the rate of interest stipulated for in a mortgage-deed is high is not sufficient to justify the conclusion that the bargain was unconscionable.

Dhanipal Das v. *Maheshar Buksh Singh*, 28 A. 570; 4 C. L. J. 1; 1 M. L. T. 205; 3 A. L. J. 495; 9 O. C. 188; 8 Bom. L. R. 491; 10 C. W. N. 849; 16 M. L. J. 292; *Meghraj* v. *Hargayan*, 7 A. L. J. 655; 7 Ind. Cas. 261, referred to.

A purchaser at an auction sale of the equity of redemption is entitled to plead that the stipulation as to interest is hard and unconscionable.

Second appeal from the decision of the District Judge of Meerut, dated the 20th June 1910.

Mr. *Surendro Nath Sen*, for the Appellants.

Mr. *Gokal Prashad*, for the Respondents.

JUDGMENT.—The suit out of which this appeal has arisen was brought by the plaintiff-respondent to enforce a mortgage executed on the 3rd of August 1897 by the first defendant, Sunder. The appellant, Srichand, is the purchaser of the mortgaged property in execution of a money-decree. One of the pleas raised by him in his defence was that the stipulation as to the rate of interest was "*hard and improper*". The bond secures a sum of Rs. 50 to be re-paid with compound interest at the rate of 2 per cent. per mensem with half-yearly rests.

The Court of first instance held that this stipulation was neither hard nor unconscionable, and decree the plaintiff's claim.

On appeal the learned Judge, referring to the fact that the mortgagor was a youth of 19, that the value of the mortgaged property was Rs. 4,000 and more than sufficient to secure the money borrowed, and that the rate of interest was high, expressed the opinion that "such a bargain might be considered to be a hard and unconscionable one." He, however, held that Sri Chand, the purchaser, could not plead that the stipulation was a hard and unconscionable bargain and was bound to pay the principal amount and compound interest at the rate agreed upon.

We do not agree with the view expressed by the learned Judge as to Srichand's right to contest the validity of the stipulation as to interest. But holding the view that we do on the other question raised in the case, we do not deem it necessary to decide this point. We are of opinion that the Court of first instance was right in holding that the stipulation as to interest was not hard and unconscionable. The latest pronouncement on the point of their Lordships of the Privy Council was made in *Dhanipal Das* v. *Maneshar Baksh Singh* (1). In that case their Lordships held that the Court "could not give relief from a transaction or contract merely on the ground that it was a hard bargain except perhaps when the extortion is so great as to be of itself evidence of fraud, which is not this case. In other cases there must be some other equity arising from the position of the parties or the particular circumstances of the case". In the case before us there is no evidence of any circumstance which would justify the Court in holding that the stipulation as to interest was procured in an unfair manner. As was observed by one of the learned Judges who decided the case of *Meghraj* v. *Hargayan* (2), "In all cases of this kind the Court must look to the facts and circumstances of the case and unless in a case there is unfair dealing the Court must enforce the contract made by the parties." In the case before us there is no suggestion of undue influence or unfair dealing. The only plea raised on the question

(1) 28 A. 570 (P. C.); 4 C. L. J. 1; 1 M. L. T. 205; 3 A. L. J. 475; 9 O. C. 188; 8 Bom. L. R. 491; 10 C. W. N. 849; 16 M. L. J. 292.

(2) 7 A. L. J. 655; 7 Ind. Cas. 261.

of interest was, as we have pointed out above, that the stipulation as to interest was hard and improper. The mere fact that the rate of interest was high, which it undoubtedly is in this case, is not sufficient to justify us in holding that the bargain was an unconscionable one and the parties who entered into it should be relieved from the liability incurred by them. In this view we are of opinion that the decree of the learned Judge of the Court below is right and this appeal must fail. We accordingly dismiss it with costs, including fees on the higher scale. We extend the time for payment of the mortgage money for a period of four months from this date.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 131 OF 1911.

April 21, 1910.

Present:—Mr. Evans, A. J. C.

BALJIT SINGH AND ANOTHER—DEFENDANTS—APPEALANTS

versus

BAHADUR SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Mortgagor and mortgagee, rights of – Splitting up of the mortgaged property with the consent of all parties, effect of—Loss of rights in execution of a decree based on a prior mortgage.

In 1878 *A.* mortgaged a share in a certain village to *R.* In 1881 he mortgaged the same property together with another share to the plaintiff and one *S.* In 1885 *R.* brought a suit upon his mortgage and obtained a decree for sale of the mortgaged property. To this suit the mortgagees of 1881 were parties. Before this decree was actually put into execution, the heirs of the mortgagors redeemed half the property mortgaged from *S.* in 1893. In 1906 the prior mortgagee *R.* put his decree into execution and got the other half of the mortgaged property sold. On a suit by the plaintiff to recover half the mortgaged property: *Held* that the mortgage security had with the consent of all the parties, *viz.*, the heirs of the mortgagors and the mortgagees, been split up into two portions and the portion redeemed in 1893 was not liable to the claim of the plaintiff, nor could the other half of the mortgaged share be recovered by the plaintiff, as whatever rights he had were lost in execution of the decree based on the prior mortgage. The plaintiff's suit was, therefore, dismissed *in toto*.

Appeal against the order of the District Judge of Hardoi, dated 8th January, 1909, modifying that of the Subordinate Judge, Hardoi, dated 25th July, 1908.

Pandit *Gokaran Nath Misra*, for the Appellant:—

Mr. *Mohammad Wasim*, for the Respondents.

JUDGMENT.—This is an appeal against an order of the District Judge of Hardoi granting a decree in favour of the respondents for Rs. 800. The facts of the case, so far as they are material to this appeal, are as below:—One Ausan Singh mortgaged a share of 1 *biswansi* in village Jodhapur Ekghara on the 10th August 1878 to one Raghunath Singh. On the 30th May 1881 he mortgaged the same property together with a share in another village to Bahadur Singh plaintiff (since deceased) and one Sahib Singh for Rs. 1,600. This was a usufructuary mortgage. On the 13th January 1885 Raghu Nath Singh brought a suit upon his mortgage of 1878 and obtained a decree for sale of the mortgaged property. To this suit the mortgagees of 1881 were parties. Ausan Singh died after this and his heirs, now represented by the appellants, redeemed half of the $1\frac{1}{4}$ *biswas* share mortgaged under the deed of 1881 by payment of Rs. 800 to Shib Singh. This was in December 1893. In February 1894 Raghunath Singh sold the decree of 1885 to Mashal Singh and Jograj Singh. Jograj Singh is the son of appellant, Guman Singh, and Mashal Singh is the nephew of appellants, Baljit Singh, and Kallu Singh. In June 1906 one-half of $1\frac{1}{4}$ *biswas* share in Jodhapur Ekghara was put up to sale in execution of the decree of 1885 and purchased by Mashal Singh and Jograj Singh who got mutation of names effected in their favour on the 21st September 1907. Thus, the plaintiff Bahadur Singh lost possession of half of the mortgaged share in Jodhapur Ekghara and he filed the present suit for possession of a 10 *biswansis* odd share. The Court of first instance granted him a decree for $6\frac{1}{4}$ *biswansis*. The present appellants appealed to the District Judge. The learned Judge found that, although the plaintiff was not entitled to possession of any property, he was nevertheless entitled to a decree for Rs. 800 being his share of the mortgage-money under the deed of 1881. Against this decision this appeal has been preferred by the appellant and the plaintiff has put in an objection to the

effect that the learned Judge should have affirmed the decree of the Court of first instance and granted the plaintiff a decree for possession of $6\frac{1}{4}$ *biswansis*. I am unable to uphold the decision of the learned Judge. It is conceded on behalf of the respondent that when half of the $1\frac{1}{4}$ *biswas* share was sold in execution of the decree of 1884 the plaintiff-respondent, who was a party to that suit, lost his rights as a mortgagee because he did not pay the amount due under the prior mortgage of 1878 which he was entitled to do under the decree of 1885. It is, therefore, conceded that so far as half of $1\frac{1}{4}$ *biswas* share in Jodhapur Ekghara is concerned the plaintiff-respondent has no remedy. With respect to the other half, which was redeemed by the apppellants in 1893 from Shib Singh, the co-mortgagee of the plaintiff-respondent under the deed of 1881, it is contended that the mortgage was an indivisible mortgage and the learned Judge was wrong in holding that it amounted in fact to two mortgages of $12\frac{1}{2}$ *biswansis* each. I find, on examination of the mortgage-deed, that there was no specification of the shares and the mortgage security was a joint one in favour of the two co-mortgagees, but the learned Pleader for the appellant has called my attention to two Exhibits A5 and A7. A5 is *khewat* of 1895 and A7 is an application made by Bahadur Singh plaintiff-respondent, after the property had been sold at auction in execution of the decree of 1885. The *khewat* of 1895 shows that Bahadur Singh was then recorded as the sole mortgagee of $12\frac{1}{2}$ *biswansis* only and in the application (Exhibit A7) there is a clear admission that half of the mortgaged property had been redeemed by the heirs of Ausan Singh on payment of Rs. 800. The exact words are as below:—"*Minjumla ek biswa panch biswansa mazkur ke* $12\frac{1}{2}$ *biswansa haqiat* Guman Singh *wa* Baljit Singh *wa* Mashal Singh *wagairah wursa Ausan Singh ne ba qadar mubligh* Rs. 800 *nisfi zar rehan musomme* Shib Singh *murthin se fak rehan kar li.*" From this latter document I have no hesitation in holding that, whatever may have been the original character of the mortgage of 188', the mortgage security was split up in 1893 with the consent of all concerned, *namely*, the heirs of the original mortgagor and the two mortgagees Bahadur Singh and Shib Singh. Therfore, that portion of the mortgaged share, which was redeemed in 1893 by the heirs of the mortgagor must be considered as a share separately mortgaged to Shib Singh and with respect to that property, the platintiff-respondent can have no claim for possession or for recovery of any portion of the mortgage-money. With respect to the other half of the mortgaged share, which was sold in execution of the decree to which the plaintiff-respondent was a party, it is conceded that he lost whatever rights he had as a mortgagee because he did not avail himself of the terms of the decree under which he was entitled to redeem the prior mortgage in order to keep his own security alive. I am, therefore, unable to find that the plaintiff-respondent, is, upon the facts before the Court, entitled to any decree whatever either for money or for possession of the property. I dismiss the objection taken by the respondent and, accepting the appeal, dismiss the claim with costs in all Courts

Appeal accepted.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 235 OF 1909.

December 9, 1909.

Present:—Mr. Chamier, J. C., and Mr. Evans, A. J. C.

Maharaj DEBI DIN—DEFENDANT—APPELLANT

versus

MANNU SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Transfer of Property (Act IV of 1882), s. 52—Lis pendens, doctrine of—Mortgage effected during the pendency of a suit, validity of—Sub-mortgagee, rights of.

In 1880 one *C.* mortgaged a certain share to *R.* and *S.* with posssession. Three deeds of further charges were also subsequently executed. One *B.* became entitled to a $\frac{1}{4}$th of the interest of the mortgage executed by *C.* In 1896 the father and guardian of *B.* sub-mortgaged that $\frac{1}{4}$th share to the appellant undertaking to put him in possession if the money was not paid within one year. *B.* ratified the deed when he came of age. In 1905 the appellant sued for possession of the property mortgaged to him impleading *B.*, his original mortgagor, and other persons representing the original mortgagees *R.* and *S.* The summons to *C.* in that suit was served on January 22nd, 1905. During the pendency of that

case, that is, on February 16th, 1905, *C.* mortgaged his share to the respondents. Subsequently, the respondents redeemed the four mortgages made by *C.* The appellant's suit in the meantime proceeded and he got a decree for possession of the ¼th share as a sub-mortgagee. The respondent brought the present suit for possession of the said share against the appellant:

Held, that under section 52 of the Transfer of Property Act the respondent could not take a valid mortgage and in order to take possession of the share mortgaged to him he must pay to the appellant ¼th of the money due on the basis of the four mortgages.

Appeal against the order of the District Judge, Sitapur, dated 17th March 1909, upholding that of the Subordinate Judge, Sitapur, dated 13th April 1908.

Pandit *Gokaran Nath Misra*, for the Appellant.

Mr. *A. P. Sen*, for the Respondents.

JUDGMENT.

CHAMIER, J. C.—This is an appeal by one of the defendants in a suit brought by the respondents Munnu Singh, Kallu Singh and Gajraj Singh. The suit was decreed by the Subordinate Judge whose decision was affirmed by the District Judge. The facts which are somewhat complicated are stated at length in the judgment of the Subordinate Judge. For the purposes of the present appeal they may be set out very shortly.

On February 17th, 1880, one Chandrika mortgaged a four-anna share in *mouzah* Neigadhi, a hamlet of Dharauli, to Rohan Singh and Surat Singh for Rs. 4,500 for 10 years with possession. By three other deeds, dated February 17th 1880, and July, 2nd 1887, he mortgaged the same share for further advances amounting to Rs. 1,336. Under circumstances which need not be detailed here, one Balbhaddar Singh became entitled to one-fourth of the interest of the mortgagees under the deeds executed by Chandrika, that is to say, to a one-anna share. On February 22nd 1896, Tilak, the father and guardian of Balbhaddar, sub-mortgaged that share to the present appellant, undertaking that if the mortgage-money was not paid off within one year he would put the appellant into possession. That deed was ratified by Balbhaddar when he came of age. On January 12th 1905, Debi Din brought a suit for possession of the property mortgaged to him, impleading Balbhaddar and Tilak already mentioned, Tikam Singh, a person whom Tilak had purported to give part of the mortgaged property, Jawahir Singh, a person who claimed under a sub-mortgage from Tikam, Chandrika, the original mortgagor, and other persons representing the original mortgagees, Rohan Singh and Surat Singh. The summons to Chandrika in that suit was served on him on January 22nd 1905. During the pendency of that case, *i. e.*, on February 16th 1905, Chandrika mortgaged his four-anna share to the plaintiffs-respondents, Munnu Singh, Kallu Singh and Gajraj Singh, with possession. Five days later these persons redeemed the four mortgages made by Chandrika in 1880 and 1887 by payment of what was due upon them to the representatives, or the persons whom they treated as the representatives, of the original mortgagees but they made no payment to the present appellant. The latter's suit in the meantime proceeded and on August 17th 1905 he got a decree for possession of a one-anna share as sub-mortgagee.

The case for the plaintiffs-respondents is, that they are not bound by the sub-mortgage to the appellant of which they had no notice, and that as they have paid off all that remained due on the original mortgages made by Chandrika Singh, they are entitled to possession as against the appellant. The appellant, on the other hand, contends that inasmuch as the plaintiffs-respondents acquired their interest as mortgagees during the pendency of his (the appellant's) suit for possession of the property as sub-mortgagee, the plaintiffs-respondents are bound by the result of that suit and cannot challenge his right to possession. He also alleges that they are bound by the mortgage because the mortgagor Chandrika, at all events, had notice of the sub-mortgage and the plaintiffs-respondents who claim under him are affected by that notice. It appears to me that the appellant's first contention must prevail. Debi Din sued in January 1905 to enforce his right to possession of the property in question as sub-mortgagee thereof. During the pendency of that suit Chandrika, one of the defendants, purported to transfer the mortgaged property to the plaintiffs-respondents and confer upon them a right to possession on redeeming the mortgages. It seems to me to be quite clear that the case *falls* within the terms of section 52 of the Transfer of Property Act. The property claimed by the respondents could not be transferred by Chandrika so as to affect the rights of the appellant under the

decree which he obtained on August 17th, 1905. In my opinion, the decisions of the Courts below on this point are wrong and should be set aside. It is unnecessary to consider the question of justice.

In their plaint the plaintiffs-respondents claimed, in the first place, an unconditional decree for possession and for mesne profits as against all the defendants including the appellant but they said that if it was found that any sum of money was payable by them before they could take possession they were prepared to pay that sum. The appellant has, form the very first, admitted the right of the plaintiffs-respondents to take possession of the property mortgaged to him on paying to him $\frac{1}{4}$th of the original mortgage-money (a larger sum is due to him but, of course, he cannot claim more than his mortgagor could have claimed). It is conceded that the amount due on the mortgages of the four-anna share was Rs. 7,100 at the time when the plaintiffs-respondents purported to redeem these mortgages. The parties are agreed that in the view which we take of the case the plaintiffs-respondents should be required to pay to the appellant one-fourth of that sum, *viz.*, Rs. 1,775. I would allow this appeal, set aside the decrees of the Courts below and give the plaintiffs-respondents a decree for possession of the one-anna share in dispute upon payment by them within three months from the date of our decree of the sum Rs. 1,775. If payment is not so made their suit will stand dismissed. In either event, the plaintiffs-respondents must pay the costs of the defendant-appellant in all three Courts, for they have insisted up to the last that they are entitled to unconditional possession of the share while the appellant has all along been willing to surrender it to them on payment of the amount now found to be due. I would make no order as to costs of the others parties to this case.

EVANS, A. J. C.—The application of section 52 of the Transfer of Property Act, 1882, to this case is not free from difficulty but I take it that as the appellant was asking for possession of the property under his mortgage when he instituted his suit on 12th January 1905, the subsequent transfer with possession to the respondents on 16th February 1905 is to that extent invalid, because it affected the right of the appellant to possession of the property in suit. So far, however, as the mortgage in favour of the respondents does not conflict with the particular right to the property adjudicated upon in the suit the transfer is not void and, therefore, the respondents are entitled as mortgagees to redeem the property. The fact that the alienation took place *pendente lite* relieves us from the necessity of expressing an opinion on the question whether the respondents are bound by a sub-mortgage of which they apparently had no direct notice. I am not prepared at present to accept the contention that notice to the mortgagor is necessarily notice to the mortgagee, but for the purposes of this case no decision on this point is called for. I concur with my learned colleague as to the order which should be passed in this case.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 250 OF 1909.

January 25, 1910.

Present: Mr. Evans, A. J. C.

TOTA RAM—PLAINTIFF—APPELLANT

versus

JOHN'S FLOUR MILL, DELHI—DEFENDANT—RESPONDENT.

Contract Act (IX of 1872), ss. 39, 49 and 93—Refusal to take delivery of all the goods, effect of—Failure to perform one's own part of contract Damages, liability to pay in case where one party does not perform his part.

In September 1907 the appellant agreed to purchase from the respondent certain flour, the terms of the contract being "Ready delivery within one week". No delivery was taken within one week nor did the appellant ask for the same. In October 1907 the respondent telegraphed to the appellant asking where to despatch the goods to. The appellant in reply asked only for half the goods. The respondent refused to supply and cancelled the contract. The appellant then insisted upon the delivery of the whole. On respondent's refusing to comply, the appellant brought a suit for damages against him:

Held, that the appellant was not entitled to any damages inasmuch as by not asking delivery of all the goods within one week, he had not performed his part of the promise and could not, therefore, call upon the respondent to perform his.

Sooltan Chund v. *Schiller*, 4 C. 252; 3 C. L. R. 287; *Simson* v. *Virayya*, 9 M. 359; *Rash Behary Shaha* v. *Nrittya Gopal Nundy*, 33 C. 477; 3 C. L. J. 249, referred to.

Appeal against the judgment and decree of the District Judge, Lucknow, dated the

22nd March 1909 confirming that of the Subordinate Judge of Lucknow, dated 25th May 1908.

Pandit *Gokaran Nat Mirsa*, for the Appellant.

Mr. *T. C. Morton*, for the Respondent.

JUDGMENT.—This is an appeal against an order of the District Judge of Lucknow dismissing the appellant's claim for damages for breach of contract. I take it, that the following facts are established. On the 17th September 1907, the appellant agreed to purchase for the respondents certain flour as set forth in a written contract.

The terms of the contract are "Ready delivery within one week". No. delivery was taken within one week nor did the appellant ask for delivery. On the 4th October 1907 the respondents wired to the appellant "Wire where to despatch (*atta*) flour. Contract was ready." On the 9th of October the appellant replied by a wire asking the respondent to despatch to Lucknow one waggon-loads each of *atta* and *maida*. It is admitted that if the appellant had asked for all the *atta* and *maida* as set forth in the written contract of the 17th September, 1907, he should have asked for two waggon-loads each. On the 10th October 1907, the respondents wired "Your contract was 25th, wired you 4th October. No reply came. Cannot supply you now. Contract cancelled." After this, the appellant wrote a letter on the 12th October 1907 for delivery in full. This request was not complied with. The Courts below have concurrently found that the respondents were justified in cancelling the contract and refusing to supply the *atta* and *maida* referred to in the contract of the 17th September 1907, and the only question now before this Court is whether this decision is correct. The grounds of appeal may be summarized as below:—*First*, that the Courts below placed an erroneous construction on the terms of the contract, dated the 17th September, 1907. *Secondly*, that the respondents by their wire, dated the 4th October 1907, modified the terms of the original contract and, therefore, have no right to rescind the contract on the ground that the appellant had asked for delivery of only half the goods. *Thirdly*, that the conduct of the parties shows that the original time fixed for the performance of the contract was no essential part thereof. *Fourthly*, that the respondents should have first given the appellant notice that the contract would be rescinded if delivery of the goods in full were not taken. I understand that the argument of the learned Pleader for the appellant is that the original contract meant that the respondents were bound to deliver the goods within one week and the appellant was bound to take delivery within one week. This contract was cancelled by the telegram of the 4th October, 1907, and it should be assumed that a new period of seven days should be counted from the 7th October, 1907. Even if this argument were accepted it is clear that the appellant never asked for delivery of *all* the goods within one week and under section 93 of the Contract Act, which is included in Chapter VII (Sale of goods), the seller of goods, in the absence of any special promise, is not bound to deliver them until the buyer applies for delivery.

The learned Pleader for the appellant has referred to section 49 of the Contract Act which is as below:—"When a promise is to be performed *without application by the promisee*, and no place is fixed for the performance of it, it is the duty of the promisor to apply to the promisee to appoint a reasonable place for the performance of the promise, and to perform it at such place." But I hold that it is only a general provision and in the case of a contract for sale of goods is modified by section 93. The following case have been cited on behalf of the appellant. *The Mersey Steel and Iron Co.*, v. *Naylor, Benzon and Co.* (1); *Sooltan Chand* v- *Schiller* (2); *Simson* v. *Virayya* (3); *Rash Behary Shaha* v. *Naittya Gopal Nundy* (4).

The ruling in *Rash Behary Shaha* v. *Naittya Gopal Nundy* (4) cleary does not apply because that was a case on which two different contracts were made. In *Sooltan Chand* v. *Schiller* (2) and *Simson* v. *Virayya* (3) the learned Judges found, upon the special facts in those cases that the defendants were not entitled to rescind the original contracts. But each case must be considered on its merits, and even assuming that there was a fresh contract in consequence of the respondent's telegram of the 4th

(1) 9 A. C. 434; 53 L. J. Q. B. 497; 51 L. T. 636; 32 W. R. 989

(2) 4 C. 252; 3 C. L. R. 287.

(3) 9 M. 359.

(4) 33 C. 477 ; 3 C. L. J. 249.

October 1907, I hold that section 39 of the Contract Act could be applied because the appellant had not asked for delivery of all the goods within one week from the 4th October 1907 and, therefore, impliedly refused to perform the contract in its entirety. I hold that time was an essential part of the contract as the price of flour was rapidly rising just at this time; and it was, therefore, necessary that the appellant should apply for delivery of all the goods within the period specified in the contract. I wish to note that, in arriving at this conclusion, I only assume for the sake of the argument that there was a fresh contract in consequence of the telegram of the 4th October, 1907 but I do not mean to decide that the telegram of the 4th October, 1907, amounted to a fresh contract within the meaning of section 62 of the Contract Act. I hold that the decision of the Court below is correct and dismiss the appeal with costs.

Appeal dismissed

PUNJAB CHIEF COURT.
SECOND CIVIL APPEAL No. 381 OF 1909.
March 29, 1911.
Present:—Mr. Justice Shah Din.
GANDU MAL—DEFENDANT—APPELLANT
versus
UDHO—PLAINTIFF AND OTHERS—
DEFENDANTS—RESPONDENTS.

Limitation Act (XV of 1877), Sch. II, Art. 135—Case between mortgagees—Mortgagee not entitled as of right to redeem a prior mortgage—Principles applicable.

Article 135 of Schedule II to the Limitation Act, 1877, has no application to a case where the mortgagor is merely a *pro forma* defendant and the real dispute is as to whether the puisne mortgagee is entitled to redeem and to take possession of the mortgaged property from the prior mortgagee in possession.

The principle of the Full Bench ruling in *Gokal Chand* v. *Rahman* 59 P. R. 1907 is not applicable to cases where the mortgagee cannot, as of right, redeem the mortgaged land.

Second appeal from the decree of the Divisional Judge, Amritsar, dated the 21st December 1909, reversing that of the Munsiff, 1st class, Gurdaspur, dated the 10th August 1908.

Mr. *Harris*, for the Appellant,

Mr. *Ganpat Rai*, for the Respondents.

JUDGMENT.—This appeal and appeal No. 382 of 1909 are connected together and will be disposed of by one judgment.

The facts are very fully stated in the judgment of the learned Divisional Judge, and it is unnecessary to repeat them here. The questions for decision in each of these two appeals, are,—

(1) Whether the plaintiff's suit is barred by limitation under Article 135 of the Limitation Act and

(2) Whether the mortgage effected in the one case in favour of Thakur Das in respect of 62 *kanals* of land on the 26th July 1889, and that effected in the other case in respect of 62 *kanals* 11 *marlas* in favour of Duni-Chand on the 22nd March 1892 were incomplete and unenforceable by reason of the prior mortgagee Budha Mal, who held possession under his mortgage dated the 26th July 1876 not being paid off promptly or within a reasonable time after the dates of the aforesaid mortgages.

Upon the first question I unhesitatingly agree with the Divisional Judge that Article 135 of the Second Schedule of the Limitation Act has no application to the facts of this case. Here the real dispute is as to whether the puisne mortgagee is entitled to redeem the prior mortgage in favour of Budha Mal and to take possession of the land from him, and in such suit the mortgagor is merely a *pro forma* defendant as he is not in actual possession of the mortgaged property. I do not see how it can be said that the mortgagor's right to possession determined when he executed the mortgage-deed in favour of the puisne mortgagee, for at that time it was the prior mortgagee who was in possession and his possession could not be considered as that of the mortgagor. Article 135, therefore, is entirely inapplicable and as it is not urged that the suit is barred by any other Article of the Limitation Act, the finding on the first question must be against the appellant.

Upon the second question I do not think that the Full Bench ruling in *Gokal Chand* v. *Rahman* (1) applies to the facts of these two cases. In the one case it was optional with Thakur Das under the express terms of his mortgage-deed to redeem the prior incumbrance at his own convenience, and even if it were not so, I fail to see how Thakur Das on payment of Rs. 191 to the prior mortgagee Budha Mal, could have asked Budha Mal as of right to let him redeem 62 *kanals* of land out of an area of 124 *kanals* wich was in Budha Mal's

(1) 59 P. R. 1907 (F. B.).

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possession under the deed of 1896. Such partial redemption was not competent to the puisne mortgagee without the consent of the prior mortgagee, and there is nothing to show that Budha Mal was ever prepared to give such consent. Similarly, in the other case, Duni Chand could not on payment of Rs.200 to Budha Mal compel him to relinquish possession of 31 *kanals* of land only, and under the terms of the mortgage-deed Duni Chand could not be deemed to have been required to make prompt payment of Rs. 200 to Budha Mal.

For these reasons, I hold that the view taken by the Divisional Judge in each of these two cases is correct and I accordingly maintain his decrees and dismiss both the appeals with costs.

Appeal dismissed.

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEAL NO. 49 OF 1910.

January 16, 1911.

Present :—Mr. Evans, A. J. C.

Babu AMIR CHAND—DECREE-HOLDER—APPELLANT

versus

Babu NARSINGH NARAIN AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Limitation Act (IX of 1908), ss. 14 (2) and 15 (1) and Art. 18—Time taken in defending another suit, exclusion of—Bona fide *prosecution of a case in another Court—Injunction or order, necessity of, in order to exclude time—Exclusion of time for purposes of limitation—Civil Procedure Code (Act V of 1908), O. XXXIV, r. 6—Execution proceedings, application in.*

The appellant obtained a mortgage-decree against respondents on the 15th October 1900 for sale of the mortgaged property. The decree was made absolute on the 12th August 1902. The mortgaged property was sold on the 25th June 1906 and a portion of the decree was realized. On the 24th July 1906 one of the respondents instituted a suit asking for a declaration that the mortgage-decree of 1900 and the sale thereunder were not binding on him. The suit was dismissed by the first Court but was decreed by the District Judge on appeal on the 30th April 1907. The latter decision was again reversed in second appeal on the 8th July 1908. On the 8th December 1909 the present application for execution was made. On objection by the judgment-debtors-respondents that the application was time-barred, it was urged by the decree-holder that the period between the 30th April 1907 and the 8th July 1908, during which time the mortgage-decree was in abeyance, should be excluded:

Held, that the application for execution was time-barred. The appellant could not claim the benefit of section 14, clause (2), or of section 15, clause (1), of the Limitation Act of 1908. The former section applies only to a case where a person makes a *bona fide* application to a Court without jurisdiction and the latter only to a case where the execution of a decree has been stayed by an injunction or order:

Held, further, that even on general principles of equity, the appellant was not entitled to exclude the period between the 30th April 1907 and the 8th July 1908:

Held, lastly, that an application under Order XXXIV, rule 6, of the Civil Procedure Code, 1908, must be treated as an application in execution proceedings to which Article 18 of the Limitation Act would apply.

Ram Raghubir v. *Musammat Zahur-un-Nisa*, 6 O. C. 114, followed.

Prannath Roy v. *Rookea Begum*, 7 M. I. A. 323; 4 W. R. 37 (P. C.); *Rajah Enayet Hossein* v. *Sayed Ahmed Reza*, 7 M. I. A. 238; *Musammat Rannee Surno Moyee* v. *Shoshee Mokhee*, 12 M. I. A. 244; 11 W. R. 5 (P. C.); 2 B. L. R. 10 (P. C.); *Bassu Kuar* v. *Dhum Singh*, 11 A. 47; *Lakhen Chandar Sen* v. *Madhu Sudhan*, 35 C. 209; 3 M. L. T. 90; 5 C. L. J. 59; 12 C. W. N. 326, referred to.

Appeal against the order of the District Judge, Fyzabad, dated the 8th May 1910, confirming the order of the Munsif, Fyzabad, dated the 25th January 1910.

Babu *Iswari Prasad*, for the Appellant.

Pandit *Gokaran Nath Misra*, for the Respondents.

JUDGMENT.—This is an appeal by a decree-holder against an order of the District Judge of Fyzabad upholding a decision of the Munsif of Fyzabad under which he dismissed the application of the appellant for a personal decree under Order XXXIV, rule 6, of the Code of Civil Procedure, corresponding to section 90 of Act XIV of 1882.

The facts are as below:—

The appellant obtained a mortgage-decree against the respondents on the 15th October 1900 for sale of mortgaged property. The decree was made absolute on the 12th August 1902, and Rs. 35 were realised by sale of the mortgaged property on the 25th June 1906. The present application was made on the 8th December 1909. The learned Judge decided that the application was time-barred as it was made more than three years after the date on which the mortgaged property was sold.

In appeal, it is conceded on behalf of the appellant that, if the ruling of this Court in *Ram Raghubir* v. *Musammat Zahur-un-nissa* (1) is to be followed, then the present application is barred by limitation unless the appellant can exclude a period from the 30th April 1907 to the 8th July 1908 under

(1) 6 O. C. 114

the circumstances which will be presently stated.

I deal first with the contention that the ruling in *Ram Raghubir* v. *Musammat Zahur-un-Nisa* (1) should not be followed. In that case it was decided that "an application under section 90 of the Transfer of Property Act cannot be considered an application for execution of a decree within the meaning of Article 179 of the Limitation Act but it is an application in execution proceedings to which Article 178 applies." I understand the contention of the learned Pleader for the appellant is as follows:—In section 89 of the Transfer of Property Act it is provided that where the defendant does not pay in the amount due the plaintiff can apply to the Court for an *order* absolute for sale of the mortgaged property and in Order XXXIV, rule 5, Civil Procedure Code, which corresponds to section 89, the word "decree" is substituted for the word "order". Similarly, a comparison of section 93, Act XIV of 1882, with Order XXXIV, rule 3, Civil Procedure Code, shows a similar alteration, the word 'decree' being substituted for the word 'order' and it is, therefore, argued that the ruling in *Ram Raghubir* v. *Musammat Zahur-un-Nisa* (1) which is based upon an Act no longer in force cannot be applied to proceedings under Order XXXIV of the Code of Civil Procedure. But it is to be noted that the wording of rule 6 of Order XXXIV is almost exactly the same as that of section 90, Act XIV of 1882 and, in the ruling cited above, Mr. Chamier clearly stated that proceedings under sections 87, 89 and 93 do not stand on the same footing as proceedings in section 90 and he, therefore, did not propose to examine any rulings which dealt with proceedings under the former sections. In this ruling he dealt entirely with proceedings under section 90 and his concluding remarks are as follow:—"Section 90 in reality provides that if in execution of the mortgage-decree it appears that a balance remains due to the mortgage a decree shall be given for the recovery thereof. I am not prepared to hold that the view which has hitherto prevailed that an application under section 90 is an application in execution proceedings is wrong. It has often been held that Article 178 applies to applications in execution to which Article 179 cannot be applied and, therefore, I would hold that an application under section 90 is governed by Article 178." I am, therefore, unable to accede to the contention that this Court should not follow the above ruling and I hold that it must be followed in the present case.

The next contention taken by the learned Pleader for the appellant refers to certain proceedings taken by respondents after the mortgage-decree had been passed. Narsing Narain, one of the respondents, instituted a suit on the 24th July 1906 asking for a declaration that the mortgage-decree of 1900 and sale thereunder were not binding on him. The learned Judge on appeal decreed his claim on the 30th April 1907 and that decision remained in force until set aside by this Court on the 8th July 1908. The contention is, that the period between the 30th April 1907 and the 8th July 1908 should be excluded in counting limitation against the appellant. This contention is based in the alternative on sections 14 (2) or 15 (1) of the Limitation Act, 1908 or on general principles of equity. Section 14 (2) provides that "in computing the period of limitation prescribed for any application, the time during which the applicant has been prosecuting with due diligence another civil proceeding whether in a Court of first instance or in a Court of appeal against the same party for the same relief shall be excluded where such proceeding is prosecuted in good faith in a Court which from defect of jurisdiction or other cause of a like nature is unable to entertain it."

This section clearly does not apply. It applies to a case where a person makes a *bona fide* application to a Court without jurisdiction, and for the purposes of this section an applicant resisting an appeal should be deemed to be prosecuting a proceeding. In the present case the applicant did not make an application before a Court without jurisdiction but merely resisted a claim which had been brought by the respondent before a Court having jurisdiction. I next deal with the contention under section (15) (1) which is as below:—

"In computing the period of limitation prescribed for any suit or application for the execution of a decree the institution or execution of which *has been delayed by injunction or order*, the time of the continuance of the injunction or order, the day on which it was issued—the day on which it was withdrawn shall be excluded." It is conceded that the appellant was not prevented by the issue of

any injunction or order from making an application under section 90 Act XIV of 1882 but it is contended that there was an order by *implication* preventing him from making such an application because the mortgage-decree was in abeyance from the 30th April 1907 until the 8th July 1908. I cannot import into this section words which are not contained in it. If during this period the appellant had asked for a decree under section 70 and his application had been refused, then the section might be applied, but in the absence of a distinct ruling in support of the appellant's contention, I hold that he cannot claim the benefit of this section.

The third contention of the learned Pleader for the appellant is that, apart from the special provisions of the Limitation Act he is entitled to the exclusion of the period during which the mortgage-decree was in abeyance upon the general principles of equity and he relies upon several rulings as below:

Raja Enayet Hossein v. *Syed Ahmed Reza*(2), *Prannath Roy* v. *Rookea Begam* (3), *Musammat Ranne Surno Moyee* v. *Shoshee Mokhee Burmonia* (4), *Bassu Kuar* v. *Dhum Singh* (5), *Lakhan Chandar Sen* v. *Madhu Sudhan* (6).

No general rule can be deduced from these decisions applicable to the present case. Both the rulings in *Raja Enayet Hossein* v. *Syed Ahmed Reza* (2) and *Prannath Roy* v. *Rookea Begam* (3) apply to cases where it was held that suits which would ordinarily have been barred under section 14 of Bengal Regulation III of 1793 were not barred because there was a good and sufficient cause for not instituting them within limitation. In *Musammat Rannee Surno Moyee* v. *Shoshee Mokhee* (4) an auction-sale under Bengal Regulation VIII of 1819 in which the rights of certain *putnedars* in a *taluk* were sold in 1844 was afterwards set aside, the auction-purchaser being directed to pay back to the *putneedars* the profits for the time they were out of posssession. The *zemindars* brought a suit against the *putneedars* to recover arrears of rent which had accrued, while they were out of possession and it was held by their Lordships of the Privy Council that the cause of action accrued on the date of the decree setting aside the auction-sale. I do not find that this ruling has any application to the present case. Similar remarks apply to the ruling in *Bassu Kuar* v. *Dhum Singh* (5) In *Lakhan Chandra Sen* v. *Madhu Sudhan* (6) it was held for certain reasons that the right of the plaintiffs to bring an action to recover property was suspended for a certain period; therefore, the suit which would have been otherwise barred was not barred by limitation. In some of the above instances there were special reasons for varying or modifying the usual law of limitation, but in the present case I can find no possible legal or equitable grounds for excluding the period during which the mortgage-decree was in abeyance, in favour of the appellant. The cause of action for an application for a decree under section 90, Act XIV of 1882, accrued on the 25th June 1906. Excluding the period from the 30th April 1907 to the 8th July 1908 there is no reason shown why the appellant did not apply between the 25th June 1906 and the 29th April 1907 and again between the 9th July 1908 and the 24th June 1909. He elected to wait until nearly six months after the limitation of three years had elapsed and he now complains because he is not allowed to make an application which he could easily have made during any of the periods indicated above.

For the foregoing reasons I hold that there is no equitable or legal ground for interference and I dismiss the appeal with costs.

Appeal dismissed.

(2) 7 M. I. A. 238.

(3) 7 M. I. A. 323; 4 W. R. 37 (P. C.)

(4) 12 M. I. A. 244; 11 W. R. 5 (P. C.); 2 B. L. R. 10 (P; C.)

(5) 11 A. 47.

(6) 35 C. 209; 3 M. L. T. 90; 7 C. L. J. 59; 12 C. W. N. 326.

ALLAHABAD HIGH COURT.

CRIMINAL APPEAL NO. 740 OF 1910.

March 24, 1911.

Present:—Mr. Justice Tudball.

AJITA AND OTHERS—APPELLANTS

versus

EMPEROR OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 401—Gang associated for habitually committing theft or robbery—Proof—Wandering tribe—Liability of individual members—Parents and children.

For the purposes of section 401 of the Indian Penal Code it must be clearly established, either by direct evidence or by facts from which the inference may be legally drawn, that the members composing a gang have combined or come together for the purpose of habitually committing theft or robbery.

The fact that several members of a gang of a wandering tribe were dishonest and did commit thefts

and other crimes is not in itself sufficient to show that the purpose for which they had combined was to habitually commit theft.

Dukharan v. *King-Emperor*, 7 O. C. 163; *The Public Prosecutor* v. *Bonigiri Pottigadu*, 32 M. 179; 5 M. L. T. 10; 9 Cr. L. J. 567; 2 Ind. Cas. 307, referred to.

The mere fact that the women and children belonging to such gang lived with adult males of the gang, is insufficient for a Court to hold that they were associated with their husbands and parents for the purpose of habitually committing theft. The fact that some of the members of such gang were guilty of theft and burglary does not establish that the association of the gang was one which was brought about for the purposes contemplated by section 401, Indian Penal Code.

Appeal against the order of conviction passed by the Sessions Judge of Jhansi, dated 22nd September, 1910.

Mr. *Sunder Bhan* (with him Mr. *Haribans Sahai*), for the Appellants.

Mr *R. Malcolmson*, Assistant Government Advocate, for the Crown.

JUDGMENT.—The thirty-two appellants have been convicted by the Sessions Judge of Jhansi of an offence under section 401, Indian Penal Code, namely, that they belong to a wandering gang of persons associated for the purpose of habitually committing theft or robbery. The appellants are 8 men and boys and 24 women and girls. They call themselves Karnataks and apparently are Kanjars or Berias, a class of persons which has been accustomed from time immemorial to wandering about in gangs over the country side living as best they can, the women dancing and singing in public. To establish the case against the present appellants the prosecution attempted to show (1) that wherever this gang went the adult males usually kept themselves out of sight while the women and children remained in camp, (2) that two of the women had been previously convicted of offences against property, (3) that from the beginning of January up to 10th February 1910 while this gang was wandering about in British Territory there were some 13 cases of offences against property committed in the neighbourhood of their encampment, (4) that on the 7th of February 1910 upon certain information the Sub-Inspector in charge of a certain police station, taking a body of men with him went into some jungle and came upon a body of some ten or twelve men; that the latter at first attempted to escape and then turned upon their pursuers and resisted their arrest; that three of them Ajita, Hukam Singh and Jensi Lal were arrested at the time, and two others Bulaki and Hindupat were recognized; that eight bundles were left behined by these men containing various articles some of which are said to have been identified by those persons whose property had been stolen between 4th January and 7th February, (5) and that the camp was searched on the 10th of February when a ring and one other article were discovered which are also said to be stolen property. The cases of theft and burglary which are alleged to have occurred while the appellants were encamped in British territory are as follows:—On the night of 4th January 1910 Amir Shah's house is said to have been robbed. On 6th January two persons Saru Ram and *Musammat* Sukhrani Dhobin were robbed. On 7th and 8th January the house of Ram Chander pointsman, is said to have been entered and property taken, and one Mr. Clarke, an employee of the railway, is said to have lost four fowls. On 10th and 11th January two persons, Raghunath and Sarul Lal, are said to have been brugled. On 23rd January two persons Laltu and Ramole are alleged to have lost a goat each and to have come upon a gang of men in the jungle who were consuming the flesh of those animals. On the night of 6th February Baran Badhai of Belman is said to have had his house burgled. On the night of 8th February, Banna of Bamrauli lost his bullock and on the night between 9th and 10th February, three burglaries are said to have been committed in the town of Moth. In addition to these facts, evidence has been adduced to show that this gang in 1909 was in the Gwalior State and committed a riot and attacked the police station, and that for three years at least the gang settled down in the Dattia State, and was finally turned out by the Maharaja. It seems to me that even if we accept all these facts as established, it is impossibe to hold that the offence contemplated in section 401 has been established. For the purposes of that section it must be clearly established either by direct evidence or by facts from which the inference may be legally drawn that the members of the gang have combined or come together for the purpose of habitually committing theft or robbery. It is quite clear that the class

of persons whom we are now considering does not primarily combine or associate for that purpose. Originally, these gypsies, no doubt combined in gangs for the purpose of self-protection. They have been wanderers for ages. The fact that many of them are dishonest and do commit thefts and other crimes is not in itself sufficient to show that the purpose for which they have combined is to habitually commit theft. The present case is very similar in aspects to the case of *Dukharan* v. *King-Emperor* (1). In that case there was a party of Domes wandering over the country side just as the persent appellants were doing. There is this difference that no stolen property is alleged to have been found in their possession. In the judgment of that case there are the following remarks:—"They are associated and wander about in their ordinary way of life, and it cannot be said to be proved that the primary purpose of their association was the commission of theft." In a case under the analogous section 400, *The Public Prosecutor* v. *Bonigiri Pottigadu* (2) it was remarked: "In a case under section 400, Indian Penal Code, the prosecution is bound to prove that the accused belong to a gang which was '*consciously*' associated for the purpose of habitually committing dacoity." In the present case 24 of the appellants (who are women and children) and two boys Rup Singh and Kana and the man Bahalia were in the camp which was situated exactly opposite the police station. The mere fact that these women and children were living with adult males of the gang is insufficient to enable the Court to hold that they were associated with their husbands and parents for the purpose of habitually committing theft. It is quite clear in their cases that their association primarily was for a very different object and not that of theft.

In respect to the other appellants Ajita, Bulaki, Hindupat, Hukam Singh and Jensi Lal it may be argued that they were found in a gang with other men; that stolen property was found in their possession, and that wherever the gang had been, thefts and burglaries had been committed, and that, therefore, these facts are sufficient to enable the Court to draw the inference that they at least were associated together for the purpose of habitually committing theft. There is, in addition to the above facts, the evidence of one man named Mula (of the same class as the appellant though not a member of their gang). This witness's evidence is to the effect that he often visited this gang, stayed with them, and has joined with various members in the commission of thefts and burglaries and dacoities. It is quite evident from the judgment of the lower Court that very little reliance can be placed upon this man's evidence. At the end of his evidence the Sessions Judge has made the following note: "A bombastic person with a flood of hearsay evidence on top, very difficult to answer question." An examination of his evidence shows that the remark was well-founded. When cross-examined he said that he had heard everything and could give no details of anything. I think his evidence may he wiped out of the record. In regard to the 13 acts of thefts and burglaries to which the prosecution have pointed as an indication of the object of the association of these men, these 13 occurrences are spread over a month and a few days. Three of them are burglaries between 9th and 10th February which were committed after the members of this gang had been arrested. The same remark applies to the theft of Nanhua's bullock. There is nothing to show that there has been an increase, more or less great, in the number of crimes usually committed in the neighbourhood during this period of one month, over and above that which usually occurs in those police stations. If the prosecution had been able to establish the fact that while this gang was in the nieghbourhood, crime had greatly increased, and had quickly subsided on their leaving the neighbourhood, some argument might have been founded thereon that this fact indicated that the gang had been given to habitually committing theft. No such attempt, however, has been made, and the Court is left in ignorance on the question as to whether or not the advent of this gang had brought with it any appreciable increase in crimes in the neighbourhood. There can be no doubt that the police did come upon a body of men in the jungle and did arrest three of them, namely, the appellants Ajita, Hukam Singh

(1) 7 O. C. 163.

(2) 32 M. 179; 5 M. L. T. 10; 9 Cr. L. J. 567; 2 Ind. Cas. 307.

and Jensi Lal, and that these men did resist their arrest. There can be little doubt also that the eight bundles were left behind by those who fled. I have been taken over the evidence of those persons who have come forward to identify the variousarticles found in those bundles, as property which had been stolen from them. Except, rerhaps, the ring of Amir Shah the stolen property consists of articles of common every day use such as are to be found in the house of any poor man in this country. In no case has the witness been able to point to any particular mark of identification. The learned Judge himself does not seem to have been greatly impresssd by the evidence of these witnesses and it is extremely doubtful that the property found is stolen property. Amir Shah's ring, however, contained a stone and was somewhat more distinctive than the other property. This ring was found attached to the skirt of one of the women in the camp, and it is not improbable that some man of this gang did have a hand in committing burglary in the house of Amir Shah. It has been argued on behalf of the appellants Hindupat and Bulaki that the evidence does not establish their membership of this gang. It is unnecessary, in my opinion, to discuss that evidence for there can be very little doubt that they were members of the gang. In the absence, however, of direct evidence it seems to me impossible to infer from the facts proved that the present appellants consciously associated themselves for the purpose of *habitually* committing theft. No doubt, various members of the gang may have been guilty of theft and burglary. But this fact alone is insufficient to establish that the association of all these men, women and children was one which was consciously brought about for the purposes contemplated by section 401, Indian Penal Code. In fact, it is quite clear that the primary object of their association was not theft. It seems to me that section 401 was never intended to apply to cases of the present kind unless it could be clearly established that these people deliberately and interticrally joined together for the common object mentioned in the section. It is difficult to conceive that a child of ten or eleven years of age (and there are such amongst the present appellants) deliberately and consciously associated with its parents and other relatives for such a common object. In my opinion the prosecution of the present appellants under this section, in the circumstances of the present case, was entirely misplaced and they ought to have been dealt with otherwise. I admit the appeals, set aside the convictions and sentences and order the release of all the appellants.

Appeal allowed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL FROM ORDER NO. 96 OF 1910.

March 8, 1911.

Present:—Mr. Justice Richards and Mr. Justice Tudball.

HAZARI LAL—DEFENDANT—APPELLANT

versus

RAM CHANDER—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. II, r. 2—Cause of action of two suits not identical—Whether one suit barred by virtue of the other.

Where the cause of action of a later suit is not identical with that of a former the later suit is not barred under Order II, rule 2, of the Code of Civil Procedure, 1908.

First appeal from an order of remand passed by the Subordinate Judge of Barielly, dated the 3rd August, 1910.

Mr *Mohan Lal Sandal*, for the Appellant.

Mr. *Gulzari Lal*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit for possession brought by an assignee of the mortgage-rights as against the mortgagor and certain other persons. The facts are as follows. One Tika Singh owned certain property which he mortgaged on the 29th September, 1885, to two persons, Nihal Singh and Mohar Singh. Each of these persons was the owner of half share in the mortgage. The mortgage was usufructuary. Nihal Singh's interest was attached in execution of a decree under section 274 of the Code of Civil Procedure and was purchased at auction by Kalka Prasad. Subsequently to this, the interests of Nihal Singh and Mohar Singh were again attached in execution of another decree, but under section 268, and were purchased by the present plaintiff; subsequently to this, the present plaintiff brought a suit to recover the whole amount of the mortgage-money by the sale of the mortgaged property. That suit was dismissed on the ground that he was

entitled only to recover possession, the mortgage being purely a usufructuary mortgage. He has now brought a suit for possession of half the mortgaged property in his capacity as the representative of Mohar Singh, who was owner of a half share in the mortgage. The first Court dismissed the suit simply on the ground that it was barred by the former suit under Order II, rule 2, of the Code of Civil Procedure. On appeal, the lower Appellate Court reversed this decision and remanded the case for trial on the merits. The present appeal is directed against this order of remand. In our opinion the order of the lower Appellate Court is quite correct. An examination of the plaints in the two cases will disclose the fact that the causes of action alleged in those plaints are not identical. In the former case the plaintiff set forth the fact of the mortgage by Tika Singh on 29th September, 1885, and the purchase by Kalka Prasad of Nihal Singh's interest. He then stated that by reason of the fact that the mortgagor never placed the mortgagee in possession, Kalka Singh's purchase actually conveyed to him no right. He then set forth his own purchase and the fact that the attachment was made under section 268 and claimed that by reason of the attachment having been made under that section he has purchased the right to recover the money from the mortgagor. He then stated that he had made a demand, that the mortgagor had refused and that thereupon the cause of action had accrued to him (from the date of the refusal) to recover the money by the sale of the property. In the present suit he sets forth the fact of the purchases and claims that as transferee of the mortgagee rights of Mohar Singh he is entitled to possession as the mortgagor has not granted possession and refuses to give him possession. It is quite clear from this that the two causes of action in the two suits are not identical and in that case the present suit cannot be barred by the provisions of Order II, rule 2. Our attention has been called to the decision in *Gokul Misser* v. *Mirza Bande Ali Beg* (1), but as the case is at present under appeal under the Letters Patent we do not think it proper to express any opinion as to the correctness or otherwise of the view taken by the learned Judge, who decided the case.

On the facts of the present case the order of the lower Appellate Court was a proper order and the appeal, therefore, fails and is dismissed. The costs of the appeal will abide the result.

Appeal dismissed.

(1) 8 Ind. Cas. 9.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 13 OF 1910.

March 24, 1911.

Present:— Sir John Stanley, KT., Chief Justice and Mr. Justice Banerji.

RAM LAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

DEBI SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Joint decree—Joint appeal—One of the appellants dying during pendency of appeal—Representative of deceased not brought on record—Abatement—Civil Procedure Code (Act XIV of 1882), s. 544.

Where several defendants jointly appeal against a joint decree, to which section 544 of the Code of Civil Procedure, 1882, applies, the death of one of such appellants, if no legal representative of the deceased appellant is brought on the record within limitation, can only have the effect of causing the appeal to abate so far as the deceased appellant is concerned. It cannot have the effect of causing the appeal as a whole to abate.

Ram Sewak v. *Lambar Pande*, 25 A. 27, followed.

Kamla Pat v. *Baldeo*, 22 A. 222, disapproved and overruled.

Letters Patent Appeal against the decision of Mr. Justice Tudball, printed at page 385 of the 4th Volume of the Indian Cases.

Mr. *Tej Bahadur Sapru*, for the Appellants.

Mr. *Chaudhri*, for the Respondents.

JUDGMENT.—The only question in this appeal is whether or not the learned Judge of this Court against whose decree this appeal has been preferred, was right in holding that the appeal had abated. The lower Appellate Court granted the plaintiff a decree in respect of their claim to certain property. The decree was a joint decree against a number of defendants. All the defendants appealed but before the hearing of the appeal one of them died and no application was made within the time allowed by law to have his representatives brought on the record. Under these circumstances, the learned Judge of this Court held that the appeal has abated. He relied on as an authority for the view which he took, the case of *Kamla Pat* v. *Baldeo* (1). This decision entirely supported the view of the learned Judge. But this

(1) 22 A. 222.

case was considered and overruled by this Bench in the later case of *Ram Sewak* v. *Lambar Pande* (2). In that case it was held that where several plaintiffs or defendants jointly appealed against a decree to which section 544 of the Code of Civil Procedure of 1882 applied the death of one of such appellants, if no legal representative of the deceased appellant was brought on the record within the limitation, can only have the effect of causing the appeal to abate so far as the deceased appellant was concerned. It cannot have the effect of causing the appeal as a whole to abate. In view of this decision we allow the appeal; we set aside the order of abatement passed by the learned Judge of this Court and we direct that the appeal be reinstated and be heard by a Judge of this Court sitting singly. We make no order as to the costs of this appeal.

Appeal allowed.

(2) 25 A. 27.

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 1 OF 1911.

March 25, 1911.

Present:—Sir John Stanley KT., Chief Justice, and Mr. Justice Banerji.

SHIAM NARAIN SINGH AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

RAM PRASAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 57 (b)—Ejectment—Trees planted by tenant—Breach of contract.

A tenant who plants trees in contravention of the contract under which he holds the holding, is liable to ejectment under section 57 (*b*) of the Agra Tenancy Act, 1902.

Letters Patent Appeal from the decision of Mr. Justice Griffin, dated the 29th of October, 1910, in S. A. No. 60 of 1910.

Dr. *Satish Chandra Banerji* (with him Mr. *Jangbahadur Lal*), for the Appellants.

Mr. *Iswar Saran*, for the Respondents.

JUDGMENT.—This is an appeal against a decree passed in a suit under section 57 and section 65 of the Agra Tenancy Act for the ejectment of the defendants for breach of a contract entered into by their predecessors-in-title in the year 1873. The predecessors-in-title of the defendants were the tenants of the plaintiffs and litigation having arisen between them a compromise was entered into whereby it was provided that the defendants predecessors-in-title should be entitled to occupy the plot of land in dispute which then formed a grove, at a yearly rent of Rs. 16 on the condition that they should not plant any more trees upon the land but should surrender the tenancy when the trees at that time upon the land no longer stood upon it. Many of the trees have been removed. It is admitted that only 13 of the trees existing in 1873 are now standing. Portion of the land is being used for agricultural purposes.

The Court of first instance gave the plaintiffs a decree for ejectment, but upon appeal the lower Appellate Court reversed the decision of the Court of first instance and dismissed the plaintiffs' suit on the ground that they were not entitled to eject the defendants under the provisions of section 57 of the Agra Tenancy Act. Upon appeal to this Court, the learned Judge before whom it came, upheld the decision of the lower Appellate Court. Hence this appeal.

It appears to us that the case is provided for by section 57 (*b*). Section 57 prescribes that a tenant shall be liable to ejectment from his holding in case, among others, "of any act or omission detrimental to the land or inconsistent with the purpose for which it was let." The planting of trees upon the land by the tenants in contravention of their contract is an act clearly inconsistent with the purposes for which the land was let. The object of the tenants in planting new trees is to maintain the property as a grove and so preclude the landlord from resuming possession when the trees existing at the date of the compromise no longer stood upon the land as was contemplated by the compromise of 1873. The defendants, therefore, in our judgment are liable to ejectment for breach of their contract. Section 65 (2) provides that where a tenant is found liable to ejectment on the ground specified in clause (*b*) of section 57, the land-holder may sue for compensation in addition to, or in lieu of, suing for ejectment or for an injunction or for the repair of the damage or waste with or without compensation. The plaintiffs have claimed in the alternative an injunction and repair of

the damage complained of. We think they are entitled to a decree under this sub-section.

We accordingly allow the appeal, set aside the decree of this Court and also the decrees of the lower Courts, and we grant a decree in the terms of prayer (*b*) in the plaint, that is, a decree for the up-rooting of the newly planted trees upon the land in question within two months from this date, and we also grant an injunction restraining the defendants from in future planting any trees upon the said plot. The plaintiffs will have their costs in all Courts.

Appeal allowed.

OUDH JUDICIAL COMMISSIONER'S, COURT.

SECOND CIVIL APPEAL No. 272 OF 1909.

March 18, 1910.

Present:—Mr. Evans, A. J. C., and Mr. Piggott, A. J. C.

GIRJA DAYAL—PLAINTIFF—APPELLANT

versus

BRIJ BHUKHAN—DEFENDANT—RESPONDENT.

Civil Procedure Code (*Act V of* 1908), *s.* 11, *Explanation* (4)—Res judicata—*Defendant omitting to put forward a plea in his defence, effect of—Plaintiff bound to set up all possible claims in his suit—Pleadings.*

A mortgagee instituted a suit for sale of the property based on his mortgage executed by the mother of the plaintiff, impleading him and the mother on the ground that she had after the mortgage gifted the property to him. In that suit it was found that the mother of the plaintiff had full rights in the property and that she was competent to mortgage. A decree for sale was passed and the decree-holder purchased the property. Subsequent to the purchase, the plaintiff sued to recover a share of the property on the ground that his mother was not competent to mortgage it and that the defendant in execution of his decree had purchased only the life-interest of his (plaintiff's) mother, which terminated with her death:

Held, that the suit was barred by the rule of *res judicata*. It was necessary for the plaintiff to have raised all the pleas available to him in that suit in order to defeat the defendant and if any plea was not taken and the defendant got his decree, it was no more open to the plaintiff to bring the suit for possession on the ground that his mother had only a life-estate and as such the mortgage and the sale held in execution of the decree were not binding on him. A plaintiff and a defendant are both bound to take every possible plea in support of his action or defence as the case may be.

Srimut Rajah Moottoo Viyadya v. *Katama Natchiar*, 11 M. I. A. 50; 10 W. R. 1; *Daya Shankar* v. *Ganga Sahai* 12 O. C. 347; 4 Ind. Cas. 763, referred to.

Appeal against the order of the District Judge, Lucknow, dated the 27th March, 1909, upholding that of the Subordinate Judge, Lucknow, dated 29th April 1908.

Babu *Bisheshar Nath Srivastava*, for the Appellant.

Mr. *A. P. Sen* (for him Pandit *Gokaran Nath Misra*), for the Respondent.

JUDGMENT.

EVANS, A. J. C.—This is an appeal against an order of the District Judge of Lucknow dismissing the appellant's claim for possession of a certain share in the village of Khanpur.

The sole question to be considered in this appeal is the application of the rule of *res judicata* as laid down in Explanation IV to section 11 of the Code of Civil Procedure (Act V of 1908). To understand the exact point for decision the following pedigree is useful:—

Salik Ram, died 1880.
|
Hanoman Prasad, died 1878
=*Musammat* Misri Kuar, died 1883.
|
Musammat Jasoda Kuar, died 1901 = Shambhu Dial — Girji Dayal, plaintiff.
Musammat Kansilla Kuar — Four sons.

It is now admitted that the property in dispute was purchased by Hanoman Prosad who was a Government servant in the name of his father Salik Ram, and Sailk Ram executed a Will in favour of his daughter-in-law *Musammat* Misri Kuar on the 9th November 1880. On the death of *Musammat* Misri Kuar her daughters got possession of the property in equal shares. *Musammat* Jasoda Kuar mortgaged her share to Brij Bhukhan respondent under a mortgage-deed dated the 13th September 1893. On the 13th April 1899 the same lady executed a deed of gift of the property in favour of her son, the appellant. The respondent brought a suit upon mortgage on the 13th July 1899 making *Musammat* Jasoda Kuar her husband Shambhu Dial and her son Girja Dayal the present appellant parties to it. Girja Dayal was then a minor but was represented

by a guardian *ad litem*. The claim was decreed and the property was put up for sale and purchased by the respondent (then decree-holder). The four sons of *Musammat* Kansilla Kuar brought a suit to recover their share of property from the respondent and eventually got a decree. The decision of this Court in that case is reported in *Brij Bhukhan* v. *Sheoraj Narain* (1). The result was that the sons of *Musammat* Kansilla Kuar got possession of 4/5th of *Musammat* Jasoda Kuar's share and the respondent was left with only 1/5th of the property which he had purchased at auction. This 4/5th share the appellant now wants to take away in the present suit which he instituted on the 21st November 1907, some ten months after the claim of the sons of *Musammat* Kansilla Kuar was decreed. The point for decision shortly stated is this. In the case instituted by the respondent on his mortgage, he described the appellant as a donee under the deed of gift executed by his mother which deed was alleged to be a fraudulent document executed in order to defeat the rights of the respondents (then plaintiffs) and the relief asked for was possession of the mortgaged property or an order for sale thereof free from all the incumbrances created by *Musammat* Jasoda Kuar, the appellant's mother. In the written statement, paragraph 9, it was admitted that the original proprietor of the property was Salik Ram, the paternal grandfather of *Musammat* Jasoda Kuar, and in paragraphs 10 and 11 it was alleged that he had left the property to his daughter-in-law *Musammat* Misri Kuar grandmother of the appellant with a restricted power of alienation. In paragraph 17 it was contended that the mortgage held by the respondent was invalid for certain reasons as set forth therein and in paragraph 20 it was alleged that *Musammat* Jasoda Kuar had in no view of the case anything more than a life-interest in the property. The learned Subordinate Judge decided the case on the 19th December 1899 and he held that *Musammat* Jasoda Kuar was the absolute owner of the property and could dispose of it as she chose. He, therefore, found that the mortgage executed by her was binding on the appellant.

The Subordinate Judge in his recital of the facts of the case has recorded, as an admitted fact, that the property in suit originally belong to Salik Ram and that on his death it came into possession of his daughter-in-law *Musammat* Misri Kuar by the virtue of his Will dated the 9th November, 1880. In the course of his judgment the following remarks appear: "I am of opinion that *Musammat* Misri Kuar was aboslute owner of the property, and on her death it was inherited by her nearest heir, *viz.*, her two daughters Jasoda and Kansilla. The property was not of such a nature as would, under the Hindu Law, give only a limited interest to these two ladies. She acquired absolute right of ownership in the property."

In the case instituted by the sons of *Musammat* Kansilla Kuar reported in *Ram Kumar* v. *Pahari Das* (2) certain other facts were disclosed which show that the facts as admitted before the Subordinate Judge in 1899 did not represent the true state of affairs and that, as a matter of fact, the two ladies, *Musammat* Jasoda Kuar and Kansilla Kuar, only took a limited interest in the property with rights of survivorship *inter se* and it was upon these facts that the sons of *Musammat* Kansilla Kuar were successful in obtaining a decree for 4/5ths of the property. The present claim by the appellant is now instituted upon the same allegations, namely, that the property was a self-acquired property of Hanoman Prasad, son of Salik Ram, and that his widow and daughters were life-holders and on their death the appellant is entitled to his share as a reversioner. He attacks the mortgage executed by his mother in favour of the respondent, on the ground that there was no legal necessity for it and, therefore, a decree thereon did not convey any title, so far as his interests are concerned. The Courts below have concurrently decided that the case now set up by the appellant is one which he might and ought to have set up as defence when he was impleaded as a defendant in the mortgage suit instituted by the respondent and as he did not then plead that his mother had a limited interest in the property as her father's heir, he cannot now maintain the present claim. The whole contention taken on behalf of the appellant by his learned Pleader practically comes to this that, although the present claim is one which *might* have been set up as a defence in the former suit, it is not one which *ought* to have been set up because it sets up a title different

(2) 10 O. C. 159.

(2) 10 O. C. 139.

from the one which he then set up under the deed of gift executed by his mother as full owner of the property. He contends that the present claim is one which is based upon quite a different set of facts, the former defence was based on the allegation that Salik Ram was full owner of the property. The present claim is based on the allegation that the full owner was his son Hanoman Prosad and if he had set up these two inconsistent pleas in the former suit considerable confusion would have arisen and as held by their Lordships of the Privy Council in the case of *Kameswar Pershad* v. *Raj Kumari Ruttan Koer* (3) "where matters are so dissimilar that their union might lead to confusion, the construction of the word 'ought' would become important." But their Lordships also lay down that the decision whether a certain defence ought or ought not to have been made depends upon the particular facts of each case. It is, therefore, necessary to decide whether, in the circumstances of this case, the appellant would have been justified in taking the defence which he now sets up in his plaint. The whole question of *res judicata* has been thoroughly discussed by Pandit Sundar Lal and Mr. Piggott, in the case of *Daya Shankar* v. *Ganga Sahai* (4) and it is unnecessary to add anything to the exhaustive review of all the authorities on the subject as they are fully set forth in that ruling. The present appeal may be disposed of in a very few words. In the *former* case, the object of the respondent was to make the mortgage binding on the appellant. The Courts found that *Musammat* Jasoda Kuar had an absolute estate and the mortgage was binding on him. In arriving at this conclusion, the Court proceeded upon a statement of facts made by the appellant and admitted by the respondent, namely, that Salik Ram was the owner of the property when he executed the Will of the 9th November, 1880. The appellant now asks for a fresh decision upon the question whether the mortgage is binding on him upon a different allegation that *Salik Ram was never owner of the property at all*, that is, he opens a question which upon his own admission had been found against him in the former case. So far as I understand the law, such decision is as much binding on him as if he put on record a plea that Salik Ram was not the owner of the property and it had been found against him upon evidence that Salik Ram was the owner of the property. If the contention of the learned Pleader for the appellant were accepted as correct it would open the door to endless litigation which is the object of section 11 of the Code of Civil Procedure to put a stop to. For instance, if a claim were made against a defendant upon a bond he might plead as a defence that he had executed it and received no consideration and then afterwards, as a plaintiff he might institute a suit for a declaration that the bond was not binding on him because he had never executed it at all. To my mind it is perfectly clear that, upon the facts stated above, there would have been no confusion in the case if the appellant had set up alternative pleas as below:—*First*, that his mother had succeeded to life-interest in the property after her father's death, her father being the owner of the property. *Secondly*, if the Court were of opinion that her grandfather Salik Ram was owner because the property was purchased in his name, the mortgage was not binding on the appellant because his mother had only a limited interest under the terms of her grandfather's Will. The ruling of the Privy Council in *Srimut Rajah Mootoo Viyadya* v. *Katama Natchiar* (5) which is cited in *Daya Shankar* v. *Ganga Sahai* (4) seems to apply with great force to the present case. It was laid down in that case that the defendant should set up all the titles he may have in his defence and their Lordships remark as below:—

"When a plaintiff claims an estate, and the defendant, being in possession resists that claim, he is bound to resist it upon all the grounds that it is possible for him, according to his knowledge, then to bring forward. The present appellant might have insisted on the validity of the alleged Will, but instead of doing so when his suit came to be heard and decided in the Court of final appeal, he in effect disclaimed all title under the instrument as a Will and insisted that it must be regarded by the Court as not being testamentary. There would be an end to all security in the administration of justice if the course now taken by the appellant of setting up the Will, were allowed." There is no doubt that the appellant was induced to embark on this litigation because the sons of *Musammat* Kansilla Kuar were successful in the case re-

(3) 20 C. 79; 19 I. A. 234.
(4) 12 O. C. 347; 4 Ind. Cas. 763.
(5) 11 M. I. A. 50; 10 W. R. 1.

ported in *Birj Bhukhan* v. *Sheoraj Narain* (1). It is not pretended that the guardian of the minor was not in possession of all the facts when the respondent instituted his suit upon his mortgage and I hold that the present claim which is instituted on a set of facts directly contrary to the facts admitted in the former mortgage case is barred by section 11 of the Code of Civil Procedure (Act V of 1908). I would dismiss the appeal with costs.

PIGGOTT, A. J. C.—I entirely concur both with the order proposed by my learned colleague and with the reasoning on which it is based. I would only add, with reference to the particular facts of this case and the point which was mainly pressed upon us in appeal, that amongst the things which "ought" to be included in the written statement of a defendant in a Civil suit is a true and correct account of the actual facts of the case as known to the said defendant at the time.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 465 OF 1909

March 27, 1911.

Present: - Mr. Justice Coxe.

GIRIJA SUNDARI DEBI—DEFENDANT—APPELLANT

versus

KAILASH CHANDRA BOSE—PLAINTIFF AND ANOTHER—DEFENDANTS RESPONDENTS.

Hindu Law—Widow—Mortgage by widow—Decree on mortgage—Subsequent decree declaring mortgage to be honest transaction and executed for legal necessity—Whether mortgage-decree binding upon reversioner—Appeal—Death of appellant—Substitution of wrong person, whether affects respondent's decree.

A Hindu widow mortgaged certain property which she inherited from her husband. The mortgagee obtained a decree against her precluding her from redeeming the mortgage. The widow appealed but died during the pendency of the appeal. The present plaintiff and one *J.* applied to be substituted, but the applicatian of the plaintiff was rejected and *J.* was substituted, subsequently the appeal was dismissed. The plaintiff then brought a suit for the recovery of the property, alleging that the mortgage was fraudulent and executed without legal necessity. That suit was dismissed and the mortgage was found to be an honest transaction and executed for legal necessity. After that, the plaintiff brought this suit for redemption:

Held, that the plaintiff was bound by the mortgage-decree obtained by the defendant against the widow, and that his suit must fail:

Held, also, that though *J.* was a wrong person to represent the widow in the unsuccessful appeal, yet the present defendant cannot be deprived of the value of the decree he had obtained.

Appeal from the decree of the Sub-Judge of Jessore, dated December 5th, 1908, affirming that of the Munsif of Jhenidah, dated March 20th, 1908.

Babu *Surendra Chandra Sen*, for the Appellant.

Babu *Shib Chandra Pait*, for the Respondents.

JUDGMENT.—This was a suit to redeem certain properties that had been mortgaged by a Hindu widow. During the widow's life-time the mortgagee issued a notice upon her under section 8 of Regulation XVII of 1806, and thereafter brought a suit for recovery of possession which was decreed by the Munsif. Reading the judgment of the Munsif with the provisions of the Regulation it is clear that the mortgagee obtained against the widow a decree precluding her from redeeming the mortgage. After the decision by the Munsif, the widow appealed. In the course of the appeal she died and the present plaintiff and one Joy Durga Das applied to be substituted as her representative. Joy Durga's application was granted and that of the plaintiff refused. The appeal was dismissed. Thereafter the plaintiff brought a suit for recovery of the property alleging that the mortgage was fraudulent and invalid and executed without legal necessity. That suit was dismissed and it was found that the mortgage had been executed for legal necessity and was a perfectly honest transaction.

The plaintiff now brings this suit for redemption. It has been decreed by the Courts below. Defendant No. 1 appeals to this Court.

The first point taken is that as it has now been settled between the parties that the mortgage was an honest mortgage and executed for legal necessity the decree for foreclosure which the defendant obtained against the widow is binding on the reversioners, and in support of this proposition reference has been made to several cases beginning with the case of *Kattama Nauchear* v. *Raja of Shivagungah* (1). There appears to be plenty of authority for holding that where a decree has been obtained on a fair trial in a suit against a Hindu widow the decree is effectual and operative as against

(1) 9 M. I. A. 539; 2 W. R. 31 (P. C.).

the reversioners unless the decree can be impeached on some special ground. The last case which I have seen on the subject is the case of *Lilabati Misrani* v. *Bishun Chobey* (2). It has been argued on behalf of the respondent that these rulings only affect those cases in which a widow sues or is sued with respect to a mortgage executed by the last full owner and have no applications to mortgages executed by the widow herself. Reference is made to a passage in Dr. Ghose's Book on Mortgage in which the author quotes the decision of the present learned Chief Justice, then Mr. Justice Jenkins, in *Srinath Das* v. *Haripada Mitter* (3), that where the widow is the person who has created the charge there is no authority to show that she sufficiently represents the reversioners. This decision, however, though entitled to the greatest respect, was not confirmed by the Appellate Bench, if I understand their judgments aright, and as a single Judge, I cannot place it in competition with the decision of the Benches to which I have referred. In the case of *Roy Radha Kissen* v. *Nane Ratan Lal* (4), Mr. Justice Mookerjee adopted the view mentioned above that a decree against the widow binds the reversioners under the circumstances specified. He certainly held on other grounds that in that particular case the decree did not operate as *res judicata* in a subsequent suit. But it does not appear even to have been suggested that this principle did not apply because the mortgage which was the subject of that suit had been executed by the widow herself. It appears to me, therefore, that if the former decision bound the widow it bound also the present reversioner. It is argued, however, that the decision had no such effect, because, the widow died in the course of the appeal and was represented by a person who had no right to represent the estate in the hearing of the appeal ; and reference is made to the case of *Harish Chandra Biswas* v. *Puri Das Das* (5). That case appears to me to be wholly different. In that case one of the defendants died in the course of the suit and a wrong person was brought on the record as his representative. But here the case is quite different. The present defendant had obtained a decree. He was the respondent in the appeal. No doubt it is the business of the plaintiff or appellant to see that he sues or appeals against the right person, but it cannot be said to be the duty of the defendant or respondent to see that he is sued or appealed against by the right person.

The present defendant had obtained a decree which, unless it was set aside by the Appellate Court, would be final and conclusive in his favour. The widow appealed. That appeal failed through no fault of this defendant. I have been shown no authority for holding that becuse a wrong person represented the widow in that unsuccessful appeal the present defendant is thereby deprived of the whole value of the decree that he had obtained, and such a view seems to me unreasonable. It seems to me, therefore, now that it has been finally and conclusively settled that the mortgage was an honest transaction executed for legal necessity, that the decree for foreclosure which the defendant obtained is sufficient to preclude the plaintiff from bringing this suit for redemption.

Secondly, it has been contended that the suit is barred by section 43. As regards this point I am inclined to think that the decision of the Court below is right, and would refer to the case of *Balmukund* v. *Musammat Sungari* (6). But, in the view that I take of the first point, it is not necessary for me to go into this point.

The appeal is accordingly allowed, and the suit is dismissed with costs of all Courts.

Appeal allowed.

(2) 6 C. L. J. 621.
(3) 3 C. W. N. 687.
(4) 6 C. L. J. 490.
(5) 12 C. L. J. 561 ; 6 Ind. Cas. 627 ; 14 C. W. N. 1041.
(6) 19 A. 379.

CALCUTTA HIGH COURT.

MISCELLANEOUS CRIMINAL CASE NO. 5 OF 1911.

February 3, 1911.

Present:—Mr. Justice Holmwood and Mr. Justice Sharf-ud-Din.

SHEIKH AKBAR—PETITIONER

versus

E. F. PRANCE—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 202—Preliminary inquiry—"Watching proceedings," meaning of.

SHEIKH AKBAR *v.* PRANCE.

If any person interested in any legal proceeding is admitted to watch or applies to watch such a proceeding, the term "watch" does not mean that of a mere on-looker for idle curiosity, but it means instructing of legal practitioners to watch the case on behalf of the alleged offender and with the leave of the Court to assist the Court in making its preliminary investigation.

Therefore, a person with regard to whom a preliminary inquiry is being held under section 202 of the Criminal Procedure Code should be admitted to watch the proceedings, and his representative, if an Advocate or Pleader, should be allowed to act as *amicus curiæ*.

Sheikh Chand v. *Mahomed Hanif*, 8 Cr. L. J. 20; 4 N. L. R. 81, referred to.

Application praying that the case against the petitioner under sections 304A, 337, 338 of the Indian Penal Code now pending trial before the Court of the Sub-Divisional Magistrate of Lalbagh may be transferred to the file of some other Magistrate.

FACTS.—In September last, a daughter of Mr. Prance of Killah Nazamat was run over by a carriage and the girl died shortly after from the effects of the injury she received.

Mr. Prance lodged an information at the *thana* to the above effect and an inquiry was started by the Police. The Police, however, after a protracted inquiry submitted a report in final form, stating that the carriage and the coachman alleged to have been implicated in the matter, could not be identified by the witnesses and the people in the locality.

Thereupon Mr. Prance made an application to the Sub-Divisional Officer of Lalbagh for a judicial inquiry of the case.

On the date fixed for inquiry the petitioner prayed for permission to be present during the inquiry which was refused.

The Sub-Divisional Officer examined some witnesses in private and held a local inquiry and on 30th November asked the Police to send up the petitioner on charges under sections 304A, 337 and 338, Indian Penal Code. The petitioner has been placed before him for trial.

The petitioner moved the District Magistrate under section 528, Criminal Procedure Code, for a transfer of the case to some other Court at Sadar. But the District Magistrate declined to order a transfer.

Hence this rule.

Mr. *S. P. Sinha*, Counsel, and Babu *Atulya Charan Bose*, for the Petitioner.

JUDGMENT.—We have heard the learned Counsel and we have read the explanation of the learned District Magistrate and we do not think that at this stage we should be justified in quashing the proceedingalthough, in view of the fact that all the witnesses who were examined at the time were unable to identify the carriage or the coachman, the evidence which was collected more than a month after should be received with the utmost caution. But we think that it would be in all respects advisable that the trial should be held before some Magistrate who has not been engaged in holding an *ex parte* inquiry upon the evidence which was collected after so much delay We are unable to accede to the proposition which appears in the headnote of the case to which the learned District Magistrate has referred us, the case of *Sheikh Chand* v. *Mahomed Hanif* (1) in the Court of the Judicial Commissioner of Nagpur. It appears to be there laid down that a person with regard to whom a preliminary inquiry is being held under section 202 is not entitled to intervene but he may only watch the proceedings like any other member of the public. We quite agree that he is not entitled by any rule of law to intervene. But the practice of this Court at any rate, and as far as we know of the Court subordinate to it, has always been that if any person interested in any legal proceedings is admitted to watch or applies to watch such a proceeding, the term "watch" does not mean that of a mere on looker for idle curiosity, but it means instructing of legal practitioners to watch the case on behalf of the alleged offender and with the leave of the Court toassist the Court in making its preliminary investigation.

We think there is no reason why a person in the position of the petitioner should not be admitted to watch the proceedings and why his representative, if he is a duly authorised Advocate or Pleader of the Court, should not be allowed to act as *amicus curiæ* in the preliminary inquiry For all these reasons we direct that the rule be made absolute on the second ground and that the proceedings be transferred for trial to another Magistrate of the first class. It appears on the record that in December last the other first class Magistrate of the Sub Division was ill. But we think that by this time if he has not recovered some body else must have been appointed in his place. In any case, there are plenty of first class Magistrates at the Sudder station of

(1) 8 Cr. L. J. 20; 4 N. L. R. 81.

which the Sub-Division is merely a suburb, and we can see no difficulty in having the case tried either at Berhampore or before some other first class Magistrate at Lalbagh. The rule is, therefore, made absolute and the case is transferred.

Rule made absolute.

PUNJAB CHIEF COURT.

CIVIL REVISION CASE NO. 1747 OF 1910.

April 5, 1911.

Present:—Mr. Justice Rattigan.

BILLA AND OTHERS—DEFENDANTS—PETITIONERS

versus

CHHUTA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Jurisdiction—Small Cause suit—Suit to recover the price of skins of animals—Evidence—Witness required by Court but not wanted by party—Civil Procedure Code (Act V of 1908), O. XVI, r. 14.

A suit to recover the price of skins of certain animals alleged to belong by custom to the plaintiff is not excepted from the cognisance of a Small Cause Court.

Where a Court desires to have the evidence of a particular witness, whom the defendant does not desire to call, the Court is not justified in insisting on the defendant paying the amount necessary to secure the attendance or evidence of the witness, and, on defendant's refusal to do so, declining to issue summonses for the attendance of his witnesses. In such a case the correct procedure is to take action under Order XVI, rule 14, of the Code of Civil Procedure.

Petition, under section 25 of Act IX of 1887 for revision of the order of the District Judge of Karnal, dated the 6th April 1910, affirming that of the Munsif, 2nd class, exercising the powers of a Judge, Small Cause Court, Karnal, dated the 31st January 1910, decreeing plaintiff's claim.

Mr. *Fazl-i-Ilahi*, for the Petitioners.

Mr. *Dowlat Ram*, for the Respondents.

JUDGMENT.—Plaintiffs, certain *Chamars* of *mauza* Kunjpura, in *tahsil* Karnal, sued to recover a sum of Rs. 35 from the defendants, members of the sweeper caste of the same village, on the allegation that defendants had appropriated the skins of certain animals which belonged by custom to plaintiffs. Defendants pleaded that the *Chamars* were entitled to the skins and carcases of animals belonging to *zemindars*, but not to the skins and carcases of animals belonging to *Mahajans*, and other like persons and that in this case the animals had belonged to *Mahajans*. Plaintiffs admitted that the animals had been the property of *Mahajans*, but nevertheless contended that they were entitled to the skins.

The suit was originally entered in the register of the Court of first instance, which was presided over by a Munsif, who had also the powers of a Small Cause Court, as a small cause, but it was subsequently struck out of that register and entered as an ordinary civil suit. Apparently, it was tried as an ordinary suit, but in the course of his judgment, the Judge remarks that he has dealt with as a small cause, and he signs his judgment as a Munsif, 2nd class, with powers of Judge, Small Cause Court.

I presume, I may take it upon these facts, that the suit was tried as a small cause, and in my opinion, quite rightly. The claim was for a sum of Rs. 35 and the mere fact that the money was claimed as due by virtue of a customary right alleged to be inherent in plaintiffs, does not take the case out of the ordinary jurisdiction of the Small Cause Court. [see *e. g.*, *Aruri* v *Kallu* (1)]. The suit does not fall within the purview of any of the articles of the second Schedule to Act IX of 1887, and I hold, therefore, that the Small Cause Court had jurisdiction to deal with the suit.

I am, however, asked to interfere on the revision side because the Judge of that Court refused to issue summonses to certain witnesses whom the defendants wished to examine and for whose attendance they paid the ordinary process-fees. I think there is force in this contention. For some reason the Judge of the Small Cause Court desired to have the evidence of the *Nawab* of Kunjpura and for their own reasons the defendants did not desire to call that person. On the 15th October 1909 they filed an application praying that certain witnesses might be summoned for the next hearing, and on the back of this application the Court passed an order to the effect that the defendants must first pay into Court the amount necessary to secure the attendance or the evidence of the *Nawab*, and thereafter pay in process-fees for their witnesses. Defendants, not unnaturally, objected to this order, but on the 24th October paid process-fees for their witnesses. The Court,

(1) 49 P. R. 1897.

however, declined to issue summonses to the latter because defendants refused to pay the process-fees for the summons to the *Nawab*. In my opinion, this procedure on the part of the Court was unjustifiable. The Court, if it thought it necessary to examine the *Nawab* as a witness, could have taken action under Order XVI, rule 4, of the Civil Procedure Code, and I think it was most unfair to insist upon the defendants calling him as a witness and to decline to issue summonses to their witnesses on their refusal to do so.

I accordingly accept the petition and setting aside the decree of the Judge, Small Cause Court, I direct him to take the evidence of the witnesses specified in the defendant's application of the 15th October 1909 and thereafter to dispose of the case in accordance with law.

Costs to be costs in the cause.

Petition accepted.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL NO. 1248 OF 1910.

April 1, 1911.

Present:—Mr. Justice Shah Din.

KHUDA BAKHSH—PLAINTIFF—APPELLANT

versus

WAHAM ALI AND ANOTHER—DEFENDANTS—RESPONDENTS.

Custom—Alienation—Awans *of Talagang* Tahsil, *Attock District*—Onus.

Among *Awans* of the Talagang *Tahsil* of the Attock District a proprietor is competent to alienate ancestral property in the presence of a son.

The burden of proving want of power to alienate lies on the person who alleges the contrary.

The *onus* of proving that a sale, which took place many years ago in payment of antecedent debts, was made without legal necessity rests upon the person contesting the sale.

Bakhsha v. *Mir Baz*, 79 P. R. 1896; *Devi Das* v. *Bhakra*, 53 P. R. 1899; *Nura* v. *Tora*, 46 P. R. 1900; and *Khudayar* v. *Fatteh*, 8 P. R. 1906; 66 P. L. R. 1906, followed.

Appeal from the order of the Divisional Judge, Attock Division, at Campbellpore, dated the 8th April 1910, confirming that of the Munsif, 1st Class, Talagang, dated the 17th January 1910, dismissing plaintiff's claim.

Mr. *Fazal-i-Ilahi*, for the Appellant.

Mr. *Pestonji Dadabhai*, for the Respondents.

JUDGMENT.—As regards the question of custom involved in this case, the decisions of this Court reported as *Bakhsha* v. *Mir Baz* (1), *Devi Das* v. *Bhakra* (2), *Nura* v. *Tora* (3) and *Khudayar* v. *Fatteh* (4), fully support the view which has been taken by the learned Divisional Judge, and not a single authority has been cited to me by the Counsel for the appellant in support of his position that among *Awans* of Talagang *Tahsil* of the Attock District a proprietor is incompetent to make an alienation of his ancestral property in the presence of a son. I, therefore, hold that the appellant, on whom the burden of proof lay, has failed to prove that his father had no power to make the sale in dispute.

Even, however, if it be granted that the power of alienation possessed by the appellant's father was restricted, I agree with the Divisional Judge in holding that as the sale in the present case took place twenty years ago in payment of antecedent debts, it was for the appellant to prove that it was made without legal necessity, and I am quite clear that he has failed to discharge this *onus*.

The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) 79 P. R. 1896.
(2) 53 P. R. 1899.
(3) 46 P. R. 1900.
(4) 8 P. R. 1906; 66 P. L. R. 1906.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 555 OF 1910.

April 4, 1911.

Present:—Sir Arthur Reid, KT., Chief Judge.

MANNU LAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

HARCHARAN DAS—PLAINTIFF—RESPONDENT.

Appeal—Revision—Punjab Courts Act (XVIII of 1884), s. 70 (1) (a) and (b)—Civil Procedure Code (Act V of 1908), s. 104 (2) and O. XLIII, r 1. (a)—Order of remand—Jurisdiction.

An order of remand directing a lower Court to hear a suit on the ground that it had jurisdiction to do so, is not open to revision under section 70 (1) (*a*) of the Punjab Courts Act, or appeal under section 70 (1) (*b*) of that Act.

Sardar Arur Singh v. *Bua Ditta*, 4 P. R. 1911; 9 Ind. Cas. 674, followed.

Second appeal from the order of the Divisional Judge, Ludhiana Division, dated

the 10th May 1910, reversing that of the District Judge, Ludhiana, dated the 27th January 1910, returning the plaint for presentation to proper Court.

Lala *Madan Gopal*, for the Appellants.

The Hon'ble Mr. *Shadi Lal*, for the Respondent.

JUDGMENT.—Counsel for the respondent raises a preliminary objection that no appeal lies and that the order of the lower Appellate Court cannot be revised under section 70 (1) (*a*) of the Courts Act. The Court of first instance held that the Ludhiana Court had no jurisdiction and returned the plaint under Order VII, rule 10, of the Code.

The respondent appealed under Order XLIII, rule 1 (*a*), to the Divisional Court, which held that the Ludhiana Court had jurisdiction, and remanded "the case under Order XLI, rule 23, for decision on the merits." Counsel contends that the remand was a necessary result of the appeal under Order XLIII, rule 1 (*a*), and that there could be no remand under Order XLI, rule 23. The remand must, therefore, be treated as an order passed on appeal under Order XLIII, rule 1 (*a*), and section 104 (2) bars an appeal from the order on the appeal under section 104 (1) (*i*) read with Order VII, rule 10.

In *Sardar Arur Singh* v. *Bua Ditta* (1) I held that an Appellate judgment deciding that the Court of first instance to hear a suit was not open to revision under section 70 (1) *a*) and I see no reason for thinking that exposition of the law erroneous.

An appeal under section 70 (1) (*b*) is barred being a second appeal.

For these reasons the preliminary objection is allowed and the appeal is dismissed with costs.

Counsel's fee sixty-four rupees.

Appeal dismissed.

(1) 4 P. R. 1911; 9 Ind. Cas. 674.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 866 OF 1910.

March 29, 1911.

Present:—Mr. Justice Shah Din.

HARNAM—PLAINTIFF—APPELLANT

versus

RAJA RAM—DEFENDANT—RESPONDENT.

Contract Act (IX of 1872), s. 16—Helpless condition of the borrower—Interest—High rate—Compound interest—Unconscionable bargain—Undue influence.

A mortgagor was in a condition of helplessness and was compelled by circumstances to borrow money from the mortgagee at the rate of Rs. 18-12 per cent. per annum payable yearly, it being stipulated in the mortgage-deed that if the interest was not paid as agreed upon compound interest at the same rate would be charged:

Held, that the mortgagee was at the time of the contract of mortgage in a position to dominate the will of the mortgagor within the meaning of section 16 of the Contract Act, and as the charging of compound interest at the rate of Rs. 1-9 per cent. per mensem was unconscionable, the mortgagee used that position to obtain an undue advantage over the mortgagor, and hence the contract of mortgage was induced by undue influence.

Maneshar Bakhsh Singh v. *Shadi Lal*, 31 A. 386; 10 C. L. J. 76; 6 A. L. J. 707; 13 C. W. N. 1069; 6 M. L. T. 71; 11 Bom. L. R. 864; 12 O. C. 300; 3 Ind. Cas. 385, (P. C.), followed.

Second appeal from the order of the Divisional Judge, Hissar, dated the 29th November 1909, modifying that of the Munsif, 1st class, Hissar, dated 30th July 1909, decreeing claim for possession by redemption of 97 *bighas*, 8 *biswas* of land, on payment of Rs. 171.

Mr. *Muhammad Hussain*, for the Appellant.

Lala *Lajpat Rai*, for the Respondent.

JUDGMENT.—The facts are very fully stated in the judgment of the learned Divisional Judge and it is unnecessary to recapitulate them here. The only two points which have been raised in this appeal are:—

(1) That the stipulation as to payment of compound interest at the rate of Rs. 1-9-0 per cent. per mensem amounts to a stipulation by way of penalty within the meaning of section 74 of the Contract Act and is, therefore, unenforceable; and

(2) that the contract of mortgage was induced by undue influence and is on that ground voidable.

In regard to the first point no authority has been cited by the appellant's Pleader in support of the position that the stipulation in question is a penal one; in fact, the contention was not very seriously pressed, and I accordingly overrule it. Upon the second point, I have no hesitation in holding that the contract of mortgage was induced by undue influence, and that, therefore, it is not enforceable in its entirety. The learned Divisional Judge in discussing this point in his judgment says,—"The necessity was of the mortgagor to borrow the money. The times no doubt were hard. There was a severe famine in the land. The mortgagor evident-

ly could not obtain a loan on his personal security. He had to mortgage his land." It would thus appear that the mortgagor was in a condition of helplessness and was compelled by circumstances to borrow money from the mortgagee at the rate of Rs. 18-12-0 per cent. per annum payable yearly, and there was a stipulation in the deed that if the interest was not paid as agreed upon compound interest at the same rate would be charged. Following the principle laid down in the judgment of their Lordships of the Privy Council in *Maneshar Bakhsh Singh* v. *Shadi Lal* (1), I hold that the mortgagee in this case was at the time of the contract of mortgage in a position to dominate the will of the mortgagor within the meaning of section 16 of the Contract Act and as the charging of compound interest at the rate of Rs. 1-9 0 per cent. per mensem was unconscionable, the mortgagee used that position to obtain an undue advantage over the mortgagor. My finding, therefore, is that the contract of mortgage in question was induced by undue influence. I further think that it would meet the ends of justice to allow simple interest on the principal mortgage-money at the rate of Rs. 18-12-0 per cent. per annum and interest at this rate should, in my opinion, be allowed from the date of suit to the date when the entire amount is paid by the mortgagors to the mortgagee, the whole amount being a charge upon the land.

I accordingly accept this appeal and reversing the decree of the lower Appellate Court, restore that of the first Court, with costs payable to the respondent.

Appeal accepted.

(1) 31 A. 386; 10 C. L. J. 76; 6 A. L. J. 707; 13 C. W. N. 1069; 6 M. L. T 71; 11 Bom. L. R. 864; 12 O. C. 300; 3 Ind. Cas. 385 (P. C.)

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL NO. 419 OF 1910.

April 5, 1911.

Present:— Mr. Justice Rattigan.

BALU AND ANOTHER — PLAINTIFFS — APPELLANTS

versus

MADAN GOPAL AND OTHERS — DEFENDANTS — RESPONDENTS.

Chief Court "Rules and Orders"—R. XXX (3) and (4)—Pre-emption suit—Pleader's fee—Method of calculating.

Pleader's fees in a suit for pre-emption should be calculated under clause (4) and not under clause (3) of Rule XXX of the Chief Court "Rules and O ders," *i.e.*, with reference either to the amount decreed, or according to the valuation of the suit, or according to such sum, not exceeding the valuation, as the Court thinks reasonable, and fixes with reference to the importance of the subject of dispute.

First appeal from the order of the Sub-Judge, 1st class, Ferozpore, dated the 27th October 1900, decreeing transfer of the sale in favour of the plaintiff on payment of Rs. 30,000, and costs of defendant.

Sardar *Kharak Singh*, for the Appellants

Mr. *Harris*, for the Respondents.

JUDGMENT.—In my opinion the order of the Sub Judge directing plaintiff to pay defendants' costs was correct. The defendants never denied plaintiffs' pre-emptive rights, but they claimed to be re-paid Rs. 30,000 as the price of the land. Plaintiffs, on the other hand, asserted that the market-value was merely Rs. 16,000 and that defendants had not paid anything more than that. The Court found that full consideration had been paid and, therefore, quite rightly mulcted plaintiffs in costs.

The Sub-Judge has, however, gone entirely astray in assessing costs. In his order of the 27th October 1909, he refers to the note appended to Rule XXX (3) of the Chief Court "Rules and Orders," and discusses the meaning of a clause in that note which had been cancelled two years previously by correction slip No. 132, dated 16th May 1907. In point of fact, however, the Sub-Judge expended a great deal of time and ingenuity very unnecessarily in this discussion, as it is Rule XXX (4) which deals with the question of Pleader's fees in suits to enforce a right of pre-emption. This rule is perfectly clear and empowers the Court to allow the fee to be calculated with reference either to the amount decreed, or according to the valuation of the suit, or according to such sum, not exceeding the valuation as the Court shall think reasonable and shall fix with reference to the importance of the subject of dispute.

In the present instance there was only one hearing and the record is light. Defendants (according to the statement made before me by one of them) paid their Pleader Rs. 50 only. In the circumstance it is inequitable to make plaintiffs pay a sum of Rs. 650 as Pleader's fee and I accordingly direct that the amount to be allowed shall be calculated

with reference to the valuation of the suit, *i.e.*, on Rs. 1,970, which represents 30 times the amount of the land revenue on the land.

I accept this petition to the extent above indicated and I leave the parties to pay their own costs in this Court.

Appeal accepted.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 175 OF 1910.

February 14, 1911.

Present:—Mr. Justice Richards.

Kuar NIHAL SINGH AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

BALDEO PERSHAD AND ANOTHER—DEFENDANTS—RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 158—Rent-free grant—Resumption—"Two successors," meaning of—Proof as to who the original grantee was.

Section 158 of the Agra Tenancy Act does not provide that the person succeeding must necessarily be the heir of the person who preceded him.

For the purpose of section 158 it is not necessary to prove who the original grantee was.

Second appeal from the decision of the District Judge of Mainpuri, dated the 10th December, 1909.

Mr. *M. L. Agarwala*, for the Appellants.

Dr. *Satish Chandra Banerji*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit to resume possession of certain *muafi* land under the provisions of section 158. Both the Courts below have decided in favour of the defendants. Section 158 provides, amongst other things, the land not liable to resumption under section 154 and which has been held rent-free for 50 years and by two successors to the original grantee, shall be deemed to be held in proprietary title.

The findings of both the Courts are absolutely clear that the land is very old *muafi* and has been held rent-free for more than 50 years. The finding of the Court is very clear that the land is not liable to resumption under section 154. The finding of the Court is not quite so clear upon the point that the land was also held by two successors to the original grantee. Mr. Agarwala, on behalf of the plaintiffs-appellants, has pressed two points. *First*, he contended that that portion of section 158 which I have quoted applies only to grants created since the 22nd of December, 1873, and *secondly*, that even assuming that his first point is not sound, that the findings of the Court below are insufficient to entitle the defendants to be deemed to have acquired proprietary right. The first point is based upon the argument that section 30, clause (*d*) of Act XII of 1881, only entitled a rent-free land-holder to have it declared that he had proprietary right if he was able to prove that the land had been held rent-free for 50 years before the 22nd of December, 1873, and that under the General Clauses Act, 1904, section 6, it follows that section 158 can only apply to grants made since the 22nd of December, 1873. In my opinion this ground is not well-founded. Section 158, in the clearest possible language, gives a person proprietary right where land has been held free of rent for 50 years and by two successors to the original grantee. What the expression "held by two successors to the original grantee" means is not very clear and Mr. Agarwala's second point is connected with this part of the section read in conjunction with the finding of the Court. Evidence was given in respect of the pedigree of the defendants and records were produced showing in whose name the land has from time to time been recorded. In the years 1857 the name of one Rambux was recorded as *muafidar*. A family pedigree was also given in evidence and appears to have been proved to the satisfaction of the Court below. After Rambux the name of one Pokhai was recorded. Pokhai was the son of Chhedi, and Baldeo and Salik, the present defendants, were the sons of Durga who appears to have been a brother of Pokhai. It must be admitted that there is no clear finding that the present defendants are the direct heirs of Rambux, nor is there any finding as to who was the original grantee. The Court of first instance, however, said in the course of his judgment that all the lands were *muafi* and they have from time to time been partitioned amongst the members of one and the same family. The Court goes on then to draw a distinction of two cases of land in possession of which the evidence did not show that *muafidars* had been for at least three generations. The lower Appellate Court adopts the finding of the Court of first instance and, in my opinion, it must be taken that both the Courts below

intended to find, and did find, that the land has been held without any break in the chain, at least from the time of Rambux, that is to say, from the year 1867 down to the present time by members of the same family.

Section 158 does not provide that the person succeeding must necessarily be the heir of the person who preceded him. The expression is "two successors." It remains to be considered whether it is necessary to prove who the original grantee was. In my opinion it is not. I think that when Rambux was found in possession ever since the year 1857, the Court is entitled to declare the defendants' proprietary title if it is shown that the land has been held for 50 years and by these generations; in other words, that if necessary the Court would be entitled to presume that Rambux was the original grantee or that a grant had been made to him. In the present case, having regard to the ancient character of the *muafi* it would be quite impossible to show by evidence who was the original grantee. In my opinion the decree of the Court below was correct and I dismiss the appeal with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 476 OF 1910.

February 7, 1910.

Present:—Mr Justice Karamat Husain.

BHAGWAT DIN—DEFENDANT—APPELLANT

versus

SHEO DIAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Pre-emption—Wajib-ul-arz—*Construction*—*Preferential rights between a near relation and a member of the same caste.*

A *Wajib-ul-arz* provided as follows:—"the right of pre-emption is given (1) to co-sharers who are near in blood to the vendor, (2) to other co-sharers of the same caste, (3) lastly to the co-sharers of the village:"

Held, that under the *Wajib-ul-arz* near relations had a preferential right over persons of the same caste.

Second appeal from the decision of the Additional Subordinate Judge of Cawnpore, dated the 24th February 1910.

Mr. *Hamilton*, for the Appellant.

Mr. *G. W. Dillon*, for the Respondents.

JUDGMENT.—Under a sale-deed dated the 20th April 1909 and registered on the 21st April 1909 one Ramadhin, son of Bhairon, sold the property in dispute to Ramadhin, son of Ram Sahai, for Rs. 550. In consequence of the above sale two pre-emptive suits were instituted, one by Sheo Dayal and another by Bhagwat Din.

Sheo Dayal in his plaint alleged that the actual price was Rs. 225 only. Bhagwat Din in his plaint said that he had a preferential right of pre-emption, that the sale price stated in the sale-deed was the correct one.

The Court of first instance, finding that both the pre-emptors were entitled to pre-empt but that Sheo Dayal had a preferential right, decreed Sheo Dayal's suit ordering him to pay Rs. 225 as the correct price, and dismissed that of Bhagwat Din's.

Both Sheo Dayal and Bhagwat Din appealed to the lower Appellate Court, which modified the decree of the Court of first instance passed in favour of Sheo Dayal by ordering him to pay the amount set forth in the sale-deed, *i.e.*, Rs. 550 instead of Rs. 225. The terms of the *wajib-ul-arz* relating to pre-emption which are set out in the judgment of the lower Appellate Court are as follows: "The right of pre-emption is given (1) to co-sharers who are near in blood to the vendor; (2) other co-sharers of the same caste, and (3) lastly to the co-sharers of the village."

Two pedigrees are referred to in the judgment of the lower Appellate Court one produced by Bhagwat Din and another produced by Sheo Dayal. The Court in its judgment finds the pedigree produced by Sheo Dayal proved and with reference to that pedigree finds that Sheo Dayal comes under the first category of the *wajib-ul arz*, that the rival pre-emptor comes under the 2nd category of it, and that the vendee who is a Brahmin does not come under any of the three clauses of the *wajib-ul-arz*. That Court also finds that the price entered in the sale-deed, *i. e.* Rs. 550 is the price paid.

Bhagwat Din has preferred a second appeal to this Court and two points are pressed by his learned Counsel. The *first* is, that the Courts below have wrongly assumed that the near relations have a preferential right over distant relations; and the *second* is, that when Bhagwat Din was ready to pay the price entered in the sale-deed and when Sheo Dayal in his plaint offered to pay Rs. 225 only, Sheo Dayal's right to pre-empt was gone. The terms of the *wajib-ul-arz* are very clear I have carefully gone

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through the original of it and have no doubt that near relations have a preferential right over persons of the same caste. There is no mention in the judgment of the lower Appellate Court that a nearer relation has a better title than a remote one and there is nothing in the *wajib-ul arz* to that effect.

According to the finding recorded by the lower Appellate Court, Sheo Dayal belongs to the first category and Bhagwat Din to the second and, that being so, the mere fact that Sheo Dayal in his plaint stated that the correct price was Rs. 225 does not disentitle him to pre-emption in payment of the price found to be correct by the lower Appellate Court and the last words in the pre-emption clause which are to the effect that if two co-sharers of equal rights claim pre-emption the one who pays more will be entitled to pre-emption have no application to this case, inasmuch as Sheo Dayal and Bhagwat Din do not belong to one and the same category.

The result is that the appeal is dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL NO. 3907 OF 1910.
March 1, 1911.
Present:—Mr. Justice Mookerjee and
Mr. Justice Teunon.
DWARKA MISSER AND OTHERS—DEFENDANTS—APPELLANTS
versus
RAM PROTAP MISSER AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Religious ceremonies, performance of—Choosing of priest—Exclusive title to officiate, if tenable.

Parties who require religious ceremonies to be performed for their benefit are at liberty to choose the priest by whom those ceremonies shall be performed.

Gour Moni Debi v. *Chairman of Panihati Municipality*, 6 Ind. Cas. 864; 12 C. L. J. 74; 14 C. W. N. 1057, relied upon.

Therefore, when pilgrims on their way to Gya perform the *sradh* ceremony of their ancestors on the bank of the Punpun, no one is entitled to a declaration that he is exclusively entitled to officiate as the priest.

But a declaration may be obtained that a person is entitled to officiate as priest for such pilgrims as may choose to employ him and that he cannot be prevented from exercising his calling.

Appeal from the decree of the Sub-Judge of Patna, dated August 29th, 1910, affirming that of the Munsif of Bankipur, dated December 22nd, 1909.

Babus *Baldeo Prasad Singh* and *Bir Bhushan Dutt*, for the Appellants.

Babus *Mohendra Nath Roy* and *Kulwant Sohay*, for the Respondents.

JUDGMENT.—This is an appeal on behalf of the defendant in a suit of a novel description. The plaintiffs-respondents allege that they are the descendants of Sham Nath Misser, and that, along with the defendants who are other descendants of the same person, they are entitled to officiate as priests at the offering of *Pindas* on the bank of the sacred river Punpun in the District of Gaya. According to orthodox Hindu nations, it is the duty of the pilgrim to Gaya to shave his head on the bank of the river Punpun, to perform the *sradh* ceremony of his ancestors and to bathe in the waters of the river on his way to the holy city. The plaintiffs allege that, as the descendants of Sham Nath Misser, they and the defendants are exclusively entitled to officiate as priests at the offering of *Pinda*, and that whoever amongst them may be employed by a particular pilgrim, he is bound to share with the other members of the family the offerings received and the emoluments earned by him. The defendants resist the claim of the plaintiffs, deny that the plaintiffs are the descendants of Sham Nath Misser and claim to be exclusively entitled to officiate as priests on the occasion of the ceremony mentioned. The Courts below have concurrently made a decree in favour of the plaintiffs by which they are declared entitled to be restored to possession of the right claimed by them, to recover mesne profits, and to have formal possession of the share of the disputed property to be enjoyed jointly with the defendants or alternately on different dates as might suit their convenience. The defendants have appealed to this Court, and on their behalf, the decision of the Subordinate Judge has been assailed substantially on two grounds, namely *first*, that the Courts below have erroneously found an evidence inadmissible in law that the plaintiffs are descendants of Sham Nath Misser, and *secondly*, that the decree made in favour of the plaintiffs is contrary to law, and grants them relief not enforceable in a Civil Court. In our opinion, the first of these grounds is unsustainable, but the second must prevail in part.

In so far as the first contention is concerned, we are unable to hold that the Courts below have relied upon any evidence inadmissible in law. Objection has been principally taken to statements made by the predecessor of the parties, but these statements are cleary admissible under section 32, sub-secion 5 of the Indian Evidence Act. Consequently, there is no substance in the first objection taken by the appellants.

In so far as the second ground urged by the appellants is concerned, it is manifest that the Courts below have completely overlooked the principles applicable to cases of this description. It is well-settled, as was pointed out by this Court in the case of *Gour Mani Debi* v. *Chairman of the Panihatti Municipality* (1), that parties who require religious ceremonies to be performed for their benefit are at liberty to chose the priest by whom they shall be performed. The plaintiffs are, therefore, not entitled to any declaration that they along with the defendants are exclusively entitled to officiate as priests, when pilgrims, on their way to the holy city, perform the *sradh* ceremony of their ancestors on the bank of the sacred river Punpun. The plaintiffs, however, can obtain a declaration that they are entitled to officiate as priests for such pilgrims as may choose to employ them for the purpose of religious ceremonies, and that the defendants are not entitled to prevent the plaintiffs from the execrise of their calling. This, however, is not the most important aspect of the case: the plaintiffs seek a declaration that if any one among the defendants assists in the performance of ceremonies by a pilgrim, the plaintiffs are entitled to share with them the offerings and emoluments. To put the matter in another way, the plaintiffs allege that the right to officiate as priest is vested in the entire body of descendants of Sham Nath Misser and that whoever amongst them may perform the ceremonies on a particular occasion and whatever sum or article he may earn thereby, he is bound to bring that into a common fund to be enjoyed by all the members of the family. In support of this extraordinary position, reliance was placed upon a decree in a suit of 1821 and a deed of partition of 1837. It appears that about the year 1821 there was a dispute between two families of *Brahmins* who may be called the *Pandeys* and the *Missers*, residents on opposite banks of the river Punpun. The *Pandeys* claimed that they as well as the *Missers*, the ancestors of the parties to this suit, were entitled jointly to perform religious ceremonies for the pilgrims on the banks of the river Punpun, and to divide the earnings amongst themselves. This claim was negatived on the 27th May 1822, and it was declared that the *Pandeys* were not entitled to officiate as priest. Subsequently, on the 28th October 1837, a deed of partition was executed amongst the predecessors of the parties to the present suit, in which it was arranged that each of the three branches of the family formed by the descendants of the three sons of Sham Nath Misser should have one-third share of the emoluments or the fees of the officiating priest at the performance of ceremonies on the bank of the river Punpun. The documents in question obviously do not establish the right now claimed by the plaintiffs. It is intelligible that members of a family may agree amongst themselves, that whoever amongst them may earn anything by officiating as a priest, the income is to be brought into a common fund and divided in certain proportion amongst them. But such an arrangement cannot be obligatory upon the parties and their successors for all time and in spite of the wishes of members who may desire to terminate it. The learned Vakil for the respondents has contended upon the authority of the cases of *Dino Nath* v. *Pratab Chandra* (2) and *Bheema* v. *Kothakota* (3), that the members of this family are entitled to a religious office and that it is open to one of them to maintain a suit against his co-sharers for recovery of his share of whatever may be given by pilgrims by way of offerings or emoluments. The cases relied upon, however, are clearly distinguishable; they are cases in which offerings were made to an idol or some other image of the deity, and it was ruled that the offerings belonged to the entire body of *shebaits*. In such a contingency, it is rightly held that although a suit by the rightful owner of a religious office against an usurper for recovery of voluntary gratuities, is not maintainable, a suit brought by a sharer in religious office against his co-sharers for recovery of his share of the voluntary

(1) 6 Ind. Cas. 864; 14 C. W. N. 1057; 12 C. L. J. 74.

(2) 27 C. 30.

(3) 17 M. L. J. 493.

gratuities is maintainable, because in the latter class of cases the basis of the claim is an arrangement, express or implied, that all the sharers should have a share in the gratuities. In this case before us, however, the initial difficulty of the plaintiffs is that they have not established that there is any religious office to which they have a claim. It has not been proved that they have a hereditary right to officiate as priests at the worship of an idol and to have a share in the offerings made to the deity. The case, on the other hand, is more analogous to that of *Jowahur Misser* v. *Bhagoo Misser* (4), where it was ruled that a claim was not maintainable for a share in the gratuity or voluntary gift to a priest officiating at a *sradh* ceremony, because the fee paid was in the nature of a voluntary gift to the person to whom it was directly paid. The reason assigned in support of this view is that where voluntary offerings were made to a priest who officiated at a *sradh* ceremony, they must be taken to have been intended for the very person who was then actually performing the ceremony [*Kashi Chandra* v. *Kailash Chandra* (5), *Sitaram* v. *Sitaram* (6), *Raja* Valad *Shivapa* v. *Krishnabhat* (7). See also *Chunnu Dat* v. *Babu Nandan* (8)]. The plaintiffs have neither alleged nor established that they have any right to the holy spot, by grant or otherwise, nor have they alleged and proved that they have a hereditary right to officiate as priest at the worship of an idol to whom offerings are made, and to have a share in such offerings. Consequently, the decree, in so far as it declares such right, cannot be supported, nor can the decree be maintained in so far as it entitles the plaintiffs to recover mesne profits.—The Courts below have neither realized the effect of such a decree, nor considered how the mesne profits can be determined in execution proceedings. If what was paid to the officiating priest was paid to him personally by a particular pilgrim the plaintiffs would not be entitled to claim a share in such a sum. But it would be impossible to discover now from any evidence that might be available, whether a particular pilgrim made a payment for the personal benefit of the officiating priest or whether it was intended to be paid to him as representative of a family.

The result, therefore, is that this appeal must be allowed in part and the decree of the Court below modified. The plaintiffs will have a declaration that they are entitled to officiate at the *pinda dehani* ceremony on the southern bank of the river Punpun and that the defendants are not entitled to obstruct the plaintiffs when they officiate as priests at such ceremony. A perpetual injunction will also issue prohibiting the defendants from interfering with and offering resistance to the plaintiffs in the performance of the *pinda dehani* ceremony. The question, however, whether the plaintiffs are entitled by grant or otherwise to joint possession, with the defendants of the spot where the ceremonies are performed and whether the plaintiffs are entitled as *shebaits* of any deity to have a share of the offerings given by pilgrims, is left open for consideration in a future suit, if occasion should arise. Each party will pay his own costs throughout this litigation.

(4) (1857) S. D. A. 362.
(5) 26 C. 355.
(6) 6 B. H. C. R. 250.
(7) 3 B. 232.
(8) 7 A. L. J. 529; 32 A. 527; 6 Ind. Cas. 223.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2971 OF 1910.
February 24, 1911.

Present:—Mr. Justice Mookerjee and Mr. Justice Teunon.

NARENDRA NATH SINHA—DEFENDANT—APPELLANT

versus

NAGENDRA NATH BISWAS—PLAINTIFF—RESPONDENT.

Bengal Municipal Act (III B. C. of 1884), s. 6, cl. (11), s. 15 proviso, cls. (i) and (ii), ss. 85, 103—Qualification to vote—Payment of rates and income-tax—Voter must be legally liable to pay rates and tax—Owner Occupier.

A person whose income is below the taxable minimum, but who submits to the levy of the income-tax, does not thereby acquire the statutory qualification as a voter as contemplated by section 15 proviso, clause (*ii*), of the Bengal Municipal Act.

The payment of rates to be available as a qualifying circumstance for a voter under section 15 proviso, clause (*i*), must be by a person legally liable to pay the same.

Where a son has contributed considerable sums of money towards the acquisition and subsequent improvement of a house which was purchased in the name of his father who lives at Benares in retirement, the son is rightly treated by the Municipality as "owner" and is, therefore, liable under section 103 of the Act to pay rates assessed on the house, and entitled to vote under section 15, clause (*i*).

NARENDRA NATH *v.* NAGENDRA NATH.

Appeal from the decree of the District Judge of 24-Pergannas, dated August 29th, 1910 modifying that of the first Munsif of Alipur, dated August 12th, 1910.

Mr. *B. C. Mitter*, Councel, and Babus *Biraj Mohan Majumdar* and *Tarakeswar Pal Chowdhury*, for the Appellant.

Mr. *S. P. Sinha* and Babus *Ram Chandra Majumdar* and *Karunamoy Bose*, for the Respondent.

JUDGMENT.

MOOKERJEE, J.—This appeal arises out of an action commenced by the plaintiff-respondent for declaration of the invalidity of the election of the defendant as a Commissioner of the Manicktolah Municipality. The suit was instituted on the 8th January 1910, after the name of the defendant had been entered in the list as qualified to vote and also to be elected as a Commissioner. The election took place on the 23rd July 1911, and the plaintiff thereupon asked for a perpetual injunction to restrain the defendant from exercising his privileges as an elected Commissioner. The Court of first instance held that the defendant was qualified to vote under clause (*i*) of the proviso to section 15 of the Bengal Municipal Act, 1884, because he had paid, during the year immediately preceding the election, Municipal rates of the aggregate amount of not less than three rupees; the Court also found that he was qualified under clause 2 of the same proviso as he had paid income-tax during that year. In this view the suit was dismissed with costs. Upon appeal, the learned District Judge has reversed this decision. He has held, *first*, that the defendant is not qualified under clause 2 of the proviso, because his income was not such as would make him liable under the law for the payment of income tax, and *secondly*, that he is not qualified under clause (*i*) of the proviso because he was not owner of the house in respect of which he was assessed by the Municipality and for which he has paid the Municipal rate. The District Judge has held in substance that, although the defendant has actually paid both income-tax and Municipal rates, he is not qualified, inasmuch as he was not liable under the law to pay either the tax or the rates. The defendant has now appealed to this Court, and on his behalf the decision of the District Judge has been assailed on the ground that, as he has paid the income-tax as well as the Municipal rates, he is qualified to vote and to be elected, even though it is established that income-tax has been illegally levied from him and he has been improperly made liable for the Municipal rates. It has further been contended that, in so far as the Municipal rates are concerned, he was properly assessed and made liable as an occupier, if not as an owner. These contentions have been strenuously challenged on behalf of the plaintiff-respondent, and it has further been argued that, in so far as the payment of income-tax is concerned, apart from the question whether the defendant was liable to pay the tax, the payment is of no assistance as it was made on the 7th June, 1910, that is, not within the official year 1909-10. The answers to the question raised, which are of some novelty and not altogether free from difficulty, must depend upon an examination of the statutory provisions on the subject.

Section 14 of the Bengal Municipal Act provides, that a certain proportion of the Commissioners of each Municipality shall be elected by male persons: resident within the limits of the Municipality, who shall have attained the age of 21 years. This section, which defines the qualifications of electors in so far as age, sex and residence are concerned, is supplemented by section 15, which imposes what may be briefly called property and educational qualifications. The proviso to section 15 lays down that every male person who is, at the time of election and has been for a period of not less than twelve months immediately preceding such election, resident within the limits of the Municipality, shall be entitled to vote at the election of Commissioners, provided he satisfies one of three requirements. The *first* of these is the payment of Municipal rates; the *second* is the payment of income-tax; the *third* is an educational qualification with which I am not concerned in the present case. It is not disputed before us that the defendant resided within the limits of the Municipality for a period of not less than twelve months immediately preceding the election. The only question, therefore, which requires consideration is, whether he has fulfilled the condition relating to the payment of the prescribed minimum amount of rates and income-tax. As already stated, there is no controversy that he has paid both rates and income-tax; but the contention of the plain-

tiff is that the defendant was not liable to pay either of the sums realised from him, and that, therefore, his submission to the illegal demand and the satisfaction of the claim made upon him, do not qualify him as an elector. It will be convenient to consider the two payments separately.

In so far as the payment of income-tax is concerned, it has not been disputed that on the 7th June 1910, income-tax was deducted from the interest on Government securities held by the defendant, but it is argued that this is of no avail, *first*, because the payment was not within the official year preceding the election ; and *secondly*, because, in any event, the defendant was not liable to pay any income-tax, as he has not an assessable income of one thousand rupees or upwards. In support of the first objection, it is contended on behalf of the plaintiff, that the income-tax mentioned in clause (2) of the proviso to section 15 of the Bengal Municipal Act, must be paid during the official year preceding the election, because the term "year" as defined in section 6, clause 19, means a year beginning on the first day of April; consequently, as the payment in this case has been made during the official year in which the election has been held, it is of no avail to the defendant. On the other hand, it is argued that all the definitions given in section 6 must be taken qualified by the introductory words, "unless there be something repugnant in the subject or context," and that the word "immediately" in the phrase "during the year immediately preceding such election" shows that the word "year" here cannot have the meaning given to the term in section 6, clause 19 ; the intention plainly, it is said, is that the payment should be made during the year which ends at the time of the election ; from this point of view, the payment of the income-tax in the present case would not be open to objection on the ground that it had been made to take. The question raised is not free from difficulty, and as the second objection must prevail, it need not be decided in this case.

In support of the second objection, it has been agued that the payment contemplated as a qualifying circumstance, must be payment by a person liable to pay under the provisions of the law. It has been contended on the other hand, on behalf of the defendant that as admittedly he had paid income-tax, it is immaterial that the same has been illegally levied from him. In this connection it may be pointed out that, under section 13 of the Income-tax Act, 1886, the tax is deducted from the interest on the securities mentioned in part III of the Second Schedule, unless the owner of the security produces a certificate from the Collector that his annual income from all sources is less than the minimum taxable income. In other words, the income-tax is automatically deducted, unless the holder of the security obtains an order for exemption. The question, therefore, arises, whether a person whose income is below the taxable minimum, but who submits to the levy of the tax does thereby acquire the statutory qualification, contemplated by section 15 of the Bengal Municipal Act. In my opinion, the question ought to be answered in the negative. The learned Counsel for the defendant has argued that the effect of such an interpretation would be to read into the Statute restrictive words which are not to be found there. I do not feel pressed by the reasonableness of this consideration. It is well settled that, although the words used in a Statute are general, they do not always receive the widest construction of which they are suspectible, and their operation is often restrained by reference to other parts of the Statute to its subject-matter, or its general scope and intention, though it may be conceded that such a restrictive operation will not be attributed to general words, unless we can find in the Statute itself some ground for limiting and restraining their meaning by reasonable construction and not by arbitrary addition or retranchment [*Beckford* v. *Wade* (1) *Twycross* v. *Grant* (2) and *Garland* v. *Carlisle* (3).] The view we take is supported by the canon of construction laid down in *Stradling* v. *Morgan* (4), which was qucted with approval by Turnor, L. J., in *Hawkins* v. *Gathercole* (5) by Halsbury, L. C., in *Cox* v. *Hakes* (6) and by Bowen, L. J. in *In re Standard Manufacturing Company* (7):

(1) 17 Ves. 87 at p. 91 ; 11 R. R.20.

(2) 2 C. P. D, 469 at pp. 530, 531 ; 46 L. J., C. P. 636, 37 L. T. 812; 25 W. R. 701.

(3) 4 Cl. & F. 693 at p. 726; 11 Bli (N. S.) 421.

(4) (1560) Plowden 199 at p. 205.

(5) 6 De G. M. & G. 1 at p. 21; 24 L. J. Ch. 332; 3 Eq. R. 348; 1 Jur. (N. S.) 481; 3 W. R. 194.

(6) (1890) 15 A. C. 506 at p. 515; 39 W. R. 145; 17 Cox C. C. 158; 60 L. J. Q. B. 89; 63 L. T. 392; 54 J P. 820.

(7) (1891) 1 Ch. 627 at p. 646; 16 L. J. Ch. 292.

NARENDRA NATH *v.* NAGENDRA NATH.

Those (Statutes) which included every person in the letter, they (the sages of the law) have adjudged to reach to some persons only, which expositions have always been founded on the intent of the Legislature, which they have collected sometimes by considering the cause and necessity of making the Act: sometimes by comparing one part of the Act with another, and sometimes by foreign circumstances" (see also Bacon on Maxims of the Law Works, Ed. Ellis and Spedding, Volume VII, page 35?.) Now, in the present case the object of the Legislature was manifestly to confer the franchies upon persons who possessed a specified property qualification, indicated by the payment of income tax to the State. It could never have been intended that a person whose income was below the taxable minimum should secure qualification as an elector by payment of income-tax when no such tax could under the law be levied from him. The only cases in which a similar question appears to have been raised is that of *Humphrey* v. *Kingman* (8), in which it was ruled that if a tax is regularly assessed against one who is in other respects a qualified elector, its payment, if made in good faith, will entitle him to vote although such tax was illegally assessed. The authority of the case, however, has been doubted, and the principle recognised therein could not possibly be extended to cover cases where, as here, a person with full knowledge of his disability, submits to an assessment solely with a view to acquire electoral qualification; countenance to such a device would be manifestly to encourage a fraud upon the Statute, so as to defeat the true object of the Legislature. I must, consequently, hold in the case before me that as the income of the defendant was below the taxable minimum and as he could not be legally assessed under the Income Tax Act, his acquiescence in the deduction of the tax from the interest on the Government security held by him, cannot possibly secure for him the qualification essential for the exercise of the franchise.

In so far as the payment of Municipal rates is concerned, it is not disputed that the defendant is recorded in the Demand Register of the Municipality as an owner of premises No. 59 Churrakdanga Road as such owner, he has paid the amount of rate assessed thereon; but it has been argued, that in the case of the first clause, quite as much as in the case of the second clause of the proviso to section 15, the payment of rates to be available as a qualifying circumstance must be by a person legally liable to pay the same and that the defendant is not such a person as his father is the owner of the house. I am of opinion, for reasons already explained, that the payment of rates by the defendant must be proved to have been made by him as a person legally liable to satisfy the Municipal demand. Now, section 103 provides that the rate upon holdings leviable under section 85 shall be payable by the owner of the holding. Section 105 then provides that the sum due from the owner, if unpaid by him, may be recovered from the occupier also; consequently it would be sufficient for the defendant to establish that he is either an owner or an occupier liable to pay the rates. The term "owner" is defined in clause 11 of section 6 to include every person who is entitled for the time being to receive any rent in respect of the land with regard to which the word is used, whether from the occupier or otherwise; the term 'owner' also includes a manager of agent or trustee for any such person. This clearly is not an exhaustive definition of the term 'owner' because, as observed in the cases of *Reg.* v. *Kershaw* (9) and *Dilworth* v. *New Zealand Commissioner of Stamps* (10), the word "include" is generally used in interpretation clauses to enlarge the meaning of words so as to make them comprehend not only such things as they signify according to their natural import but also the things they are declared to include. An owner, therefore, for the purposes of the Municipal Act, includes not only an owner in actual occupation of the holding, but also an owner entitled to receive rent from the occupier or otherwise. This definition, it must be remembered, however, was framed, not so much with a view to confer rights as to impose liabilities as is usual in Statutes of this description [see the observations of Blackburn, J. in *Cook* v. *Montague* (11)] apart from this circumstance, it is plain that the definition of the term 'owner' is comprehensive enough to include the father

(8) (1842) 5 Metcalfe (Mess) 162.

(9) 6 E. & B. 999 at p. 1007; 106 R. R. 906; 26 L. J. M. C. 19; 2 Jur. (N. S.) 1139; 5 W. R. 53.

(10) (1899) A. C. 99 at p. 105; 68 L. J. P. C. 1; 79 L. T. 473; 47 W. R. 337.

(11) (1872) L. R. 7 Q. B. 418 at p. 422; 41 L. J. M. C. 149; 26 L. T. 471; 20 W. R. 624.

of the defendants, even though he is not in receipt of rent from his sons. The argument on behalf of the plaintiff, an argument which found favour with the learned District Judge, is that as the father of the defendant is not in receipt of rent from his sons, and lives at Benares in retirement, he cannot be deemed to be a person entitled, within the meaning of section 6, clause 11, to receive rent from the occupier or otherwise. This view, in my opinion, is manifestly fallacious. The definition is not so framed as to restrict its application only to the owner who is in actual receipt of rent, and it may be observed, that when a similar contention was raised with reference to section 250 of Statute 18 and 19 Vic. Chap. 120 it was overruled by the Court of appeal in *Wright* v. *Ingle*(12). If it be assumed, therefore, that the father of the defendant is the owner of the house, though he is not in possession, he is still owner within the extended definition of that term as given in section 6, clause 11, and consequently the defendant himself, as his manager or agent, has been rightly treated as the owner by the Municipality. But upon facts patent on the record, it is plain that the defendant is also 'owner' in the ordinary acceptation of the term. It is incontestable that the defendant has contributed considerable sums towards the acquisition and subsequent improvement of the property. The theory of the District Judge that these sums must be regarded as free gifts to his father is based upon no evidence at all, and cannot possibly be sustained. The presumption is that when the defendant contributed towards the costs of acquisition of the property, he became joint owner thereof with his father [*Dhurma Das Kundoo* v. *Amulya Dhan Kundoo* (13).] From this point of view also, the defendant would be appropriately treated as owner. But, even if it be assumed for a moment that the defendant is not an owner, he is, at any rate, an occupier, and as such liable to pay the rates under section 105 of the Bengal Municipal Act. It cannot be disputed that he had satisfied the Municipal demand with his own money; consequently, there is no foundation for the suggestion that the payment was by a person neither liable nor competent to make it under the provisions of the law. I hold, therefore, that the defendant was qualified to be an elector under the first clause of the proviso to section 15, and hence necessarily, to be a Commissioner under the same section. The conclusion follows that the objection of the plaintiff to the legality of the election cannot be sustained.

The result is that the appeal must be allowed, the decree of the District Judge reversed and that of the Court of first instance restored, with costs to the defendant in all the Courts.

TEUNON, J.—In this case I have had the advantage of reading the judgment just delivered by my learned brother and need not again set out the facts, or the contentions of the parties to this appeal.

For the reasons given at length by my learned brother I agree that the appellant is not a qualified voter under the 2nd clause of the proviso to section 15 of the Act.

On the other hand, it has been found by the Court of first instance that though the premises in question were purchased in the name of the father, the major portion of the consideration-money was paid by the appellant out of the joint funds belonging to himself and his five brothers, and further that the expenditure on subsequent extensive alteration and additions was similarly defrayed by the appellant out of the said fund. This finding has not been displaced by the learned District Judge and there is ample evidence in support of it. Indeed, that evidence shows that out of the sum of Rs. 3,200 which formed the consideration-money, Rs. 2,865 were paid by the six brothers and their subsequent expenditure on the property amounted to some Rs. 7,000.

The recital in the deed of sale and the assertion made by the father to the knowledge of his son the appellant in certain suits and certain letters have apparently been erroneously treated by the District Judge as conclusive evidence of the father's exclusive title. These recitals and assertions, when assented to or not contradicted by the son, may be said at best to represent admissions capable of explanation. They have been explained, and there is no warrant in law for the learned District Judge's assumption that the sums spent by the sons aggregating

(12) (1885) 16 Q. B. D. 379; 55 L. J. M. C. 17; 50 J. P. 426; 54 L. T. 511; 33 W. R. 222.
(13) 3 C. L. J. 616; 10 C. W. N. 765; 33 C. 1119.

some Rs. 9,000 should be regarded as fee gifts made by them to their father.

There is thus, in my opinion, no question that the appellant and his brothers have a substantial interest in the property and have been rightly treated by the Municipality as owners in the ordinary acceptation of that term and, therefore, liable under section 103 of the Act to pay the rates assessed on the holding.

In the view of the case, the payment of rates made by the appellant entitles him to a vote under the first clause of the proviso to section 15 of the Act.

For these reasons I agree in decreeing this appeal with costs.

Appeal decreed.

PUNJAB CHIEF COURT.

CIVIL REVISION CASE NO. 274 OF 1910.

March 30, 1911.

Present:—Mr. Justice Shah Din.

TUFAIL MAHOMED, MINOR, THROUGH *Musammat* HASSI, HIS GRANDMOTHER—PLAINTIFF—PETITIONER

versus

HIRA SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Joinder of causes of action and parties—Suit for possession as heir—Impleading of different alienees in one suit—Trial of separate issues—Interlocutory judgments—Practice—Amendment of plaint.

In a suit for possession by inheritance, the plaintiff can in one suit attack several alienations made at different times in respect of various portions of property by a deceased owner in favour of different persons. There is no misjoinder of parties or causes of action by including all the alienees in one suit

Musammat Gopal Devi v. *Jai Narain*, 1 P. R. 1905; 83 P. L. R. 1905, *Umabai* v. *Vithal Vasudev*, 33 B. 293; 11 Bom. L. R. 34; 5 M. L. T. 230; 1 Ind. Cas. 120; *Ballabh Rai* v. *Gopal Lal Singh*, 6 Ind. Cas. 577; *Fazal Hussein* v. *Amir Haidar*, 9 Ind. Cas. 588, followed.

Where several alienees have been impleaded as defendants, the difficulties arising from variety of defences can be cured by successive trial of the issues separately affecting different defendants. Interlocutory judgments may, if the plaintiff succeeds, be given against different defendants as their cases are disposed of, final judgment for the possession of the whole property being reserved till the conclusion of the trial of the whole case. The plaintiff should not be compelled to bring a separate suit against each defendant.

Umabai v. *Vithal Vasudev*, 33 B. 293; 11 Bom. L. R. 34; 5 M. L. T. 230; 1 Ind. Cas. 120, followed.

Musammat Gopal Devi v. *Jai Narain*, 1 P. R. 1905; 83 P. L. R. 1905, not approved.

Petition under section 70 (*b*) of Act XVIII of 1884 as amended by Act XXV of 1899, for revision of the order of the Sub-Judge, 1st class, Jullundur, dated the 22nd December 1909, returning the plaint for amendment on account of misjoinder of parties and causes of action.

Mr. *Fazl-i-Hussain*, for the Petitioner.

Pandit *Sheo Narain*, for the Respondents.

JUDGMENT.—The learned Pleader for the respondents concedes that the view of law taken by the lower Court as regards the alleged misjoinder of causes of action in this case is erroneous, inasmuch as this being a suit for possession, the plaintiff-petitioner was quite competent to attack in one suit the several alienations which had been made at different terms in respect of various portions of property by his grandfather in favour of different persons [*Musammat Gopal Devi* v. *Jai Narain* (1), *Umabai* v. *Vithal Vasudev*(2); *Hari Ballabh Rai* v. *Gopal Lal Singh* (3); *Fazal Hussein* v. *Amir Haidar* (4).] It is, however, pointed out that as the plaintiff attacks no less than 17 alienations, the inclusion in one suit of all the alienees as defendants, each one of whom would have to put in separate pleas based upon separate sets of facts, would necessarily involve confusion and entail inconvenience on the alienees and it is urged that, at any rate, upon that ground the lower Court was justified, in directing the plaintiff to confine his suit to one alienation alone. In connection with this part of the argument, it is sufficient to say that the rule of procedure laid down in *Umabai* v. *Vithal Vasudev* (2) appears to be a reasonable one, and might well be followed in a case such as the present. In that case the learned Judges, in noticing the objection on the ground of inconvenience as to the frame of a suit in which several alienees had been impleaded as defendants, laid down that "the difficulties arising from variety of defences can be cured by the successive trial of the issues separately affecting different defendants. Following the English practice interlocutory judgments may, if the plaintiff succeeds, be given against different defendants as their cases are disposed of, final judgment for possession of the whole property being reserved till the conclusion of the trial of the whole case." The

(1) 1 P. R. 1905; 83 P. L. R. 1905.
(2) 33 B. 293; 11 Bom. L. R. 34; 5 M. L. T. 230; 1 Ind. Cas. 120.
(3) 6 Ind. Cas. 577.
(4) 9 Ind. Cas. 588.

observance of a similar procedure in the present case would obviate any possible inconvenience to the alienees, which might otherwise result from the plaintiff being allowed to attack several alienations in one suit. The directions given by the Calcutta High Court in the case reported as *Hari Ballabh Rai* v. *Gopal Lal Singh* (3) to the effect that the claim in respect of each alienation should be treated as a separate suit for purposes of convenience do not commend themselves to me, as under that procedure awkward questions as to the valuation of each such suit as to the amount of Court-fee payable in respect of it, and as to the course of appeal might conceivably arise and introduce into the case elements of unnecessary complication.

The procedure suggested by the Bombay High Court, on the other hand, would frequently prove to be much simpler and less open to objection from the point of view of both parties.

I accordingly accept this revision and setting aside the order of the lower Court send the case back for disposal in accordance with the above remarks. The petitioner will get his costs in this Court.

Revision accepted.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 2444 OF 1908.

March 2, 1911.

Present:—Mr. Justice Mookerjee and Mr. Justice Teunon.

SHYAMA CHARAN BHATTACHARYYA —DEFENDANT—APPELLANT

versus

MOKHODA SUNDARI DEBI—PLAINTIFF—RESPONDENT.

Estoppel—Mortgagor and mortgagee—Transferor and transferee of non-transferable holding—Question of transferability of holding—Mortgagee-purchaser and private purchaser.

A mortgagor is estopped from denying his mortgagee's title and the existence of the lien which he has created or from defeating its enforcement against the property upon which it was placed.

Debendra Nath v. *Mirza Abdul*, 1 Ind. Cas. 264; 10 C. L. J. 150, relied upon

When a non-transferable holding is sold or mortgaged by a tenant he is, as between himself and the transferee, estopped from setting up that such sale or mortgage is invalid.

The question of transferability of the holding does not arise between the mortgagee-purchaser of the interest of the tenant and the private purchaser from the same person.

Appeal from the decree of the Sub-Judge of Faridpur, dated August 4th, 1908, affirming that of the third Munsif of Bhanga, dated April 30, 1908.

Babus *Boidya Nath Dutt* and *Jnenandra Nath Sarkar*, for the Appellant.

Babus *Dwarka Nath Chakravarti* and *Brojo Lal Chakravarti*, for the Respondent.

JUDGMENT.—This is an appeal on behalf of the first defendant in a suit for recovery of possession of a holding which admittedly belonged at one time to a man named Kudratulla. On the 22nd May 1892, Kudratulla mortgaged the holding to one Umasundary Dasi. The mortgagee sued, in 1897, to enforce the security and obtained a decree on the 7th July, 1897. The decree was subsequently transferred to the plaintiff, who took out execution thereof as assignee. The holding was purchased by the plaintiff at the execution-sale on the 22nd December 1904, and possession was delivered by Court on the 1st June, 1905. Meanwhile, the first defendant had purchased the holding from the mortgagor Kudratulla on the 31st August 1904; he resisted the plaintiff who was unable to obtain actual possession of the holding from him. The result was that, on the 10th May 1907, the plaintiff commenced this action for recovery of possession. The first defendant alone appeared and contested the claim substantially on the ground that the mortgage, the decree thereon, and the subsequent sale were collusive and fraudulent. As regards his own purchase, he added that he had not been able to secure recognition from the landlord. The Court of first instance held upon the evidence that as the mortgage represented a genuine transaction, there was practically no defence to the suit. The Court further held that the defendant was not entitled to show that he had subsequently obtained recognition from the landlord and thus to raise the question of the transferability of the holding. The result was that a decree for possession was made in favour of the plaintiff. The defendant then appealed to the Subordinate Judge, and argued that an issue ought to have been raised upon the question of transferability of the holding. This contention was overruled, and the decree of the Court of first instance was affirmed on the 11th August 1908. The first defendant has now appealed to this Court, and on his behalf the objection taken in the Courts

below has been reiterated. The substantial question in controversy, therefore, between the parties to this appeal is whether or not in the events which have happened, the first defendant is entitled to raise the question of transferability.

Now, in the first place, it is well-settled that when a non-transferable holding has been sold by a tenant under a conveyance, he is as between himself and the transferee, estopped from setting up the invalidity of the sale by him [*Bhagirath Changa* v. *Hafiz-ud-din* (1)]. The same doctrine applies as between mortgagor and mortgagee [*Krishna Lal* v. *Bhairab Chundra* (2)]. This position may be supported on the principle explained in the case of *Debendra Nath* v. *Mirza Abdul* (3), that a mortgagor is estopped from denying the mortgagee's title and the existence of the lien which he has created, or from defeating its enforcement against the property upon which it was placed. Consequently, in the case before us, neither the mortgagor nor the first defendant, as his representative-in-interest, can challenge the validity of the title of the plaintiff as based on the mortgage. The position of the first defendant is further affected by the circumstance that he purchased *pendente lite*, because, as explained in the case of *Surji Ram Marwari* v. *Barham Deo Persad* (4), in the case of a mortgage-suit the *lis* continues after the decree *nisi*, and doctrine of *lis pendens* is applicable to proceedings to realize the mortgage after the decree for sale. *Prima facie*, therefore, the defendant is not entitled to question the validity of the mortgage, and this view is supported by the case of *Ayen-ud-din* v. *Srish Chandra* (5), which is not distinguishable from the case before us. That case, again, is in accordance with the earlier decision in *Ambica Nath* v. *Aditya Nath* (6), and was accepted as good law in *Hari Das Bairagi* v. *Udoy Chandra* (7), though the decision in this latter case was subsequently set aside upon a different point [*Uday Chandra* v. *Hari Dass* (8)]. We are not prepared to dissent from the decision in *Ayen-ud-din* v. *Srish Chandra* (5), which completely covers the case before us and has been recently followed in *Samir-ud-din* v. *Benga* (9), though it may be difficult to reconcile it with *Achanulla* v. *Salemonnessa* (10), where the decision was based on the doubtful ground that the execution-purchaser of the interest of the tenant was not bound by the same estoppel as the tenant himself. It has been suggested, however, that when, during the pendency of the suit, the defendant alleged that he had obtained recognition from the landlord he ought to have been allowed to prove it and thus to place himself in the position of the landlord who, it cannot be disputed, is entitled to raise the question of transferability. In support of this view, reference has been made to rule 8 of Order VIII of the Civil Procedure Code of 1908, which provides that any ground of defence which has arisen after the institution of the suit may be raised by the defendant in his written statement. This rule is of no assistance to the appellant. In the *first place*, it was not in force when this case was tried in the original Court or in the Court of appeal below. In the *second place*, even if it had been in force it would be of no avail because the circumstance alleged by the defendant happened after he had filed his written statement in which he stated explicitly that his purchase had not been, up to that time, recognised by the landlord. Consequently, there is no occasion for any application of the principle recognised in *Rup Chand* v. *Sarveswar* (11) and *Bipin Behari* v. *Tincowri* (12). On the other hand, the principle applicable to this case is laid down in *Radhay Koer* v. *Ajodhya Das* (13), where it is pointed out that although in some instances a Court will take notice of events which have happened subsequent to the institution of the suit, [*Ram Ratan* v. *Mohant Sahu* (14), *Hazari Mal* v. *Janaki Prasad* (15) *Ramyad* v. *Bindeswari* (16), *Udit Chobey* v. *Rashika Prasad* (17)], it will not dismiss a claim for recovery of possession on the ground

(1) 4 C. W. N. 679.
(2) 2 C. L. J. 19*n*.
(3) 1 Ind. Cas. 264; 10 C. L. J. 150.
(4) 2 C. L. J. 288.
(5) 11. C. W. N. 76.
(6) 6 C. W. N. 624.
(7) 12 C. W. N. 1086; 8. C. L. J. 261.
(8) 10 C. L. J. 608; 3 Ind. Cas. 417; 13 C. W. N. 937.
(9) 13 C. W. N. 630; 1 Ind. Cas. 114.
(10) 9 C. W. N. xxiv.
(11) 33 C. 915; 3 C. L. J. 629.
(12) 13 C. L. J. 271; 9 Ind. Cas. 374.
(13) 7 C. L. J. 262.
(14) 6 C. L. J. 74; 11 C. W. N. 732.
(15) 6 C. L.J. 92.
(16) 6 C. L. J. 102.
(17) 6 C. L. J. 662; 3 M.L. T. 41.

that the right set up by the plaintiff is alleged to have been subsequently nullified by the defendant during the pendency of the suit. On a review, then, of the authorities, it is clear that the preponderance of the judicial opinion is in favour of the view that the question of transferability does not arise in the present suit between the plaintiff as the mortgagee-purchaser of the interest of the tenant and the first defendant as private purchaser from the same person.

The result, therefore, is that the decree made by the Court below is affirmed, and this appeal dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL NO. 1750 OF 1909.
March 28, 1911.
Present:—Mr. Justice Coxe.
JANARDAN PATHAK AND ANOTHER—DEFENDANTS—APPELLANTS
versus
ANU RAM DATTA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Widow—Absolute interest—Want of reversioners - No claim by Crown.

The mere fact that there are no reversioners, or that the Crown or other person, entitled to property on the death of a widow, does not claim it, cannot possibly give the widow an absolute interest in that property, which she can bequeath by a Will.

Collector of Masulipatam v. *Cavaly Vencata Narainapah*, 8 M. I. A. 500; 2 W. R. (P. C.) 59, referred to.

Appeal from the decree of the District Judge of Assam Valley District, dated May 12th, 1909, affirming that of the Munsif of Borpeta, dated July 1st, 1908.

Babus *Surendra Nath Roy* and *Satyendra Nath Roy*, for the Appellants.

JUDGMENT.—This was a suit for recovery of certain land on the allegation that it had originally belonged to one Kamala Priya, a Hindu widow, who had bequeathed it to the plaintiff by a Will. The suit has been decreed by the learned District Judge and the defendants appeal.

Two points have been taken in this appeal. The first is that the land in question is not covered by the Will. But, on reading the Will as a whole, I think the view taken by the learned District Judge on this point is correct.

The second contention, however, must in my opinion, prevail. It is to the effect that Kamala Priya being a Hindu widow had only a limited interest in the property and could not bequeath it to the plaintiffs. On this point the learned District Judge says: "It is argued that a widow having only a limited interest in land derived from her husband or son cannot bequeath it by Will. In this case it appears that Kamala Priya's husband has no heirs or reversioners at all, at least no such person can be named or discovered. The property in such a case would escheat to the Crown, or when it is merely a tenancy, as in the present case, the land would revert to the landlord. But neither the Crown nor the landlord has put forward any claim, or seems likely to do so. Although no authority has been cited on this point I am of opinion, that the legatees of a widow would acquire a good title under her Will as against outsiders when there are no reversioners and when the Crown or the landlord does not care to resume the property." This view cannot, I think, be sustained. The mere fact that there are no reversioners or that the Crown or other person entitled to the property on the widow's death does not claim it cannot possibly give the widow an absolute interest in the property which she could bequeath by a Will. And in connection with this point I may refer to the case of *Collector of Masulipatam* v. *Cavaly Vencata Narainapah* (1).

The appeal, accordingly, must be allowed and the suit dismissed with costs of all the Courts.

Aapeal allowed.

(1) 8 M. I. A. 500; 2 W. R. (P. C.) 59.

CALCUTTA HIGH COURT.
CIVIL RULE NO. 1833 OF 1910.
February 15, 1911.
Present:—Mr. Justice Mookerjee and Mr. Justice Teunon.
MAHOMED AKBAR JAMAN KHAN—DECREE-HOLDER—AUCTION-PURCHASER—PETITIONER
versus
SUKHDEO PANDAY AND ANOTHER—JUDGMENT-DEBTORS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 47, O. XXI, rr. 89, 92—Execution of decree—Sale, setting aside of, by payment—Deposit within thirty days—Court closed on

MAHOMED AKBAR JAMAN KHAN *v.* SUKHDEO PANDAY.

thirtieth day—Deposit on re-opening day, validity of—Actus curiæ neminem gravabit.

In execution of a decree for money, the immoveable properties of the judgment-debtor were sold and purchased by the decree-holder on July 20th, 1909. On August 19th, 1909, the judgment-debtor made an application to have the sale set aside under rule 89 of Order XXI of the Civil Procedure Code. The agent of the judgment-debtor was ready to deposit the money and a *challan* was duly filled up and placed in the hands of the proper officer for signature of the presiding officer, but he was informed that as the presiding officer had left the Court, his signature could not be obtained on that day. The next day the money was deposited. The sale was set aside:

Held, that the order setting the sale aside is within the scope of section 47 of the Code and is appealable; the application for revision in this case was, therefore, treated by the High Court as an appeal

Held, also, that, as the judgment-debtor could not deposit the money on the last day owing to the absence of the presiding officer, the maxim *actus curiæ neminem gravabit* applied, and the deposit made the next day was valid and the sale was properly set aside.

Rule against the order of the District Judge of Shahabad, dated February 25th, 1910, reversing that of the Munsif of Sassaram, dated September 4th, 1909.

Moulvi *Mahommad Mustafa Khan*, for the Petitioner.

Babu *Chandra Sekhar Prosad Singh*, for the Opposite Party.

JUDGMENT.—We are invited in this rule to consider the legality of an order for reversal of an execution-sale. The circumstances under which the order in controversy has been made do not admit of any doubt or dispute. In execution of a decree for money, the immoveable properties of the judgment-debtors, the opposite parties in this rule, were brought to sale on the 20th July 1909, and were purchased by the decree-holder, the petitioner, before this Court. On the 19th August 1909, the judgment-debtors made an application to have the sale set aside under rule 89 of Order XXI of the Civil Procedure Code of 1908. But, although the application was made on that date, the requisite sum was not deposited in the Treasury till the next day. The case for the judgment-debtors is, that on the 19th August their agent was present in Court with the money, and was ready to deposit it; that for the purpose a *challan* was duly filled up and placed in the hands of the proper officer for signature of the presiding officer, and that he was informed later on in the day that as the presiding officer had left the Court, his signature could not be obtained on that day. The result was that the *challan* was signed on the following day, and the money received on the authority thereof by the Treasury Officer. These facts are beyond controversy: they were stated by the agent of the judgment-debtors on oath before the presiding officer in the course of the inquiry which followed, and the allegations of the witness were not contradicted either by the presiding officer himself or the officer entrusted with the duty of receiving the *challan* and getting it signed. The decree-holder, auction-purchaser, objected to the reversal of the sale on the ground that the provisions of the law were inflexible, that the judgment-debtors had failed to comply with them, and that consequently the Court had no jurisdiction to make an order in their favour. This objection prevailed, and the application was dismissed. Upon appeal, the learned District Judge has reversed the order and directed the sale to be set aside. He has held that the judgment-debtors were not to blame in any way; that they had done their best to comply with the requirements of the law, and that the money was not deposited in the Treasury within thirty days from the sale as prescribed by rule 92 of Order XXI of the Code by reason of the action of the Court for which the judgment-debtors could not be rightly held responsible. The decree-holder, auction-purchaser, has obtained the present rule for reversal of the order of the District Judge.

A preliminary objection has been taken that the rule ought to be discharged as the order assailed is open to appeal. There can, in our opinion, be no room for discussion that the order is appealable, and that the interference of this Court has been sought erroneously in a manner not contemplated by the law. The order is clearly one within the scope of section 47 of the Code, because it decides a question between the parties to the suit in which the decree was passed and relates to the execution and satisfaction of the decree. It is not necessary to lay down an inflexible rule that every order made upon an application under rule 89 falls within the scope of section 47. The true nature of the order must be examined, and the character of the parties affected thereby ascertained before it can be determined whether the order does or does not fall within the

scope of section 47. [*Pita Mati* v. *Chunilal* (1); *Murlidhar* v. *Anand Rao* (2); *Srinivasa* v. *Ayyathorai* (3); *Phul Chand* v. *Narsingh* (4)]. The contrary view taken in *Kuber Singh* v. *Shib Lal* (5) cannot be supported on principle, and is not easy to reconcile with the later decision in *Imtiazi Begam* v. *Dhuman Begam* (6). The view we take is supported by the principle which underlies the decision of the Court in the case of *Joytara* v. *Piran Krishna* (7). It is obvious, therefore, that our interference cannot be invited in the exercise of our revisional jurisdiction. We are not prepared, however, to discharge the rule on this ground. The application was presented to this Court within the time allowed for the presentation of an appeal, and we think that the petition may well be treated as a memorandum of appeal, as was done by the Full Bench in the case of *Mahomed Wahid-ud-din* v. *Hakiman* (8).

As regards the merits of the case, there is no dispute that the judgment-debtors have not been able to comply strictly with the requirements of the law. It has not been, and it cannot be, suggested that the mere presentation of the application within thirty days from the sale is sufficient compliance with the law. Rule 92 requires that the money also should be deposited within 30 days from the date of sale [*Mathuji* v. *Kondaji* (9)]. The question, however, arises, what are the functions and powers of the Court, when a party-litigant has found it impossible to comply with the requirements of the statute, not because of his own fault but by reason of the action or inaction of the Court. In our opinion, the principle applicable to such a contingency is expressed by the maxim *actus curiæ neminem gravabit*, an act of the Court shall prejudice no man. As Mr. Justice Crosswell put it in *Freeman* v. *Tranah* (10) this maxim is founded upon justice and good sense, and affords a safe and certain guide for the administration of the law. In other words, as Lord Justice James observed in *Tuffazal* v. *Raghonath* (11), it is the duty of a Judge to be always vigilant so as not to allow the act of the Court itself to do wrong to the suitor. This principle has been extensively recognised and applied by Courts of Justice in this country, and the time within which a party is required to perform an act has been extended, when it could not be performed by reason of the action or inaction of the Court. See for instances, *Rhidoy* v. *Kailas* (12); *Bani Madhub* v. *Matungini* (13); *Ugrahlall* v. *Radha Pershad* (14); *Abdool* v. *Jadub* (15); *Shooshee* v. *Gobind* (16); *Peary* v. *Anunda* (17); *Behari* v. *Munghola-nath* (18); *Dabee* v. *Heramun* (19) and *Aravamudu* v. *Samiyappa* (20). The same principle has been applied so as to enable the Court to deliver judgments *nunc pro tunc* [*Hara Krishna* v. *Ramgopal* (21); *Conture* v. *Bonchand* (22)] to order restitution when a party has been deprived of possession of his property by an erroneous order of the Court subsequently reversed by a superior tribunal, *Rodger* v. *Comptoir* (23) and *Forester* v. *Secretary of State* (24), and generally to place the parties in the same position as they would have occupied but for the erroneous decision of the Court [*Radhey Singh* v. *Mangni Ram* (25); *Udit Chobey* v. *Rashika Prasad* (26)]. It may be conceded that the maxim may not be of universal application and may require qualification [*Leech* v. *Lamb* (27); *In re Treasthic Morth* (28); *Kambina-yani* v. *Uddighiri* (29)]: but we feel no doubt that it is applicable to the circumstances of the case before us. The General Rules and Circular Orders, issued by this Court (Volume 1 page 187)* made it the duty of the Court to accept the money when it was tendered, and

(1) 31 B. 207: 9 Bom. L. R. 15.
(2) 25 B. 418.
(3) 21 M. 406.
(4) 28 C. 73.
(5) 27 A. 263.
(6) 29 A. 275; A. W. N. (1907) 64; 4 A. L. J. 135.
(7) 13 C. L. J. 257; 7 Ind Cas. 769.
(8) 25 C. 757 at p. 778.
(9) 7 Bom. L. R. 263.
(10) 12 C. B. 406; 21 L. J. P. C. 214; 16 Jur. 1141.
(11) 14 M. I. A. 40 at p. 51; 7 B. L. R. 186.
(12) 4 B. L. R. (F. B) 82; 13 W. R. (F. B.) 3.
(13) 13 C. 104. (14) 18 C. 255. (15) 25 C. 216.
(16) 18 C. 231. (17) 18 C. 631. (18) 5 C. 110.
(19) 8 W. R. 223. (20) 21 M. 385
(21) 14 C. W. N. 759; 6 Ind. Cas 170.
(22) (1892) Cana Sup. Court 281.
(23) 3 P. C. 465; 7 Moore. P. C. 314; 40 L. J. P. C. 1; 24 L. T 111; 19 W. R. 449.
(24) 4 I A. 137; 3 C. 161. (25) 6 C. W. N. 710.
(26) 6 C. L. J. 662.
(27) 11 Exch. 437; 25 L.J. Ex 17; 1 Jur. (N. S.) 1175; 4 W. R. 589.
(28) (1905) 37 Cana. Sup. Court 79.
(29) 2 M. H. C. R. 268.

* "Cost must be received when the Court is bound by law to accept payment either absolutely or up to a given time and in every such case the money shall be received even although tendered after the hour prescribed by rule 15."

there was no justification for the delay which took place by reason apparently of the fact that for some unexplained reason the presiding officer left the Court at an early hour. The difficulty, therefore, which sometimes presents itself in this class of cases as in *Chandi Charan* v. *Banke Behary* (30), namely, whether the erroneous act of a particular officer may be rightly treated as an act of the Court itself does not arise here. As Mr. Justice Jenkins observed in the case last mentioned, for an act to be clothed with the character of an act of the Court, it is, generally speaking, essential that it must be the act of the prescribed officer acting in accordance with the prescribed rules of the Court. Here, the rules framed by this Court were not carried out by the presiding officer of the Court, with the result that the petitioner found it impossible to deposit the money in the Treasury within the prescribed time, although he had done everything in his power in the matter. It would, in our opinion, be a lamentable failure of justice if we were to hold that the Court is not competent to do substantial justice in a case of this description. As Lord Penzance observed in *Kendall* v. *Hamilton* (31) procedure is but the machinery of the law after all, the channel and the means whereby the law is administered and justice reached: it strangely departs from its office when in place of facilitating, it is permitted to obstruct and even extinguish legal rights, and is thus made to govern where it ought to subserve. We feel no doubt, therefore, that the order of the learned District Judge ought to be affirmed and this rule discharged with costs. We assess the hearing-fee at one gold *mohur*.

(30) 26 C. 449.

(31) 4 A. C. 504 at p. 525; 48 L. J. Q. B. 705; 41 L. T. 418; 48 W. R. 97.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 470 OF 1909.
April 4, 1911.
Present:—Mr. Justice Coxe.
SATIS CHANDRA GHOSE AND ANOTHER—DEFENDANTS—APPELLANTS
versus
PUTU MALLIK—PLAINTIFF—RESPONDENT.

Landlord and Tenant—Mortgage-decree by landlord—Purchase by third party in execution—Rent-decree by landlord—Purchase by landlord in execution of rent-decree—Priority of title—Estopped—Bengal Tenancy Act (VIII of 1885), Sch. III, art. 3—Limitation—Possession of landlord after purchase in execution of rent-decree—Period of limitation for suit by tenant for recovery of possession.

P. as *shebait* sued *A.* a tenant on a mortgage. On the day this suit was instituted, all the *shebaits*, including *P.*, sued *A.* for rent. *P.* obtained a decree on his mortgage, advertised it for sale and the plaintiff purchased the holding at the auction. Subsequently execution was taken out of the rent-decree and the *shebait* landlords themselves purchased the holding. The plaintiff sued the landlords for possession. The son of *P.* defended the suit:

Held, that ordinarily the purchase at the rent-decree sale would be entitled to preference over the mortgage-decree sale; but as *P.* advertised the holding for sale in execution of his own mortgage-decree when he knew all the time that the interest passing at the sale was valueless, as it could be put an end to by the sale in execution of the rent-decree, the plaintiff should be given priority, and the son of *P.* should be held estopped by the conduct of his father from claiming that his purchase should prevail.

When the whole body of landlords obtain a proper rent-decree and purchase the holding in execution and dispossess the tenant, the special law of limitation contained in Article 3 of Schedule III of the Bengal Tenancy Act applies.

Appeal from the decree of the Sub-Judge of Hoogly, dated December 10th, 1908, reversing that of the Munsif of Amta, dated March 9th, 1908.

Babus *Brojo Lal Chakravarti* and *Lalit Mohan Mukerjee*, for the Appellant.

Moulvi *Syed Shamsul Huda* and Babu *Kummar Sankar Roy*, for the Respondent.

JUDGMENT.—This appeal was heard in part on the 22nd March, but it was found necessary to adjourn it in order to ascertain what was the nature of the decree in execution of which the plaintiff purchased. This decree has been shown me and found to be a mortgage-decree and the appeal has now been heard in full.

It seems clear now that the facts are as follows:—On the 22nd November 1897 Prya Nath Ghose, as *shebait* of certain deities sued Alapdi Mullik, then tenant of the land in suit, on a mortgage. He obtained a decree and in execution sold the right, title and interest of Alapdi Mullik in the holding, which was purchased by the plaintiff on the 10th October, 1898. On the same day that this suit was instituted, namely, the 22nd November, 1897, all the *shebaits*, including Pryanath, brought a suit as *shebait* against Alapdi for

the rent of the holding, obtained a decree, and in execution put up the holding for sale, which they bought in themselves on the 14th March 1899. They dispossessed the plaintiff who brought the present suit for recovery. The suit was contested in the Courts below by the 6th defendant only, who is the son of Prya Nath Ghose, now dead. In this appeal the 7th defendant has also joined but he did not contest the suit in the Courts below.

The Subordinate Judge has decreed the suit. He holds that as the defendants dispossessed the plaintiffs as auction-purchasers and not as landlords the rule of two years' limitation does not apply. He also holds that as the sale-certificate of the defendants shows that they purchased the right, title and interest of Alapdi, their purchase was no better than the plaintiff's and being subsequent to it cannot prevail against it. In this view I think the Subordinate Judge is clearly wrong. The sale-certificate is headed "Rent execution case," and Exhibit B shows that the sale was made in execution of a rent-decree. The fact, therefore, that the certificate was wrong in form, as these certificates very frequently are, does not alter the fact that really the sale was effected in execution of a rent-decree, and passed the holding. In this connection I have been referred to the case of *Akhoy Kummar Soor* v. *Bejoy Chand Mahatap* (1).

Ordinarily, therefore, the purchase would be entitled to preference over the purchase of the plaintiff in execution of a mortgage. But I think that in the special circumstances of this case that preference should not be allowed. The 7th defendant as I have observed did not contest the suit. As regards the 6th defendant he is, I think, estopped by the conduct of his father, Prya Nath Ghose, from claiming that his purchase should prevail. And it can hardly be supposed that the other defendants were unaware of or did not acquiesce in Prya Nath's proceedings. The two suits were instituted on the same day. The decree for rent was obtained on the 4th January 1898. This being so, when Prya Nath Ghose knew that this rent-decree had been obtained, and was ready for execution, I do not think that he was entitled to advertise the holding for sale in execution of his mortgage-decree and conceal from intending purchasers that the interest they purchased might be extinguished at any moment. That certainly, in the words of Order XXI, rule 66, was a thing most material for a purchaser to know in order to judge of the value of the property. It may be open to question what a decree-holder is bound to reveal at an execution-sale, and it may be conceded that this case is nearly the border line, but I do not think a landlord can be entitled to advertise a holding for sale in execution of his own mortgage-decree, and obtained Rs. 98 for it, when he knows all the time that the interest passing at the sale for all practical purposes is valueless.

It appears to me however, that the Subordinate Judge is wrong in holding that the rule of two years' limitation does not apply. No doubt there is plenty of authority for holding that when a co-sharer landlord purchases the *raiyti* interest in execution of his decree for a share of the rent, which is a mere decree for money, the rule does not apply, because the landlord does not assist in the dispossession in his character of landlord but in that of an auction-purchaser under a money-decree [*Abhoy Churn Mookerjee* v. *Sheikh Titu* (2); *Brojo Kishore Mahapatra* v. *Saraswati Dassi* (3); *Mohomed Khalil* v. *Hirendra Nath Bhattacharya* (4).] But I can find no case in which it has been held that when the whole body of landlords obtain a proper rent-decree, and purchase the holding in execution the special law of limitation does not apply. It is settled that that law applies when the landlord has a hand in the ouster and I do not see how it can be said that in such a case the landlord has no hand in the ouster. If the landlord, by which term I mean the whole body of landlords, in execution of a rent-decree sells the holding, and it is purchased by a third party, a suit by the old tenant for recovery of possession is governed by the rule of two years' limitation [*Amin-ud-din* v. *Musammat Ulfatunnissa Bibi* (5)]; or, in other words, the landlord must be regarded as having a hand in the ouster. It seems to me that it would be absurd to hold that if the landlord in such a case bought the land himself, the rule would not apply; or, in other words, that he would not have a hand in the ouster. It

(1) 29 C. 813.

(2) 2 C. W. N. 175.
(3) 6 C. W. N. 333.
(4) 5 C. L. J. 650.
(5) 9 C. L. J. 131: 3 Ind. Cas. 315; 13 C. W. N. 108.

seems to me that he would be more and certainly not less, concerned in the dispossession.

In this view I think a decision should be arrived at on the question of limitation and the appeal will go back to the Subordinate Judge for disposal after deciding whether the plaintiff has proved his possession within two years before the institution of the suit. Costs to abide the result.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 572 OF 1909.

March 23, 1911.

Present:—Mr. Justice Munro and Mr. Justice Sankaran Nair.

ANIVILLA SUNDARARAMAYYA—APPELLANTS

versus

CHERLA SITAMMA AND OTHERS—RESPONDENTS.

Hindu Law—Joint property—Gift to daughter by father of ancestral immoveable property after her marriage.

A gift of ancestral immoveable property by a Hindu father to hi daughter, after the latter's marriage, is valid. In making such a gift the father merely discharges a moral obligation.

Churman Sahu v. *Gopi Sahu*, 37 C. 1; 13 C. W. N. 994; 10 C. L. J. 545; 1 Ind. Cas. 945, *Ramasami Ayyar* v. *Vengidusami Ayyar*, 22 M. 113; *Kudutamma* v. *Narasimha Charlu*, 17 M. L. J. 528; *Kamakshi Ammal* v. *Chakrapani Chettiar*, 30 M. 462; 17 M. L. J. 450; 3 M. L. T. 23, distinguished.

Second appeal against the decree of the Subordinote Judge's Court of Ellore in Appeal Suit No. 18 of 1908 presented against the decree of the Court of District Munsif of Tanuku in Original Suit No. 56 of 1906.

The Hon'ble Mr. *P. S. Sivaswami Aiyar*, (Advocate-General), for the Appellants.

Mr. *P. Narayana Murti*, for the 1st Respondent.

Mr. *V. Ramesam*, for 6th to 8th Respondents.

JUDGMENT.—The plaintiff and his father were members of an undivided family. The father made a gift of about 8 acres of land which formed ancestral property to the first defendant, his daughter, in 1899. The father died in 1904 and the plaintiff sues to recover possession of the land given to the first defendant by his father on the ground that the father was not competent to make a gift of joint family property. The family owned not less than 200 acres at the time of the gift.

The lower Appellate Court was of opinion that the plaintiff's father had intended at the time of her marriage to give some properties to the first defendant, and as he was only carrying out the intention by making this gift it is valid.

The marriage took place about 40 years before the gift. There is no evidence that the father then had any intention to give any property to the first defendant. We are, therefore, unable to accept that finding. Is the gift then valid?

The Hindu Law texts fully support the proposition that it is competent to a father to make gifts of jewels or other ancestral moveable property to his daughter on her marriage. In a learned judgment it has been held by the High Court of Calcutta that a widow may make a valid gift of a reasonable portion of even the immoveable property of her husband to her daughter on the occasion of the performance of certain ceremonies which are usual when the wife on the attainment of puberty leaves her parental home for that of her husband, *Churaman Sahu* v. *Gopi Sahu* (1). That a gift of land to the son-in law on the occasion of his marriage is an act warranted by the authorities and customary in this Presidency was held by the Madras High Court in *Ramasami Ayyar* v. *Vengidusami Ayyar*, (2).

We see no reason to differ from these two decisions. The father or the widow is not bound to give any property. There may be no legal but only a moral obligation. It is also true that in the case before us the father did not make any gift and discharge that moral obligation at the time of the marriage. But it is difficult to see why the moral obligation does not sustain a gift because it was not made to the daughter at the time of marriage but only sometime later. The moral obligation of the plaintiff's father continued in force till it was discharged by the gift in 1899. This question was raised in the case of *Kudutamma* v. *Narasimha Charyulu* (3). Then, after the death of the father, the brother made a gift of certain joint family property to his sister who was married during the life-time of the father who gave her or her husband no property at the time

(1) 37 C. 1; 13 C. W. N. 994; 10 C. L. J. 545; 1 Ind. Cas. 945.

(2) 22 M. 113.

(3) 17 M. L. J. 528.

of marriage. It was found there that the father had expressed no intention at any time of making any gift. He had made no promise either. It was held, however, that there was a strong moral obligation on the father to make a gift out of the joint family property on the occasion of the marriage either to the daughter or son-in-law as a provision for them and the gift which, in the circumstances of the case, was an eminently reasonable one was not in excess of the powers of the brother though he was not even the managing member at the time of her marriage. This case was followed in *Churman Sahu* v. *Gopi Sahu* (1). It is directly in point and is consistent with principle. It was argued that the case of *Ramasami Ayyar* v. *Vengidusami Ayyar* (2) refers only to a gift to a son-in-law and there is no authority to support gifts to daughters. But the texts relating to gifts on marriage show that they are made to the bride, and regard being had to the fact these gifts are intended as a provision for the married couple and are made by the father probably in lieu of her share of the family property when by marriage she is leaving it for another family, it seems more appropriate that such gifts should be made in her name than that of her husband. In both cases *Kuduttamma* v. *Narasimha Charyulu* (3) and *Churaman Sahu* v. *Gopi Sahu* (1) the gifts were made to the woman.

It was also contended that a father is entitled to give only jewels and other moveable property, and that the Hindu law texts do not justify any gift of land on marriage occasions. In all the three cases we have referred to the gifts were of immoveable property, and so faras this Presidency is concerned it is enough to say that gift of land has been common for more than a century and that the payment of money when paid is in lieu of land. See *Ramasami Ayyar* v. *Vengidusami Ayyar* (2). When the necessity of the gifts is recognised it seems unreasonable in these days to make its validity depend upon the nature of the property, upon the question whether it is moveable or immoveable. It is not suggested that the alienation in question is unreasonable as in *Kamakshi Ammal* v. *Chakrapany Chettiar* (4). In the case of *Churaman Sahu* v. *Gopi Sahu* (1) the value of the property given away was more than a fourth and less than a third of the father's property. Here, if the father had enforced a partition, he would have admittedly got not less than 100 acres and it is impossible to say that a gift of 8 acres is unreasonable.

The second appeal is dismissed with costs.

Appeal dismissed.

(4) 30 M. 452; 17 M. L. J. 405; 3 M. L. T. 23.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 44 OF 1901.

February 28, 1911.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Sundara Aiyar.

BURUGAPALLI SRIRAMULU—APPELLANTS

versus

NANDIGAM SUBBARAYADU AND OTHERS—RESPONDENTS.

Partition—Partial partition—Trustee or Manager of minor's property, mixing his own property with that of the other, effect of—Onus of proof.

A suit for partial partition of an estate is not maintainable. But the Court may decide such a suit if the defendant is willing that the rights of the parties in respect of the property be decided in that suit.

If a trustee or agent mixes or confuses the property which he holds in a fiduciary character with his own property, the onus lies heavily on him to prove the extent of his property. If he fails to do so, and the two properties cannot be distinguished or separated with perfect accuracy, the whole must be considered as belonging to the other party.

Appeal against the decree of the Subordinate Judge of Kistna at Ellore, in Original Suit No. 30 of 1905.

Mr. *T. Prakasam*, for the Appellants.

Mr. *P. Nagabushanam*, for the Respondents.

JUDGMENT.—The plaintiff in this suit is the brother-in-law of the 1st to 3rd defendants, having married their sister. The father of the 1st to 3rd defendants, Gopayya, died about March 1883. His wife had predeceased him and his sons were all minors. His eldest son, the 1st defendant, was apparently only 14 years old then (see Exhibit IIIc, a decree dated the 11th August 1887 in which he is described as a minor) and certainly not more than 16 years. The 2nd defendant attained his majority in 1898 and the 3rd defendant apparently in 1901. The plaintiff admits that he was, to some extent at least, taking care of defendants Nos. 1 to 3. He institutes this suit for the recovery of eleven items of immoveable pro-

perty, described in Schedule A attached to the plaint, as well as for a declaration of his right to certain grain pits, described in Schedule B of the plaint, in which grain had been stored. The plaint is dated the 5th September 1905. The plaint states that the defendants unlawfully took possession of all the properties referred to in about May 1904, after the termination of a criminal complaint instituted by him against the defendants on account of the removal of some cattle by them. That complaint was dismissed on the ground that the disputes between the parties were of a civil nature. The plaintiff made defendants Nos. 4 to 17 parties on the ground that they had colluded with defendants Nos. 1 to 3 in unlawfully taking possession of the properties. The defendants Nos. 4, 7, 8, 9 and 10 were his farm-servants and the other defendants are described by him as his enemies. The Subordinate Judge states that the plaintiff resorted to the device of making all of them parties in order to discredit the evidence which he apprehended they might give in support of defendants Nos. 1 to 3. We have no doubt that his observation is a perfectly just one, as the plaintiff's evidence shows that he had no reasonable ground for believing that they were in possession of the plaint properties. The 1st to 3rd defendants contend that their father, Gopayya, just before his death, entrusted them to the care of the plaintiff, and asked him to be their guardian and to take care of their properties, that the plaintiff with his family was living with them till about 1900, that he was in possession of all their property till the dispute about cattle referred to above, that he managed them on their behalf and with the savings arising from the income purchased all the plaint properties except item No. 11, which, they said, was in the possession of defendants Nos. 11 to 14 and a moiety of item No. 6 which according to them belonged to two other persons. They alleged in the alternative in paragraph 13 of the written statement that, if the plaintiff has any right to the property sued for, "he will have to get one share equally with these defendants. This suit, brought without praying for any such share being given, is not maintainable." They further allege that the plaintiff was a poor man at the death of their father possessed only of 7 acres of *jeroyati* land and a fourth-share in his family house and other property worth about Rs. 200.

The important question in the case is that raised by the 1st issue, "whether the plaintiff is the owner of the plaint property." The defendants Nos. 11 to 14 did not claim item No. 11. The lower Court found that a moiety of item No. 6 did not belong to the two persons who are alleged by defendants Nos. 1 to 3 to be in possession thereof. The Subordinate Judge found that "the plaintiff and defendants Nos. 1 to 3 were living jointly after Gopayya's death, clubbed together their properties, that a sort of implied partnership was thereby created and that the properties in dispute were purchased out of their joint funds" except items Nos. 1 and 2 which were purchased during the life-time of Gopayya but out of his funds. Although, according to his view, item No. 11 also belongs jointly to the plaintiff and defendants Nos. 1 to 3, he gave the plaintiff a decree for item No. 11 as the 1st to 3rd defendants did not claim it. He also allowed him half of item No. 6 for the same reason. With regard to the other items he held that the plaintiff was entitled to a half share of them. The plaintiff appeals against this decree and defendants Nos. 1 to 3 have filed a memorandum of objections claiming three-fourths instead of half of the lands in suit.

The lower Court has discussed in great detail the evidence relating to the question whether the plaintiff acted as the guardian of defendants Nos. 1 to 3, received the profits of their properties, mixed them with his own income and utilised both for the purchase of the plaint property. He relied in support of his conclusion mainly on the admissions made by the plaintiff himself examined as his first witness. Mr. Prakasam addressed to us a long and laborious argument to show that this conclusion is not sustained by the evidence, but it was, from the beginning, a hopeless effort in the face of the plaintiff's own admissions. The plaintiff's father died when he was an infant, and he was brought up under the care of Gopayya, and after the death of Gopayya the plaintiff in his turn took care of his minor sons. There is considerable evidence that Gopayya expressly appointed the plaintiff as the guardian of his children before

his death. But it is immaterial whether this evidence is true or not, although the probabilities are in favour of its truth. We have no doubt whatever that the plaintiff took up the management of Gopayya's properties and continued to live with the defendants and was in uncontrolled possession of the incomes of their property. The two families, in fact, lived together as if they were members of one undivided Hindu family. The plaintiff admits in his deposition that, except for 3 or 4 years, he paid the *kist* of the defendants' lands; that the produce both of his own lands and the lands of the defendants were stored in the defendants' house; that he used to get the defendants' paddy thrashad out and stored in their house; that he took possession of five bonds belonging to Gopayya and also miscellaneous papers; that defendants Nos. 1 to 3 used to help him in the cultivation of his own lands, and that his servants used to take part in the cultivation of the defendants' lands. He admits further that he managed all the business relating to the marriages of the defendants, though he says he did so at the request of two female relations of the defendants, Nagamma and Subbamma; that he respresented them in litigation as their guardian, and that he paid the defendants' school-fees. In fact his admission covers the whole ground except the particular fact that he utilised the defendants' moneys for the purchase of the lands in question. His own 7th and 8th witnesses prove the defendants' case even more completely. The 7th witness traded jointly with the plaintiff. He says, "I know that the plaintiff dealt with all business relating to the 1st to 3rd defendants but on what terms with the 1st to 3rd defendants he did so, I do not know, Gopayya's sons used to purchase articles of food from my shop for 10 or 12 years and I kept accounts therefor in plaintiff's name. It was plaintiff that used to settle accounts and pay up my dues... ... ... All the 12 years I kept the *khata* in plaintiff's name and received moneys always from him. The plaintiff never separately kept a *khata* for his own goods. . . . . Whether I received the plaintiff's produe or whether I got the produce belonging to the defendants Nos. 1 to 3, I entered the whole thing in plaintiff's *khata* itself. I owed Gopayya Rs. 50 at the time of his death. After Gopayya's death, I executed to the plaintiff a mortgage-bond. I included therein Rs. 50 due to Gopayya also. . . . . because after Gopayya's death plaintiff managed all the properties of Gopayya's sons. I executed to plaintiff the mortgage-bond for Gopayya's money also." The 8th witness who also had dealings with the plaintiff gives similar evidence. Several of the defendants' witnesses who support their case are relations of the plaintiff. The defence 9th witness is the Munsif, and the 11th witness is the *Karnam* of Valivennu, the village of the parites. It was urged that the 7th witness was hostile to the plaintiff, that he had to be brought up under warrant of arrest to Court on account of his unwillingness to depose, and that the plaintiff asked the permission of the Court to cross-examine him but it was refused. On going through the evidence of this witness we cannot agree that his deposition shows any hostility to the plaintiff. He supported him in the examination-in-chief and tried not to damage his case as far as he could help it. His unwillingness to attend Court was probably due to a desire to avoid giving evidence, which he knew would not support the plaintiff, while he was unwilling to depose against him if he could avoid doing so. The plaintiff professes complete ignorance as to what the defendants did with their property or with its income, but says that they cultivated their own land and dealt with their incomes. Gopayya possessed 50 acres of land at his death, besides holding some more lands on lease-hold right, while the plaintiff's own lands could not yield a net income of more than Rs. 50 a year. Items Nos. 1 to 10 of the plaint schedule were purchased for a sum of Rs. 3,500 and odd. The plaintiff says that he has other lands worth about Rs. 3,000 and bonds which seem to amount to more than Rs. 5,000. He has, besides, re-built his house at a cost of about Rs. 5,000. He has kept no accounts and admits that he is unable to say what particular funds he utilised for making his several acquisitions, but would have the Court believe that they were all his own. It is impossible to come to any other conclusion than that the whole of his testimony on this point is that of a hardened liar. The only purchase that he can point to as

made by the defendants with their money is that evidenced by Exhibit HHH relating to a small plot of land for Rs. 200, but the consideration for the purchase was the amount due on a bond executed in Gopayya's favour in 1879. It was contended that, if the 2nd defendant had given evidence in the case, the plaintiff would have been able to show that the defendants were lending moneys to various persons on their own account. But it is impossible to believe that the plaintiff would not have been able to give other evidence that the defendants had purchased property or had dealings independently, if it were true. The appellant refers to Exhibits, M, BB and AAA to show that the defendants were managing their ownaffairs. Of these, Exhibit M was a mortgage-bond, dated the 23rd June 1886 in favour of the 1st defendant and the defence 3rd withess. The land mortgaged under the document was subsequently purchased under Exhibit K in the plaintiff's name. Exhibit M contains an endorsement showing payment of the mortgage money to the 1st defendant and the defence 3rd witness, but the latter explains that no payment was really made to the 1st defendant. It may be noted that the plaintiff is unable to say in whose possession Exhibit M was on the date of the endorsement, a matter about which he could have no doubt if he had no interest in it. We agree with the lower Court that the plaintiff has not shown that the 1st defendant himself got Exhibit M executed in his own favour. Exhibit BB is dated the 1st May 1901 and is a *kadapa* or *muchilika* executed in favour of the defendants for a portion of the *inam* land belonging to Gopayya. No previous *muchilikas* are produced. The defence 3rd witness says that he attested Exhibit BB at the plaintiff's request, and that he did not see the 1st defendant give any corresponding *cowle* for the land. There is nothing improbable in the suggestion that, as the land to which Exhibit BB relates was a part of the defendants' original property, the plaintiff took the *muchilika* in the defendants' name. The Subordinate Judge thinks that, probably about that time, the plaintiff "began to bring into existence documents which in the fulness of time should stand him in good stead." Whether this be so or not, the circumstance that it does not relate to any land acquired subsequent to Gopayya's death deprives it of all significance. Exhibit AAA is a pro-note of the year 1902 executed in the 2nd defendant's favour on the same day as Exhibit HH 55, another pro-note in the plaintiff's favour by the same debtor. The plaintiff's 16th witness says that he connot say with whom the loan was negotiated, that the plaintiff and the 2nd defendant went together to make the loan and that two pro-notes were taken, one in the plaintiff's name and the other in the name of the 2nd defendant. The money due under Exhibit AAA was subsequently received by the 3rd defendant. The appellant argues that this is strong evidence that the defendants had dealings of their own. The defendants' case is that this loan was made by the 2nd defendant out of the moneys given to him as *Kanam* or present at his marriage by his mother-in law, Seshamma. There is nothing improbable in the story though the fact that the re-payment was made to the 3rd defendant may indicate that the money did not belong to the 2nd defendant alone. But in any event, we are not prepared to attach much importance to this transaction which is of a recent date. The appellant relies also on the fact that Exhibit L, which is the sale-deed for a portion of item No. 4 in his favour, was attested by the 1st defendant; but this fact may as well be relied on by the defendants as showing that they had an interest in the land purchased under the document. We agree with the Subordinate Judge that Exhibits SS and YY, *kadappas* relating to other lands in the 1st defendant's name, are not proved. We consider it unnecessary to refer to the rest of the evidence in detail. We agree with the Subordinate Judge that the plaintiff did not purchase the properties sued for out of his own funds solely. Mr. Prakasam contends that as the defendants contended that the lands purchased in the plaintiff's name belonged to themselves solely and failed to prove it, the lower Court should have passed a decree for those lands in the plaintiff's favour. We cannot agree with this contention as it is clear to us that the defendants contended in the alternative that the

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plaintiff would be entitled only to a one-fourth share of the lands purchased in his name. The Subordinate Judge takes it that the properties of the plaintiff and defendants Nos. 1 to 3 were equal at the time of Gopayya's death. He has not discussed the evidence bearing on the proportionate incomes of the lands and other properties belonging to the two parties. On a consideration of the evidence on record we are unable to agree with him that the income of the plaintiff's property was equal to that of property beloging to Gopayya. It is by no means clear whether the plaintiff contributed any portion of the funds required for the purchase of the plaint lands and as he has produced no accounts and has admitted that he could not say out of what funds each item of property was purchased, it would be proper to make every presumption against him and to dismiss his claim altogether. It has, moreover, to be noticed that there are other lands worth apparently nearly as much as those in the suit which have also been purchased in the plaintiff's name after the death of Gopayya. While this suit was pending, the defendants instituted another suit, O. S. No. 12 of 1897, for an account of the plaintiff's management of the properties from 1883 to 1904 and claimed "either the cash or the property found due as per accounts." The trial of this suit has, we understand, been adjourned pending the decision of this appeal. It would be much more easy to do complete justice between the parties if all the claims of both parties were before the Court at once. The plaintiff would not strictly be entitled to claim a share of part only of the properties belonging to both parties. [*See Parbati Churn Deb* v. *Ainud-deen* (1); *Ramasami Chetti* v. *Alagirisami Chetti* (2)]. As, however, the defendants are willing that the rights of the parties, so far as the lands in the suit alone are concerned, should be decided by us, reserving the right of the defendants to a share of the other properties or to an account, we think it is proper in the interests of the parties to do so. The task, however, is not easy, as the plaintiff chose not to produce any accounts or to give evidence as to what surplus his income left him at the time of the purchase of these properties or to disclose what funds of the defendants he used for making the purchases in question. So far as the plaintiff is concerned, he possessed only 8 acres of land at the time of Gopayya's death. It could be leased according to him for Rs. 58 a year; as the land was not let out to tenants, but was cultivated by the parties, we might take the income to be Rs. 80 a year, or Rs. 50 deducting the annual *kist* of Rs. 30. The plaintiff says that he held in addition some lands on *cowles*, but the evidence regarding this is not satisfactory, nor is it clear whether such lands, if any, were held by him for the discharge of the interest or the principal of debts due to him or on leases taken independently of any such debts. The plaintiff says he had Rs. 10,000 due to him from various debtors when he attained majority. This he has altogether failed to prove. He admits he has no accounts to support this contention. There is no evidence to show what money his father obtained on partition with his brothers. The plaintiff has produced two set of documents, Exhibits FF and HH series, to prove the extent of his dealings. We do not think that Exhibit FF series have been properly proved. But taking them to be proved, the result is that the plaintiff had about Rs. 1,000 due to him. This may be taken roughly to yield an income of Rs. 100 a year. The plaintiff had no children at the time of Gopayya's death, but had a wife and mother to support. His first child was born in 1889, and subsequently his family increased and five daughters and two sons were born to him. Of the lands in dispute, except items Nos. 1 and 2, with which we shall deal separately, only item No. 8 was purchased for a sum of Rs. 50 before 1889 (Exhibit R dated the 29th May 1886). The defence 3rd witness says that Rs. 40 out of the consideration was an amount due to Gopayya. The remaining lands were purchased in 1893, 1894, 1900, 1901 and 1902 after the plaintiff's expenses increased. In the circumstances, it is by no means clear that the plaintiff's income contributed anything towards the purchase of the lands. The plaintiff was occupying a fiduciary position towards the defendants, and was practically in absolute management of their property, and the onus lies heavily on him to prove whether any

(1) 7 C. 577; 9 C. L. R. 170.
(2) 27 M. 361 at p. 366.

and if so, what, contribution, was made by him, and, if he fails to do so, the Court would be entitled to treat the whole property as belonging to the defendants. In *Cook* v. *Addison* (3), Sir John Stuart, Vice-Chancellor, observed. "It is a well-established doctrine in this Court that if a trustee or agent mixes or confuses the property which he holds in a fiduciary character with his own property so as that they cannot be separated with perfect accuracy, he is liable for the whole. This doctrine was explained by Lord Eldon in *Lupton* v. *White* (4)." In *Lupton* v. *White* (4) Lord Eldon in explaining this doctrine refers to *Armary* v. *Delamirie* (5), and to another case *Panton* v. *Panton*, which is very similar to the present case. There, "a clerk in a banking house at Chester remitted his own money with that of his employer to an agent in London to be laid out upon security and by management the securities were so changed that the properties could not be distinguished. The Court of Exchequer held, that the confusion being occasioned by him who so dealt with the property, the distinction lay on him and if he could not distinguish what was his own, the whole must be considered as belonging to the other." His Lordship refers also to other similar cases where the rule had been acted on. See also *White* v. *Lady Lincoln* (6); *The Duke of Leeds* v. *Earl of Amherst* (7) and Godefray on Trust, 3rd Edition, page 817. Gopayya's lands, on the best estimate we are able to make with Mr. Ramesam's help, must have yielded a net income of about Rs. 600 a year. The defendants, both in the lower Court and in their memorandum of objections before us, claim to be entitled only to a three-fourths share of the lands; and the plaintiff has certainly not proved that he has contributed more than one-fourth of the money laid out for their purchase, if indeed he contributed anything at all. Mr. Prakasam contends that where a trustee or other fiduciary agent mixes up trust funds with his own and purchases property with the joint funds, the beneficiary is not entitled to claim the lands themselves but only to a charge on them for his share of the money expended in the purchase, and he relies on the rule laid down in *In re Hallet* (8). It is unnecessary to deal with this contention as we agree with the lower Court in holding that the lands purchased in this case were treated and enjoyed by the parties as belonging to them in common.

It is contended for the appellant that items Nos. 1 and 2, at any rate, having been purchased in Gopayya's life-time by the plaintiff, the defendants are not entitled to a share in them. The defence 3rd witness says that they were bought with Gopayya's money. The plaintiff admits that he was looking after Gopayya during his last illness. The purchase was made on the 2nd March about a week before Gopayya's death. These items had been already mortgaged to Gopayya. We believe the defendants' evidence that the money belonged to Gopayya, as that is in accordance with the probabilities of the case, and the lands were subsequently enjoyed in common by both parties. We hold, therefore, that the plaintiff is not entitled to those items exclusively. We have no doubt that the conduct of the plaintiff in this case has been grossly fraudulent. We cannot accept his story that the cause of the quarrel between the parties was his refusal to lend cattle to the defendants for use. In 1904 he purchased some property in his wife's name which apparently roused the suspicion of the defendants. The defendant's version that the cattle quarrel was due to the plaintiff's attempt to sell some of the cattle and to appropriate the proceeds to his own use appears to be more probable. After the criminal case, when according to the plaintiff the defendants dispossessed him, he took no immediate steps to assert his right but waited for nearly a year-and-a-half to launch the present suit. We dismiss this appeal with costs and allow the memorandum of objections with costs both in this Court and in the lower Court.

Appeal dismissed:
Memo. of objections allowed.

(3) 7 Eq. 466; 38 L. J. Ch. 322; 20 L. T. 212; 17 W. R. 480.
(4) 15 Ves. 432; 10 R. R. 94.
(5) (1772) 1 Stra 505.
(6) 8 Ves. 363; 7 R. R. 71.
(7) 20 Beav. 239.
(8) 13 Ch. D. 696; 49 L. J. Ch. 415; 42 L. T. 421; 28 W. R. 732.

PUNJAB CHIEF COURT.
CRIMINAL APPEAL No. 68 OF 1911.
April 10, 1911.
Present:—Mr. Justice Johnstone.
KARM SINGH, *Mali*—CONVICT—APPELLANT
versus
EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 234, 239—Three persons tried jointly for cheating—Cheating committed by each against different persons on different dates—Legality of trial.

Three persons were tried jointly for cheating. The charges against them were that each of them had cheated a different person on a different date:

Held, that the trial was illegal, because the three acts of cheating were wholly distinct, and there was no continuity between the three acts, each act being a completed act in itself, and the original design was accomplished, so far as that act was concerned, before the next succeeding act was embarked upon.

Charagudi Venkatadari v. *Emperor*, 33 M. 502; 1 M. W. N. 65; 7 M. L. T. 299; 20 M. L. J. 220; 5 Ind. Cas. 847, 10 Cr. L. J. 258; *Budhai Sheikh* v. *Emperor*, 33 C. 292; 10 C. W. N. 32; 3 Cr. L. J. 126, followed.

Section 234, Criminal Procedure Code, can only be applied in the case of a single accused.

Appeal from the order of the Additional District Magistrate, Lahore, dated the 30th January 1911, convicting the appellant.

Bhagat *Govind Das*, for the Appellant.

The *Government Advocate*, for the Respondent.

JUDGMENT.—These two criminal appeal Nos. 68 and 82 go together. Three persons—Sher Muhammad Assan, Karm Singh Mali, and Gobind Ram Chawla—were placed before the lower Court for joint trial, and, after certain evidence was taken, charges were drawn up against each of them of offences punishable under section 420, Indian Penal Code, thus (in brief):—

(*a*) that you on 9th 11th March 1910 at Lahore cheated so and so;

(*b*) that you on 21st March 1910 at Lahore cheated so and so (another person);

(*c*) that you on 9th April 1910 at Lahore cheated so and so (a third person.)

Convictions and heavy sentences followed which have been appealed against.

The question is raised of the legality of this sort of joinder of charges and of accused persons. The learned Government Advocate admits that the trial has been illegal, and I fear this is the case. Section 239, Criminal Procedure Code, is clear; the offences, in

order that they might have been properly tried together, should have been committed in the course of the same transaction, while here it is admitted, and is quite clear, that the three acts of cheating were wholly distinct. To use the language employed in *Charagudi Venkatadari* v. *Emperor* (1) each act was a completed act in itself, and the original design was accomplished so far as that act was concerned before the next succeeding offence was embarked upon. There is no continuity between the three acts of cheating. *Budhai Sheikh* v. *Emperor* (2) is also in point in this case. Section 234, Criminal Procedure Code, does not help because it can only be applied in the case of a single accused.

I am asked by the accused's Counsel also to consider whether there is against them sufficient proof to warrant their being put to the annoyance and expense of fresh trials. The case has not been argued before me on the evidence and it would not be right for me so to consider it and to make up my mind as to the guilt or innocence of the accused. I have, however, consulted the statements of the complainants and have looked at some of the evidence, and I am of opinion that there is a *prima facie* case against each or every accused of the cheating in regard to each of the three offences charged. In regard to none of the charges and to none of the accused am I in a position to say that I could summarily acquit them.

I accept the appeal, set aside the conviction and sentences and order re-trial in accordance with law.

Re-trial ordered.

(1) 33 M. 502; 1 M. W. N. 65; 7 M. L. T. 299; 20 M. L. J. 220; 5 Ind. Cas. 847; 10 Cr. L. J. 258.
(2) 33 C. 292; 10 C. W. N. 32; 3 Cr. L. J. 126.

MADRAS HIGH COURT.
SECOND CIVIL APPEAL No. 1414 OF 1909.
March 16, 1911.
Present:—Mr. Justice Sankaran Nair and Mr. Justice Ayling.
KUPPUSAWMY *alias* VENCATACHARIAR—APPELLANT
versus
SRINIVASAIENGAR AND OTHERS—RESPONDENTS.

Hindu Law—Property in possession of widow not as

GOPAL *v.* BISHUNNATH.

heir—Qualified estate—Prescriptive title—Presumption—Practice.

It cannot be presumed that the possession of a female member of a Hindu family, who is not entitled to take as heir, is the possession of a qualified owner, and the party making such an assertion must prove that she took only the limited estate of a Hindu widow.

Bapanayya v. *Pedichalanaya*, 9 M. L. J. 33, referred to.

Where plaintiff sued to set aside an alienation by a widow, on the ground that he was the reversioner to the estate, and that the widow, having been in possession for 13 years, had acquired title by prescription:

Held, that the question of the widow's acquisition of title by prescription was a question of fact which it was for the plaintiff to prove, and the High Court would not interfere with such a finding in second appeal.

Second appeal against the decree of the District Court of Coimabatore in Appeal Suit No. 31 of 1908 presented against the decree of the District Munsif of Erode in Original Suit No. 78 of 1906.

The Hon'ble Mr. *P. S. Sivaswami Aiyar*, (Advocate-General), for the Appellants.

The Hon'ble Mr. *L. A. Govindaragava Iyer*, for the Respondents.

JUDGMENT.—The plaintiff sues as an expectant reversioner entitled to the possession of the properties on the death of the first defendant, a Hindu widow, to set aside an alienation made by her in favour of the second defendant. The first defendant is the widow of Seshachella Iyengar who died in the years 1887. The lower Courts have found that, on his death, his properties devolved on one Annathurai, his paternal uncle, and that, therefore, the plaintiff's claim as reversioner fails. It is contended in appeal before us that, on Seshachella's death, his widow, the first defendant, took possession of his property and as she was in possession for thirteen years before she alienated the property she acquired title to it by prescription and having taken and held it as widow she prescribed for a widow's estate and, therefore, on her death Seshachella's reversioner would succeed to the property. The question whether the first defendant acquired any title by prescription is admittedly a question of fact. As pointed out in *Bapanayya* v. *Pedichalanaiya* (1), there is no presumption that the possession of a female member of Hindu family not entitled to take as heir is the possession of a qualified owner and it was for the appellant to assert and prove that the first defendant took only the limited estate of a widow. We see no reason why we should allow him to raise that question, the decision of which depends upon evidence, at this stage. Fresh evidence might have to be taken. We accordingly disallow that contention and dismiss the second appeal with costs.

Appeal dismissed.

(1) 9 M. L. J. 33.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 143 OF 1910.

January 20, 1911.

Present:—Mr. Evans, A. J. C.

GOPAL—DEFENDANT—APPELLANT

versus

BISHUNNATH MINOR UNDER THE GUARDIANSHIP OF *Musammat* MUNGA—PLAINTIFF RESPONDENT.

Evidence Act (I of 1872), s. 68—Hindu Law—Joint family property, presumption as to—Property purchased from joint funds—Joint family property, existence of, necessary to raise presumption as to jointness.

In order to prove a sale-deed it is not necessary, under section 68 of the Evidence Act, to examine a marginal witness, as the sale-deed is not a document which is required by law to be attested.

In order to establish that property purchased by a member of a joint family is joint family property, it must be shown either that it was acquired from the common funds or that the family of which the purchaser is a member possessed joint property. Without such proof the presumption that the property is joint family property cannot arise.

Appeal against the order of the Additional Judge of Fyzabad, dated the 29th January 1910, modifying the order of the Subordinate Judge, Fyzabad, dated 25th February 1909.

Mr. *Mohammad Wasim*, for the Appellant.

Mr. *E. Manuel* and Babu *Bisheshar Nath Srivastava*, for the Respondent.

JUDGMENT.—This is an appeal by the defendant against an order of the Additional Judge of Fyzabad granting the respondent a decree for possession of a house situate in the Fyzabad city.

The facts of the case are set forth in my order dated the 7th July 1908, under which I remanded the case for trial on the merits for certain reasons.

The respondent claimed possession of the house on the allegation that he had purchased it from Hanoman Prasad the elder brother of the appellant on the 27th July, 1896. The

defence taken was that Hanoman Prasad was a member of an undivided Hindu family and that he could not legally sell the house as it was the ancestral property of the family. When the appeal came on for hearing, the respondent's Pleader produced a copy of a sale-deed dated the 30th April, 1885, which, if genuine, showed that the house had been purchased by Hanuman Prasad from one Lal Behari. The non-production of this copy when the case was first heard was satisfactorily accounted for and I, therefore, considered it necessary for the ends of justice to order a re-hearing. This re-hearing has now taken place with the result that respondent has been successful. The learned Judge, on a consideration of the evidence before him, has found that the copy produced is a copy of a genuine sale-deed executed in 1885 and that it referred to the house now in dispute between the parties. This is a finding of fact which is conclusive, but it is contested on the ground that the sale-deed required attestation and that the evidence of one witness who is not proved to be dead was not taken. Counsel for the appellant is unable to show that this sale-deed required attestation. The consideration was Rs. 240 and, under section 54 of the Transfer of Property Act, a sale of tangible immoveable property of the value of Rs. 100 and upwards can be made by a registered instrument. It is now conceded that any point of law which might arise as to the absence of evidence of an attesting witness need not be considered as the document is not one of the kinds referred to in section 68 of the Evidence Act.

The next point taken is, that the learned Judge was wrong in finding that it was proved that the house had been purchased by Hanuman Prasad by his own money and not from the joint family funds. It is contended that the burden of proof was wrongly placed upon the appellant. The decision of the learned Judge on this part of the case is as below,—"It is urged by the learned Vakil for the defendant that the mere fact that the house was purchased by one member of the family is not sufficient to raise any presumption that the house was purchased by him from separate funds. In suppcrt of this contention I am referred to a ruling of their Lordships of the Privy Council in *Dhurm Das* v. *Shamma Sundrai* (1). I have a full report of the case before me. The facts of that case differ from this case. It was found in that case that the family lived in commensality, eating together, and possessing joint property. In my opinion there is no evidence in this case to prove that the family possessed any joint property." He then proceeded to discuss the evidence as to the existence of the joint property and then remarked as below,—"In absence of the proof of there being any joint property, I do not think that it can be said that the purchase was made from the joint funds (*vide* Mayne's Hindu Law, Edition VII, page 368). I, therefore, find that the house in suit was the self-acquired property of Hanoman." The learned Counsel for the appellant refers to certain passages in Trevelyan's Hindu Family Law, pages 261, *et seq*, where it is laid down that property purchased by or in the name of a co-parcener in a family which is joint in estate is presumed, apart from special circumstances, to have belonged to the co-parcenary at the time of the acquisition and that the purchase of property in the name of one member does not by itself show that the acquisition was separate. But it is laid down on page 265 that there is no presumption that a family possesses any particular property or any property at all and that a person who claims a share in property as belonging to a joint family must prove that the property was held or acquired by the members of the family as such. I think the learned Judge was right in holding that there was no proof of joint property. It lay upon the appellant, in particular circumstances of this case, to show that the property had been acquired by Hanoman Prasad from family funds. I do not think that the burden of proof was wrongly placed by the Court below. I may also note a very important fact. The appellant, who is the younger brother of Hanoman Prasad and who must have succeeded to whatever family property there was after the death of Hamoman Prasad and his father, did not come into the witness-box to say whether he had inherited any considerable cash or other moveable property from them. If he had proved that he had inherited some cash, it would have tended to show that there was family property in existence in 1885. His absence from the witness-box shows that there was no family property in exist-

(1) 3 M. I. A. 229; 6 W. R. (P. C.) 43.

ence when Hanoman Prasad died.

Upon a consideration of the whole case, I find that the learned Judge was justified in holding that it was not proved that the money used for the purchase of the house in 1885 was joint family property. The findings of the learned Judge are findings of fact which are binding upon this Court unless it is shown that he has taken an erroneous view of the law on the subject. This is not made out, and I, therefore, dismiss this appeal with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.
CIVIL RULE NO. 439 OF 1911.
February 23, 1911.
Present:—Mr. Justice Mookerjee and
Mr. Justice Teunon.
DARPA NARAYAN BERA—PETITIONER
versus
BIPIN BEHARI MITRA AND OTHERS
OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 476—Order for prosecution—Successor of Judge who had heard evidence—Preliminary investigation, whether necessary—Omission to hold investigation—Accused, whether prejudiced or not—Question may be considered by High Court.

The phraseology of section 476 of the Criminal Procedure Code shows that a preliminary inquiry is not obligatory. An order under that section may be made by a Judge who had not heard the evidence at the original trial, and without an independent investigation, as the power to direct prosecution is conferred on the Court and not on the individual officer who fills the judicial office at a particular time.

What has to be borne in mind in each individual case is whether in the interests of justice a preliminary investigation is necessary.

Whether the person against whom an order under section 476 has been made without a preliminary investigation, has been prejudiced by reason of the omission to make such investigation, is a matter which may be considered by the High Court when the propriety of the order is called in question.

Choudhuri Mahomad Izharul Huq v. *Queen-Empress* 20 C. 349, referred to.

This was a rule against an order of the Munsif of Arambagh directing the commitment to the local Criminal Court, under section 436 of the Criminal Procedure Code, of the above petitioner for giving false evidence in his Court in a Rent-suit on September 10th, 1909 and for using as genuine a forged document, namely, a *farda*, in the above suit, and on the above date, knowing it to be forged.

Babus *Boido Nath Dutt* and *Tarakeshwar Pal Chowdhury*, for the Petitioner.

Babu *Hari Har Ganguly*, for the Opposite Party.

JUDGMENT.—We are invited in this rule to set aside an order for the prosecution of the petitioner under section 476, Criminal Procedure Code. It appears that the petitioner was cited as a witness on behalf of the defendants in a suit for rent, and he produced what purported to be a receipt in proof of the allegation of the defendants that the rent had been paid. The Court of first instance held that the document in question was not genuine and overruled the plea of payment. This decree was made on the 16th September 1909. On the 16th December following, the plaintiff applied for sanction to prosecute the petitioner. This application, however, was not granted by the Munsif as an appeal had been preferred against his decision in the suit. There can be no doubt that the Munsif acted properly in declining to grant sanction at that stage. The decision of the Munsif, however, was affirmed on appeal by the Subordinate Judge on the 19th May 1910. Thereupon, on the 6th August following, the plaintiffs renewed their application for sanction to prosecute the petitioner. Meanwhile, the Officer who had tried the orignal suit had been transferred and the matter was taken up by his successor. The petitioner was called upon to show cause why his prosecution should not be directed. He appeared on the 17th September 1910 and asked for time to enable him to produce evidence. The case was adjourned repeatedly from time to time to enable the petitioner to produce his witnesses. Finally, on the 7th January 1911, as no witness was forthcoming, the case was heard and the order in question made. The propriety of this order has now been assailed on the ground that as it was made by a Judge who had not heard the evidence at the original trial, it ought not to have been made without an independent investigation by him.

At one stage of the argument it was suggested, though somewhat faintly, upon the authority of the case of *Krishna Gobinda Dut* v. *Emperor* (1); *Bega Singh* v. *Emperor* (2);

(1) 9 C. W. N. 859.
(2) 34 C. 551 11 C. W. N. 568; 5 C. L. J. 508; 5 Cr L. J. 398.

and *Kartik Ram Bhakat* v. *Emperor* (3), it was not competent to the Court under any circumstances to make an order without an independent investigation. In view of the decision of this Court in the case of *Shaik Bahadur* v. *Shaikh Eradatulla* (4), the cases relied upon cannot, however, be treated as binding authority for the proposition enunciated. But the learned Vakil for the petitioner contends that there are passages in the order of reference to the Full Bench in the case last mentioned which lend some support to his contention. We have not been able to discover any passage which lends any support to the argument of the learned Vakil for the petitioner. All that was pointed out in that case was that if an offence has been committed not in Court but outside the Court, as in the case of obstruction to execution of a judicial process, an investigation may be necessary to enable the Court to ascertain facts justifying an order under section 476, Criminal Procedure Code. It may be observed that the very phraseology of section 476 shows that a preliminary inquiry is not obligatory on the Court. The section provides that the Court after making any such preliminary inquiry as may be necessary may send the case for inquiry or trial to the nearest Magistrate. It is clear, therefore, as pointed out by this Court in the case of *Choudhari Muhammad Izharul Haq* v. *Queen-Empress* (5) and *Baperam Surma* v. *Gaurinath Dutt* (6) and by the learned Judge of the Bombay High Court in *In re Jivabhai Khusal* (7), that in strict law, for proceedings under the section, neither a notice to show cause why a party should not be sent for trial, nor a preliminary inquiry is indispensable. What has to be borne in mind in each individual case, is, whether in the interests of justice a preliminary investigation is necessary. It may be added that whether the person against whom an order under section 476 has been made without preliminary investigation has been prejudiced by reason of the omission to make such investigation, is a matter which may be considered by this Court when the propriety of the order is called in question see *Choudhri Muhammed Izharul Haq* v. *Queen-Empress* (5)].

The real question, therefore, which arises in the case before us, is whether the petitioner has been prejudiced by reason of the omission of the Court below to hold a preliminary investigation. We are clearly of opinion that the petitioner has not been prejudiced. Although he was a witness in the case, it appears that he was the leading figure in that litigation. In fact, he appeared in Court to support his brother who claimed to have purchased the tenancy in question, and as such purchaser to have made payment of rent to the landlord. The question in controversy was fairly simple, namely, whether the receipt produced was genuine or not. The Court of first instance, as also the Court of appeal, came to the conclusion that the document in question was not genuine. It was, therefore, perfectly open to the Munsif before whom the application under section 476 was made to consider the evidence on the record, and after hearing the parties, if he was satisfied that an order was needed in the interests of justice under section 476, to make the appropriate order. There can be no question that the power to direct prosecution is conferred on the Court and not on the individual officer who fills in judicial office at a particular time. No doubt, when the application is made before the officer who has heard the evidence at the original trial, he is in a position of advantage, but we are unable to lay down that in no case can his successor make an order under section 476, Criminal Procedure Code, without an independent investigation.

The result, therefore, is that the order of the Court below is affirmed and this rule discharged.

Rule discharged.

(3) 35 C. 114; 7 Cr. L. J. 134.
(4) 6 Ind. Cas. 801; 12 C. L. J. 45; 37 C. 642; 14 C. W. N. 799; 11 Cr. L. J. 407.
(5) 20 C. 349.
(6) 20 C. 474.
(7) 7 Bom. L. R. 84; 2 Cr. L. J. 54.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS Nos. 954, 955, 957 TO 966 OF 1908.

March 14, 1911.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Ayling.

SREEMANTURAYA YERLAGADDA MALIKARJUNA PRASADA NAIDU BAHADUR ZEMINDAR GARU—APPELLANT

versus

VEMULAPALLI SUBBAYA AND OTHERS—RESPONDENTS.

Landlord and Tenant—Pattahs—*Stipulation for increased rent for cultivation of dry lands with wet crops by means of Government water, whether enforceable—Madras Rent Recovery Act (Mad. VIII of* 1865), *s.* 11.

A stipulation in a *muchilika* executed by a tenant to his landlord for payment of a special rent for cultivating dry lands with wet crops by means of a channel constructed and maintained by Government, is not supported by any consideration and is unenforceable.

There is no obligation on the part of the tenant in such a case to pay higher rent as the improvement was not made by the landlord, nor was he required to make any additional payment to Government. The landlord cannot, therefore, apply to the Collector, under section 11 of the Madras Rent Recovery Act, to enhance the rent payable by his tenant.

Suppu Pillay v. *Nagaya*, 31 M. 19; 3 M. L. T. 103; 17 M. L. J. 511 and S. A. Nos. 1121 to 1125 of 1908, distinguished.

The proviso to section 11 of the Madras Rent Recovery Act precludes a landlord from enhancing rent except under the conditions laid down by that section.

Vencatagiri Rajah v. *Pichana*, 9 M. 27; *Fischer* v. *Kamakshi Pillai*, 21 M. 137; *Gopalsawmi Chettiar* v. *Fischer*, 28 M. 328; 15 M. L. J. 14: *Armugam Chetty* v. *Raja Jagaveera Rama Vencateswara Ettappa*, 28 M. 444; 15 M. L. J. 292; *Suppa Pillai* v. *Nagayasawmi Thambichi Naicker*, 31 M. 19; 3 M. L. T. 103; 17 M. L. J. 511 and *Paramasawmi* v. *Pusala Thevan*, 20 M. L. J. 142; 5 Ind. Cas. 911, referred to.

Assuming that a landlord is entitled to claim *varam* under the sharing system in the absence of the said stipulation in the *muchilika*, if any rent under the sharing system was higher than the money rent paid by tenant under the terms of the *muchilika*, that would be an enhancement of rent under section 11 of the Rent Recovery Act.

A stipulation in a *pattah* that the tenant should relinquish the right of cultivation, if he cultivated dry lands with wet crops without the landlord's permission, is penal and cannot be enforced.

Appa Rau v. *Ratnam*, 13 M. 253, followed.

Second appeals against the decrees of the District Court of Kistna in Appeal Suit Nos. 269, 270, 272 to 281 of 1906, respectively presented against the decision of the Deputy Collector, Bandar Division, in Summary Suit Nos. 228, 230, 232 to 237 and 239 to 242 of 1908, respectively.

Mr. *C. V. Ananthakrishna Iyer* for the Appellant.

Mr. *T. Prakasam*, for the Respondent.

JUDGMENT.—The suits are brought to enforce acceptance of *pattahs* which were tendered by the plaintiff to his tenants. The main contention is as to the rate of Rs. 3-3-0 per acre which is entered in the *pattahs* as payable on dry lands converted into wet by means of Krishna water.

The Judge has found that till *Fasli* 1278 the village was entirely under dry cultivation and the sharing system was in force. In *Fasli* 1279 the money-rent system was introduced and it was agreed between the parties that the *ryots* were to pay a rent of Rs. 27-4-0 per *khatti*, and in the event of the *ryots* cultivating dry lands with wet crops by means of Krishna water without the *zemindar's* permission they were to pay Rs. 100 per *khatti*.

The *pattahs* produced by the *zemindar* of *Fasli* 1300 contain the stipulation and they also state that the right of cultivation should be relinquished if the lands are cultivated without such permission. Following the decision in *Appa Rau* v. *Ratnam* (1) the Judge has expressed his opinion that this stipulation was penal and unreasonable. It was the plaintiff's case that the question of the settlement of wet rates, if cultivation of wet crops was effected by means of Krishna water, was reserved until such cultivation actually began. The Judge has held that the plaintiff has failed to prove such reservation. In 1897 the *ryots* executed *muchilikas* for 5 years in which they agreed to pay Rs. 3-3-0 per acre for *bapet* wet lands, *i.e.*, for dry lands cultivated with wet crops, not only for the period of five years but also subsequent to it. The wet crops are raised with the aid of water from Krishna channel constructed and maintained solely by Government and it is contended that, therefore, there is no consideration for this agreement. The Judge has upheld this contention. It is argued by the appellant's Pleader that this was an adjustment of disputes between the parties. But it is found as a fact by the Judge that there were no disputes and Exhibit IV series, which, it is alleged, prove that there were disputes, only show, as

(1) 13 M. 253.

pointed out by the Judge, that these lands were not to be cultivated without the permission of the *zemindar*. We are, therefore, unable to agree with the appellant's Pleader that this rate was agreed upon to avoid future disputes. It is then contended that the landlord is entitled to revert to the sharing system and the parties could properly agree to a fixed rate for the future in lieu of a fluctuating *varam*. There is, however, nothing to show that the plaintiff is entitled to claim *varam* in the absence of this stipulation. We have already stated that the reservation at the time of the agreement of *Fasli* 1279 has not been proved nor is it proved that the rent of Rs. 27-4-0 was to be payable only when the land was cultivated with the dry crops. It has been repeatedly held that the proviso to section 11 of the Rent Recovery Act precludes the *zemindar* from enhancing the rent except under the conditions laid down by that section. See *Venkatagiri Raja* v. *Pitchama* (2), *Fischer* v. *Kamakshi Pillai* (3), *Gopalasami Chettiar* v. *Fischer* (4); *Arumugam Chetti* v. *Raja Jagaveera Rama Venkateswara Ettappa* (5); *Suppa Pillai* v. *Nagayasawmi Thambichi Naicker* (6) and *Paramasawmi* v. *Pusala Thevan* (7) and if any rent under the sharing system is in effect higher than the money-rent now being paid by the defendant it would, in our opinion, be clearly an enhancement of rent under section 11 of the Rent Recovery Act. Mr. Anantakrishna Iyer contends that the landord has, by this agreement, precluded himself from applying to enhance the rent under that section. It is enough to say that neither of the conditions which give him a right to apply exists in this case. The improvement was not made by the landlord and he has not been required to make any additional payment to Government; there is no such right in him to apply which he has given up. There was thus no obligation on the part of the tenant to pay any higher rent. Any agreement to pay such rent is unsupported by any consideration and is, therefore, not enforceable. As to the cases cited, *Suppa Pillai* v. *Nagaya* (6) is a case where money assessment was substituted for *varam* and a provision that the tenant must pay an increased rent for certain cultivation may not be an enhancement if it was in the power of the landlord to claim the higher rent in *varam* in the absence of such stipulation. In *Mallikarjana Prosada* v. *Bandi Ramasawmi* (8) the learned Judges hold that the plaintiff was entitled to revert to *varam* and the agreement to pay the money rent in lieu of that *varam* was, therefore, upheld. A contract may be enforceable, as pointed out in that case, though the effect of it may amount to an enhancement of rent without the Collector's sanction. But a contract involves consideration and there was consideration as above pointed out in that case. In these cases there is no consideration. We, therefore, dismiss the second appeals with costs.

Appeals dismissed.

(2) 9 M. 27.
(3) 21 M. 137.
(4) 28 M. 328; 15 M. L. J. 14.
(5) 28 M. 444; 15 M. L. J. 292.
(6) 31 M. 19; 3 M. L. T. 103; 17 M. L. J. 511.
(7) 20 M. L. J. 142; 5 Ind. Cas. 911.

(8) 7 Ind. Cas 897; 1 M. W. N. 686; 8 M L. T. 436.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL NO. 11 OF 1910.

March 29, 1911.

Present:—Mr. Justice Mookerjee and Mr. Justice Caspersz.

GANGA PRASAD SHAHU--PETITIONER—APPELLANT

versus

Lala RAMASREY SHAHU AND ANOTHER—OPPOSITE PARTY—RESPONDENTS.

Hindu Law - Widow — Re-marriage — Guardian—Children by first husband—Removal from guardianship—Hindu Widows' Re-marriage Act (XV of 1856*), ss.* 2, 3*—Discretion of Court—Welfare of minor.*

There is nothing either in the Hindu Law or in the statutory provision on the subject which renders it obligatory for a Court to remove a mother from the office of guardian of her infant childern, merely because she has re-married.

The fact that, in spite of her re-marriage, she is allowed to continue to act as guardian, plainly indicates that according to other civilised systems of jurisprudence, the appointment is not contrary to dictates of humanity or principles of universal justice.

Although it is discretionary with a Court to remove a Hindu mother from the office of guardian of the children of her first marriage, upon her re-marriage, the exercise of such a discretion must be regulated from the point of view of the welfare of the infant concerned.

Appeal from the order of the District Judge of Patna, dated September 1st, 1909.

Babu *Naresh Chandra Sinha*, for the Appellant.

Babu *Karunamoy Bose*, for the Respondent.

JUDGMENT.—This appeal is directed against an order by which the Court below

has refused an application, under section 39 of the Guardians and Wards Act, 1890, for removal of the respondent, a Hindu lady, from the guardianship of the person and property of her infant sons on the ground that she has re-married after the death of her first husband. The circumstances under which the application was made are not disputed. One Mahabir Prasad died about the year 1900. He left a widow, now respondent before us, and three infant sons by her. On the 5th December, 1904, the widow obtained a certificate of guardianship in respect of the person and property of her infant sons. On the 29th May, 1909, she married a second time in *sagai* form; it may be mentioned at this stage, that re-marriage in this form is recognised by the caste to which she belongs. On the 28th June 1909, the appellant before us, who is the son of the peternal uncle of the father of the infants, applied to the Court for the removal of the widow from the office of guardian, on the ground that, in view of the provisions of section 3 of the Hindu Widows' Re-marriage Act of 1856, she had, upon her second marriage, forfeited her right to act as guardian of the person and property of her infant sons by her first husband. The application was opposed by the widow, and it was contended that, in spite of her second marriage, she was a fit and proper person to continue as guardian of her minor children. Two of the children were examined by the Court; one of these supported the application made by his uncle, while the other distinctly stated his preference for his mother. The learned District Judge held that no ground had been made out for the removal of the guardian and dismissed the application.

The uncle of the infants who was petitioner in the Court below, has now appealed to this Court, and on his behalf the decision of the District Judge has been assailed broadly on the ground that, under section 3 of Act XV of 1856, the mother of the infants ceased to be their guardian immediately upon her re-marriage, and that, in any event, it would not be to the interest of the minors that they should continue to live under the guardianship of their mother after she had taken a second husband. In answer to this contention it has been argued that the Hindu Widows' Re-marriage Act of 1856 has no application by reason of two circumstances, namely, *first*, that it applies only to cases where the re-marriage of the widow would have been invalid but for the provisions of the Act and *secondly*, that section 3 of Act XV of 1856, even if it be held to be applicable, governs only cases of first appointment of a guardian, and not cases where, as here, a mother appointed guardian during her widowhood is sought to be removed on the ground of her re-marriage. It has further been contended that if re-marriage does not operate as a ground of forfeiture of the office of guardian, and if the matter is in the discretion of the Court, no grounds have been established for the interference of the Court. The question raised is one of considerable importance and apparently of first impression in so far, at any rate, as this Court is concerned.

There is no controversy in the case before us that the respondent was properly appointed guardian of the person and property of her infant children when the order was made in her favour in 1904, under section 7 of the Guardians and Wards Act of 1890. Section 39 of that Act specifies the grounds for the removal of a guardian appointed by the Court. The first nine grounds mentioned in the section have obviously no application to the circumstances of this case. The tenth ground, upon which the application of the appellant is apparently based, provides that the Court may, on the application of any person interested, or of its own motion, remove a guardian appointed by the Court by reason of the guardianship of the guardian ceasing or being liable to cease under the law to which the minor is subject. In the present case, the minors are subject to Hindu Law, and the question, therefore, arises, whether under that law the guardianship of their mother ceases or is liable to cease upon her re-marriage Our attention has not been drawn to any text of Hindu Law, which would support an affirmative answer to this question. Jagannath in his Digest (translated by Colebrooke Vol. IV, 1798, pages 242-44 texts 449-53) deals with the question of the protection of the property of infants. He first quotes a text of Manu to the effect that the King should guard the property which descends to an infant by inheritance until he returns from the house of his preceptor or until he has passed his minority. To this is added an explanation

from the Ratnacara, that wealth, which descends to an infant by inheritance and becomes the property of the minor, let the King guard, that is, let him protect it from the other heirs. The learned author adds his own comment that the King may commit the share of the minor in trust to any one co-heir or other guardian. The texts subsequently quoted from Vishnu, Saucha and Lichita tend to the same conclusion, namely, that the King should guard the property of an infant and protect it, as he is incapable from non-age of conducting his own affairs. Jagannath then comments on a text of Bandhayana that in respect of shares of infants, the King must himself, or through some person appointed by him, keep the share of the minor: the expenses and other matters should be superintended by the King himself or by a person appointed by him: the property of a minor should be entrusted to heirs and the rest appointed with his concurrence, or if the infant be absolutely incapable of discretion, with the consent of a near and unimpeachable friend, such as his mother and the rest, to which the learned author adds, that, according to Katyayana, kinsmen must guard the property of an infant. In the comments on text 453 Jagannath adds, that in practice, a mother is guardian of a minor and of his property, but he seems to hold that she may not always be skilled in the conduct of affairs in which case the King, as the universal superintendent, may arrange to guard the property by every possible means. The substance of this discussion, treated as authoritative in *Kisto Kissor* v. *Kadermoye* (1) which was accepted as good law in *Bhikuo Koer* v. *Chamela Koer* (2), points to the conclusion, that the King, as the ultimate protector of the State, may give suitable direction for the protection of the state of infants and that the test to be applied is to determine what course is beneficial to the infant concerned. It cannot, therefore, be affirmed as an inflexible rule of Hindu Law, that a mother, upon her re-marriage, is disqualified to act as guardian of the person and property of her infant sons; indeed, the texts of Manu (IX 146, 190, 191) may militate against any such rule.

1) 2 C. L. R. 583.
2 2 C. W. N. 191.

Reliance, however, has been placed by the learned Vakil for the appellant upon the case of *Ban Sheo* v. *Rutonjee Nuthoo* (3), as an authority for the proposition, that a Hindu mother loses her right to act as guardian of her children by reason of her re-marriage. The case mentioned, however, is not an authority for any such comprehensive proposition. In that case, upon the re-marriage of a Hindu widow by name Sheo Rutonjee Nuthoo, the grandfather of her child commenced an action for possession of the child on the ground that as she had contracted a second marriage, by the custom of the caste, the plaintiff, as the paternal grandfather, had a right to the child. In so far as we can gather from the meagre statement in the report, it was not contested by the widow that there was such a custom, but she resisted the claim on the ground that, so long as the infant was at the breast, the mother had the best right to it. The Court of first instance dismissed the suit, as the *Sastri* of the Surat Adalat declared the plea of the mother to be good in law. On appeal, the *Zillah* Judge found that the decision was opposed to the rules of the caste, and that, as the mother at the time of the original trial was seven months gone with child, the plea set up in defence, which alone, according to the exposition of the *Sastri*, constituted her right to retain possession of the child, no longer held good. The decree of the original Court was, therefore, reversed, and the possession of the child awarded to the grandfather. The mother of the chiled then appealed to the Bombay Sudder Court, and a Full Bench (Warden, Grant and Larken, JJ.,) held, that the view of the *Zillah* Judge was correct; and that the pregnancy of the mother by a second marriage had divested her of the right she would otherwise have to the charge of a child of tender years by a first marriage. It is manifest, therefore, that this decision was founded on the custom of the caste to which the widow belonged. It was alleged by her father-in-law, and not disputed by her, that according to such custom she had forfeited her right to the guardianship of her son as soon as she contracted a second marriage. The case cannot consequently be treated as an authority for the broad proposition that a Hindu mother loses her right of

(3) (1851) Mooris. Bom. S. D. 103.

guardianship of her infant children, by a second marriage. It may be added that the case of *Muhtaboo* v. *Ganesh Lal* (4), where a mother was superseded from the office of guardian by reason of loss of caste, can have no application in view of the provisions of the Hindu Widows' Re-marriage Act, 1856.

It has next been argued by the learned Vakil for the appellant, that by section 3 of Act XV of 1856, a Hindu widow, on her re-marriage, loses the right of guardianship of her children by her deceased husband. That section provides as follows :

"On the re-marriage of a Hindu widow, if neither the widow nor any other person has been expressly constituted by the Will or testamentary disposition of the deceased husband, the guardian of his children, the father or paternal grandfather or the mother or paternal grandmother of the deceased husband, or any such relative of the deceased husband, may petition the highest Court, having original jurisdiction in Civil cases in the place where the deceased husband was domiciled at the time of his death, for the appointment of some proper person to be guardian of the said children, and thereupon it shall be lawful for the said Court, if it shall think fit, to appoint such guardian, who, when appointed, shall be entitled to have the care and custody of the said children or of any of them during their minority in the place of their mother ; and in making such appointment the Court shall be guided, so far as may be, by the laws and rules in force touching the guardianship of children who have neither father nor mother: Provided that when the said children have not property of their own, sufficient for their support and proper education whilst minors, no such appointment shall be made otherwise than with the consent of the mother, unless the proposed guardian shall have given security for the support and proper education of the children whilst minors."

The learned Vakil for the respondent has argued, that the application of this section to the case before us is excluded by reason of two circumstances, namely, *first* that the section applies only to cases of first appointment of a guardian of an infant and *secondly*, that it applies only to cases in which the validity of re-marriage of a widow is not recognised by the caste to which she belongs, and reliance has to be placed upon the provisions of the Act to legalise it. He has further contended, that upon a true construction of the section itself, even if it be assumed to be applicable, the Court is competent to appoint the mother, who has re-married, as guardian of her infant children, not in her capacity as mother, but as a person otherwise suitable for the purpose. In so far as the first reason assigned by the learned Vakil for the respondent for exclusion of the application of the section is concerned, we are not impressed by it as well founded. It is an elementary principle, that if a person is appointed guardian of an infant and events subsequently happen which, if they had existed at the time of the original appointment would have been sufficient to disqualify him from appointment as guardian, such disqualifying circumstances, when they come into existence, justify the removal of the guardian. This principle is recognised by Domat in his Treatise on Civil Law (Ed. Cushing, Volume I, paragraphs 1380 and 1397. In so far, however, as the second reason urged by the learned Vakil for the respondent with a view to exclude the operation of section 3 is concerned it is, in our opinion, more substantial. The view was maintained by Sir Charles Sargent, C. J., in *Parek* v. *Bai Vakhat* (5), that the provisions of section 3 of Act XV of 1856, have no application to a case where the widow belongs to a caste in which re-marriage is permitted; in other words as the object of the statute was to enable widows who were unable to marry previously, to re-marry, the statute ought to be considered as a whole, and such of its provisions as impose a disability ought not to be applied to cases where it is needless for the parties to seek the benefit of the provisions which recognise the right of a widow to re-marry. In this view, section 3 would have no application to the case before us. But it is worthy of note that this doctrine may and has been carried too far. As was pointed out by this Court in the case of *Nitya Madhav* v. *Srinath Chandra* (6), the principle of which we recognise as well founded, the learned Judges of the Allahabad High Court

(4) (1854) Beng. S. D. A. 329.

(5) 11 B 119 at. p. 130.
(6) 8 C. L. J. 542.

in *Khuddo* v. *Durga Prasad* (7), *Ranjit* v. *Radharam* (8), *Harsaran* v. *Nandi* (9) and *Dharam* v. *Nand Lal* (10), appear to have held that because section 2 of Act XV of 1856 did not apply to a case in which the re-marriage of a widow was recognised by the caste, it follows that the interest of the widow in the estate of her husband did not cease on such re-marriage. It seems to have been overlooked, however, that although section 2 might not apply, the same result might follow from an application of the fundamental rules of Hindu Law, as pointed out in the cases of *Matungim* v. *Ram Kutton* (11); *Murugayi* v. *Viramakali* (12); *Rasul Jehan* v. *Ram Surun* (13); *Vithu* v. *Govinda* (14) and *Panchappa* v. *Sanganbasawa* (15). In fact, in such cases as was clearly recognised in *Putlabai* v. *Mahadu* (16), two questions arise for consideration, namely, *first*, whether the provisions of the statute apply, and, *secondly*, if they do not, what is the effect of the application of the general principles of Hindu Law? This latter standpoint appear to have been overlooked by the learned Judges of the Allahabad High Court in the four cases just mentioned as was plainly indicated by Mr. Justice Banerjee in *Gajadhar* v. *Kounsilla* (17). Consequently, in the case before us, if we adopt the view taken by Sir Charles Sargent, section 3 has no application, because it is not disputed that the widow belongs to a caste in which re-marriage is recognised as valid by custom. Apart from this ground, however, we are decidedly of opinion that the second contention of the learned Vakil for the respondent is well-founded; namely that upon a true interpretation of section 3, the Court is not bound to remove the mother who has been previously appointed guardian from her office merely by reason of her re-marriage. That section, no doubt, provides that it shall be lawfull for the Court upon such re-marriage to appoint some proper person the guardian of the children in the place of the mother, and that in making such appointment the Court shall be guided, so far as may be, by the laws and rules in force touching the guardianship of children who have neither father nor mother. The law clearly contemplates that the widow upon re marriage ceases to be the widow of her first husband. She consequently loses her preferential right to act as guardian of her children by her first marriage. But, although such re-marriage is equivalent to a civil death in respect of her first husband and his children by her so far as their guardianship is concerned, she is not physically dead. This is manifest from the proviso to section 3, which contemplates that when the childern have not property of their own sufficient for their support and proper education, no guardian shall be appointed otherwise than with the consent of the mother, unless the proposed guardian gives security. It has even been held (see section 5) that such a re-married widow may succeed to the estate of her son by her former marriage [*Akora Suth* v. *Boreani* (18), *Chaman* v. *Kashi* (19), *Basappa* v. *Rayava* (20)]. To put the matter briefly, the Legislature recognises that such re-marriage not only does not operate as a physical death of the widow, but it does not operate even as a civil death for all purposes. Under such circumstances, it is impossible for us to hold that the Court may not appoint the mother as guardian of her children by her first marriage, notwithstanding the provisions of section 3 of the Hindu Widows' Re-marriage Act. The only effect of the section is, that the preferential right to the appointment she would otherwise have [Macnaghten, Considerations on Hindu Law, 25; Macnaghten on Hindu Law, Volume I, 103, *Oorahee* v. *Rajbunsee* (21)], is destroyed, and if she is appointed she must be appointed as stranger [*Khushali* v. *Rani* (22)]; in other words, the Court has a discretion in the matter, though ordinarily, unless good causes were shown to the contrary, the Court would appoint a relation as guardian under section 3 in the place of the mother.

The question which has been argued before us has, it may be observed, been raised and

(7) 29 A. 122; 3 A. L. J. 729; A. W. N. (1906) 299.
(8) 20 A. 476.
(9) 11 A. 330.
(10) A. W. N. (1889) 78.
(11) 19 C. 289.
(12) 1 M. 226.
(13) 22 C. 589.
(14) 22 B. 321.
(15) 24 B. 89.
(16) 33 B. 107; 10 Bom. L. R. 1134; 1 Ind. Cas. 659.
(17) 31 A. 161; 6 A. L. J. 107; 1 Ind. Cas. 761.
(18) 11 W. R. 82; 2 B. L. R. A. C. 199.
(19) 26 B. 388
(20) 29 B. 91.
(21) (1847) Beng. S. D. A. 557.
(22) 4 A. 195.

decided in England. Under the law as it stood before the Guardianship of Infants Act, 1886, it appears to have been repeatedly held that the second marriage of a widow does not operate as a necessary supersession from the guardianship of her infant children by her first marriage [*Villareal* v. *Mellish* (23)]. In the case of *In re Gornal* (24), the practice of the Court was stated to be upon the re-marriage of the widow, to direct a reference for the appointment of a new guardian and, under such reference, to continue her as guardian or re-appoint her with others [*Anonymous* (25), *Jones* v. *Powell* (26), *Potinger* v. *Wightman* (27)]. The matter in England is, as we have stated, now regulated by statute, and in *In re X, X* v. *Z* (28), it was ruled by the Court of Appeal, that the mere fact of the second marriage of the mother to a husband of a different faith from that of the father of her children, was not a ground for interference by the Court for the purpose of adding a co-guardian with her. It is manifest, therefore, that in England there is no inflexible rule that a mother, upon re-marriage, must necessarily be removed from the office of guardian of her infant children.

A similar view has been maintained in the American Courts and it has been ruled that a woman may be appointed guardian of the person and property of her child by first marriage although she has married again and lives with her husband [*In re Hermance* (29)]. In Louisiana, on the other hand, the re-married mother is allowed to act as guardian only if the Court is advised of her fitness by what is called a family meeting [*Robins* v. *Weeks* (30), *In re Mossy* (31), *Jewell* v. *Deblane* (32); *Gandet* v. *Gandet* (33)]. We do not refer to these English or American cases as furnishing in any way authorities binding upon this Court in the decision of this matter, which must be determined on priciples recognised by Hindu Law, under which system the conception of the marriage relationship is fundamentally different from what prevails in other systems of jurisprudence: but these cases serve to indicate that there is no foundation for the suggestion made by the learned Vakil for the appellant, that the view taken by the Court below is manifestly unreasonable. It is also worthy of note, as pointed out by Domat (Volume I, section 1378) that, although under the civil law women could not be guardians they could be so to their own children; mothers and grandmothers were qualified, because the authority which nature gives them over their children, and the affection which they have for their interest, exempt them from the rule which excludes women from guardianship, and as the mother was capable of being guardian, the guardianship might be likewise committed to her second husband, who is described as the father-in-law to the minors (see also Salkowski on Roman Private Law page 302).

On a review, then, of the principles and authorities we have examined, the position may be summed up as fallows:—

There is nothing in Hindu Law to make it obligatory upon the Court to remove the mother from the office of guardian of her infant childern merely because she has re-married; there is also nothing in the statutory provisions on the subject which compel the Court to direct her removal under similar circumstances. While the fact that in spite of her re-marriage, she is allowed to continue to act as guardian according to other civilised saystems of jurisprudence, plainly indicates that the appointment is not so contrary to dictates of humanity or principles of universal justice as the learned Vakil for the appellant contended. In fact, in many instances, the inflexible rule suggested by the learned Vakil for the appellant, if adopted, might lead to serious injury of an infant of tender years. We must hold, therefore, that although the Court has a discretion to remove a Hindu mother from the office of guardian of the children of her first marriage, when she has re-married, the exercise of such discretion must be regulated from the point of view of the welfare of the infant concerned. In the case before us, upon the facts disclosed in the evidence, there is no room for controversy as to the manner in which this discretion ought to be exercised. The first child has, no doubt, indicated his preference for his uncle, the second, however,

(23) (1737) 2 Swanston 533.
(24) 1 Beav. 347; 48 Eng. R. 974.
(25) 8 Simon. 346.
(26) 9 Beav. 345; 5 Eng. R. 376.
(27) (1817) 3 Mer. 67; 36 Eng. R. 26.
(28) (1899) 1 Ch. 526; 68 L. J. Ch. 265; 47 W. R. 345; 80 L. T. 311.
(29) (1884) 2 Den. Sur. 1.
(30) (1827) 5 Martin. (N. S.) 379.
(31) (1843) 3 Robinson. 390.
(32) (1902) 110 La. 8 0; 34 Southern. 787.
(33) 14 La. 112.

has pronounced clearly in favour of the mother. The first child is stated to be half-witted, and there can be no doubt that the appellant has done his best to cause estrangement between the mother and the son. The charges of neglect have been proved to be wholly groundless. The learned District Judge, therefore, rightly refused to remove the mother from the office of guardian.

The result is that the order of the Court below is affirmed and this appeal is dismissed with costs. We assess the hearing fee at five gold *mohurs*.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 640 OF 1909.

February 15, 1911.

Present: Mr. Justice Munro and Mr. Justice Sankaran Nair.

BAMMIDI BAYYA NAIDU—APPELLANT

versus

BAMMIDI PARADESI NAIDU AND OTHERS RESPONDENTS.

Civil Procedure Code (Act V of 1908), *s.* 11—Res judicata—*Landlord and Tenant—Suit for rent—Plea of improper* patta—*Question of title—Trial of suits and trial of issues—Explicit findings on issues necessary to operate as* res judicata—*Madras Rent Recovery Act (VIII of* 1865), *ss.* 3, 4, 7.

The plaintiff, a landlord, sued defendants, his tenants, for rent for *Fasli* 1316. Defendants pleaded that the *patta* tendered was not a proper one as a portion of the land did not belong to the plaintiff who had entered a larger extent of *jerayati* land in the *patta* than he held The plaintiff contended that the matter was *res judicata* by reason of an action for rent for a prior *fasli*, the terms of which were the same as in the present case, where the defendant raised the same plea and the Court found that the *patta* tendered was a proper one:

Per *Sankaran Nair, J.*—As there was no express finding in the previous suit as to the title to the lands which was definitely raised in this suit, the matter was *not res judicata*, and it could not be implied that there was any decision on the question now raised, that is, whether the lands in dispute belong to the plaintiff or to the defendants.

Section 11 of Act V of 1908 deals with two classes of cases, *viz.*, trials of suits and trials of issues. In the case of trials of suits, the suits must be either dismissed or decreed. In the case of trials of issues the Judge records finding on the issues. In the first case, the decree may render it necessary to imply a decision on a question not expressly decided. In the latter, from its very nature, no implication is necessary, but there must be a clear decision to create the bar by *res judicata*.

To hold that an issue has been determined it must appear that the matter raised by that issue was alleged by one party and denied by the other, and that there was a finding of the Court thereon; where there is no such finding, the question can be tried in a subsequent suit

A plaintiff need not sue on all his causes of action; if he fails on one title, he may recover on another title.

Per *Munro, J.*—The finding in the previous suit that the *pattas* were proper, *i.e.*, that they were such as defendants were bound to accept, was a finding that the relationship of landlord and tenant subsisted between the plaintiff and the defendants in respect of the lands entered in the *pattas*, and the defendants cannot be allowed again to put plaintiff to proof of his title.

Second appeal against the decree of the District Court of Ganjam in Appeal Suit No 170 of 1908, presented against the decree of the Court of the District Munsif of Sompeta in Original Suit No. 861 of 1907.

The Hon'ble Mr. *T. V. Seshagiri Aiyar*, for the Appellant.

Dr. *S. Swaminathan*, for the Respondent.

JUDGMENT.

MUNRO, J.—The plaintiff, a land-holder to whom the provisions of section 3 of Madras Act VIII of 1865 apply, sues the defendants, his tenants, for rent for *Fasli* 1316. Under section 7 of the above-mentioned Act no suit brought to enforce the terms of a tenancy shall be sustainable unless *patta* and *muchilika* have been exchanged, or unless it be proved that the party attempting to enforce the contract had tendered such a *patta* or *muchilika* as the other party was bound to accept, or unless both parties shall have agreed to dispense with *pattas* and *muchilikas*. Under section 4 of the Act the *patta* must contain, among other things, the local description and extent of the land. The *patta* in the present suit gives the extent and boundaries of the land alleged by the plaintiff to be in the defendants' occupation. The defendants alleged that the extent of *jeroyity* land entered in the *patta* was greater than the extent of such land held by them. The plaintiff contended that the matter was *res judicata* by reason of the decision in a similar suit by him against the defendants for the rent of two previous *faslis*. The *pattas* in that suit were similar to the *patta* in the present suit. In the former suit the plaintiff alleged tender of *pattas* and refusal by the defendants, but the defendants contended that the plaintiff did not tender *pattas* for the suit *faslis* and that the *pattas* alleged to have been tendered

were improper, one of the objections taken to the propriety of the *pattas* being that the extent of the defendants' *jeroyity* land was much overstated. In this state of the pleadings it was incumbent upon the plaintiff, under section 7 of Act VIII of 1865, to prove the tender of such *pattas* as the defendants were bound to accept. An issue was accordingly framed as to the tender and propriety of the *pattas*, and was found in the affirmative. Had it been found in the negative, the plaintiff's suit must have been dismissed. In the present suit an issue as to the tender and propriety of *patta* also necessarily arises. The *patta* being similar to the *pattas* in the previous suit and no change of circumstances being alleged, I think the plaintiff's contention should have been upheld. The finding in the previous suit that the *pattas* were proper *i. e.*, that they were such as defendants were bound to accept, was a finding that the relationship of landlord and tenant subsisted between the plaintiff and the defendants in respect of the land entered in the *pattas*, and I do not think the defendants can again be allowed to put the plaintiff to proof of his title. See *Venkatachalapati* v. *Krishna* (1) I would, therefore, allow the appeal.

As my learned brother takes the contrary view, the second appeal is dismissed with costs.

SANKARAN NAIR, J.—This suit is brought by the plaintiff to recover rent due for *Fasli* 1316 from the defendants who are tenants in possession of certain lands which the plaintiff says are held under him. The plaintiff states that he tendered a proper *patta* to the first defendant according to which the first defendant was bound to properly cultivate and raise crops in about 14 acres of land in the village of Jayakrishnapuram and pay the landlord's share. The main contention of the defendants is that the defendants hold about 5 acres of land under the plaintiff and that of the rest about 10 acres are *inam* lands and 3 acres are cash-rent paying lands belonging to the defendants themselves. Both the lower Courts have upheld the defendants' contention. In fact, the Judge states that the plaintiff did not seriously argue before him that the *patta* was a proper one or that the lands which were found by the Munsif to belong to the defendant really belonged to the plaintiff. The question that was argued before us at great length, is whether the defendants are barred from raising this plea by the decision in a previous suit.

The plaintiff sued in O. S. No. 430 of 1906 on the file of the same Court for the rent of *Faslis* 1314 and 1315. In that case he alleged tender of a *patta* which both the lower Courts say was similar to the *patta* which is now alleged to have been tendered. The defendants alleged in that suit that the extent of land belonging to the plaintiff had been very much overstated. On that plea, the following issue was raised in that suit:

"Whether plaintiff tendered *pattas* to the first defendant and whether the *pattas* so tendered were proper?"

It was decided that *pattas* were tendered and the Court that tried that suit also held that "the terms of the *pattas*, Exhibits E and F, do not contain any objectionable matter," and accordingly found that issue in the affirmative. The plaintiff got a decree for the rent due for *Fasli* 1314. His claim for the rent for *Fasli* 1315 was dismissed as it was found that the defendant had executed a *muchilika* for that year to another person with the consent of the plaintiff, who was, therefore, held estopped from claiming that year's rent. There was no finding on the question whether these ten acres were *inam* and the other three acres belonged to the defendant. In fact, the question was not raised in that form, nor was there any clear decision that the lands belonged to the plaintiff except what may be implied from what is extracted above.

The plaintiff's contention is thus stated by the Munsif, "the defendant did not raise this question or did not so raise the question as to place the Court in a position to give a proper finding on all the matters relevant; the defendant is now barred under section 13." In second appeal it is also contended before us that this question was really raised and decided against the defendant.

Section 11 of the new Civil Procedure Code runs thus,—"No Court shall try any suit or issue in which the matter directly and substantially in issue in a former suit between the same parties or between parties under whom they or any of them claim,

(1) 13 M. 287.

litigating under the same title in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court."

No question arises in this case as to the identity of parties or to the competency of the Courts. The points for determination are whether the question 'that the property now belongs to the defendant' "has been directly and substantially in issue in the former suit" and whether it has been finally decided.

To be in issue, a matter must have been put forward, or must be one which ought to have been put forward in the previous suit,—See explanations 3 and 4 to the section.

It is settled by the Judicial Committee that the scope of the rule of *res judicata* as limited by the words "directly and substantially in issue" is not confined to the relief granted by the former suit or to the property which was the subject-matter therein,—See *Pittapur Raja* v. *Buchi Sitayya*, (2), in which the Judicial Committee considered the words of section 13 of the Code of Civil Procedure of 1877. It cannot, therefore, be contended that in O S. No. 430 of 1906 the only matter in issue was whether the plaintiff was entitled to the rent then sued for and that the decision, if any, on this question, *i.e.*, whether these lands belong to the plaintiff or the defendant, cannot be *res judicata* for the sole reason that the present suit is for the rent of another year.

On the other hand, the words of the section clearly imply that the decision on a matter not essential for the relief finally granted in the former case, or which did not form one of the grounds for the decision itself, cannot be said to have been directly and substantially in issue,—See *Sheosagar Singh* v. *Sitaram Singh* (3).

The rule appears to be that where the decision on a question was essential to the relief granted or the decree passed, or where it formed the ground-work of the decision, then the matter must be deemed to have been directly and substantially in issue in the suit. If, therefore, the decision as to the extent of the plaintiff's property, or that the property in question belongs to the plaintiff, was essential for the decree that was passed in O. S. No. 430 of 1906, then the question must be deemed to have been directly and substantially in issue under explanation 4 to section 11, Civil Procedure Code, even though the parties did not raise that question as they were bound to raise it. Again, whether essential or not, if the Court in the former suit, decided that the property belonged to the plaintiff and based the judgment in favour of the plaintiff, for the rent that alone was sued for, on the ground that this property belonged to him then aiso it was directly and substantially in issue.

The section also states that not only must it have been directly and substantially in issue but it must have been *heard and decided*. If, as a matter of fact, such a question was heard and decided, then all the conditions of *res judicata*, so far as they are material to this case have been complied with. Even if the question was not raised it must be deemed to have been raised,—See explanation (4).

We shall now consider when a question is *res judicata*, though there was no express finding on it in the previous suit. With reference to this it must be borne in mind that the section deals with two classes of cases, *viz.*, trials of suits and trials of issues. The difference is, that in the case of trials of suits, the suits must either be dismissed or decreed. In the case of trials of issues, the Judge records findings on the issues. In the first case the decree may render it necessary to imply a decision on a question not expressly decided. In the latter, from its very nature no implication is necessary, but we ought to have a clear decision to create the bar.

The decision of a suit involves the determination of all the questions which are necessary and essential for that decision, and those questions will, therefore, be deemed to have been necessarily decided, if not expressly, by implication. Thus, where a certain relief is granted to the plaintiff in a suit, it is not open to the defendant in that suit to raise any plea in a subsequent suit which would interfere with the relief given in the previous suit. He cannot interfere with scope of that prior decree so far as that matter is concerned. He was bound to raise every plea in the previous suit, and if he did not raise it he is precluded from relying upon it so far as the

(2) 8 M. 219 (P. C.); 12 I. A. 16.
(3) 24 C. 616 (P. C.); 24 I. A. 50.

claim which was then allowed was concerned. Thus, when the plaintiff brings a suit for possession of property against a defendant, the latter is bound to put forward every ground of defence he may have. If a decree is passed against him, it is not open to him to say afterwards that he then resisted the suit only, for instance, on the ground of his being the heir of the deceased admitted owner, and that he is entitled to put forward his claim as a devisee in a subsequent suit. So in *Sivagananga case—Srimut Ra a Mootloo Vijaya Ragunadha Bodha Gooroosawmy Peria Odaya Tevar* v. *Katama Nachiar, Zemindar of Sivaganga* (4). Similarly, if there is a mortgage-decree directing the sale of certain properties and their distribution in satisfaction of certain mortgage-claims in the order and mode mentioned in the decree then it is not open to any of the parties to put forward any other claim or mortgage which would interfere with such distribution,—See *Sri Gopal* v. *Pirthi Singh* (5),—whether this claim was set up in the previovs suit or not. Again, if a suit is brought on a bond, the decree for payment of the money if conclusive against the defendant as to its genuineness, consideration and non-payment. Section 11 says that the matter must have been decided in the previous suit. In the cases above referred to there is a decision by necessary implication. A finding in express terms is not necessary,—see *Pahalwan Singh* v. *Maharajah Muheshur Buksh Singh Bahadur* (6); *Mahabir Pershad Singh* v. *Macnaghten* (7).

Mr. Seshagiri Aiyar contended that under the provisions of the Rent Recovery Act, VIII of 1865, no suit for rent is maintainable against a tenant unless the *patta* tendered to the tenant is one he was bound to accept, and he was not bound to accept the *patta* unless the lands for which the rent is payable are correctly stated therein; when, therefore, the Court decided in O. S. No. 436 of 1906, that rent was payable and that the tenant was bound to accept the *patta* then in question, it must be taken to have also impliedly decided, within the meaning of the above decisions, that the lands as stated in the *patta* belonged to the plaintiff and were held by the defendants as tenants. But it is to be noticed that though a *patta* when tendered to a tenant must be one he is bound to accept, the tender of a *patta* is not essential to entitle a landlord to recover rent. The parties may dispense with them. A decree for rent, therefore, does not necessarily involve the decision that a proper *patta* has been tendered. *Misir Raghobardial* v. *Sheo Buk h Singh* (8) was a case in which a suit was first brought for sum of Rs. 1,665 for the interest only, the principal sum not being then due. The plaintiff alleged that it was for interest on a bond for Rs. 12,000, which the defendant denied, and an issue was raised as to the consideration of the bond. It was decided to be only Rs. 4,790. In a suit subsequently brought to recover the principal sum of Rs. 12,000 after it had fallen due, in a Court of higher jurisdiction the question, was raised whether the decision in the first suit with reference to consideration was binding. One of the grounds for holding that it was not binding was that the first Court was not competent to try the second suit. With reference to the issue as to consideration raisad in the first suit, their Lordships of the Privy Council say, "This was a collateral rather than a direct issue in the suit. The plaintiff may have succeeded without having a finding upon it, if he had proved an admission by the defendant that the sum claimed was due for interest or etc., etc." The difference between issues 'collateral' and 'direct' as pointed out by their Lordships depends upon this whether it was possible to pass the decree without any finding upon the particular issue. If it was not possible then it was a direct issue. The parties were bound to raise it. If they did not raise it, it will be deemed to have been raised, and even if there is no finding on it as the final decision could not have been arrived at without a finding, the decision of that question will be necessarily implied. The fact that it was based on an admission would make no difference. In the case before us, we have a decree for rent. This does not necessarily require a decision as to the terms of the *patta* or the extent of the land for which the rent has to be paid. If, therefore, as a fact that question was not decided in the previous suit we are not bound to imply that it was so decided. The cause of action

(4) 11 M. I. A. 50; 10 W. R. 1.
(5) 24 A. 429.
(6) 12 B. L. R. 391 (P. C.) 18 W. R. 182.
(7) 16 C. 682 (P. C.); 16 I. A. 107.
(8) 9 C. 439.

in this suit for the rent for *Fasli* 1316 is not the same cause of action as in the previous suit. The property sued for is not the same. The right litigated in this suit, *i. e.*, the claim to recover the rent for *Fasli* 1316, is not the same as in the previous suit. The decree dismissing this suit will not in any way interfere with the decree in the previous suit awarding to the plaintiff the rent for *Fasli* 1314 any more than the dismissal of the claim for rent for *Fasli* 1315 interferes with the decree for the rent of *Fasli* 1314. If the parties had agreed to dispense with the exchange of *pattas* and *muchilikas* or the claim for rent had been admitted, a decree could have been passed without any reference to the title to the land. In these circumstances, we cannot imply that there was any decision on the question now raised, *i. e.*, whether the lands in dispute belong to the plaintiff or to the defendant.

It was contended that a determination that these lands do not belong to the plaintiff would be inconsistent with the decision in the previous case that the *patta* then tendered was proper, as that decision that the *patta* was proper necessarily implies that the lands therein belong to the plaintiff but this is not enough. In the case reported in *Amanat Bibi* v. *Imdad Hussain* (9), a suit was brought by the plaintiff to redeem certain property on a mortgage which was recognised as subsisting in the year 1854. The question was, whether the plaintiff was barred by the decision in a prior case where a suit was brought by the same plaintiff to recover the same property on the ground that the defendant had paid the arrears of Government Revenue on account of the plaintiff. That suit was dismissed on the finding that the property had been transferred to the defendant *Talukdar* by a deed of conditional sale which was dated in 1853, under which the purchase-money was to be re-paid within a period of 8 months and that on the expiration of that period the sale was to become absolute. Their Lordships of the Judicial Committee construing the corresponding section of the Civil Procedure Code of 1877 held that there was no bar. They said, "Now, what was the question in issue in the former suit? The question was whether the plaintiff was entitled to recover property which had been transferred by the Government to the *Talukdar* on re-paying to the *Talukdar* the arrears of revenue which he had paid to Government. The matter in issue in this suit is the respondent's right to redemption under a mortgage deed. *It may be difficult to reconcile the position of the* Talukdar *as a mortgagee in* 1854 *with his position as absolute owner in* 1853 *under a purchase from the mortgagor.*" (The italics are mine). "But if it be established that the respondent was mortgagor in 1854 with the right of redemption, why should he be barred of his right merely because at an earlier date he may have had no right to the property at all." It will be seen that the *Talukdar's* position as absolute owner in 1853 under a purchase from the mortgagor is absolutely inconsistent with the existence of that mortgage at any subsequent date, yet as the question of mortgage-right set up in the second case was not necessarily involved in the previous decision, though the finding on which the judgment was really based was inconsistent with the claim set up in the latter suit, their Lordships held that the claim was not *res judicata*.

If then the decision or the decree in the first suit does not require us to assume the determination of the question now in issue in this subsequent suit, are we bound to imply that there was a decision as to the extent of land in the previous suit for the reason that when that Court decided that the *patta* was a proper one it must be taken to have decided on the extent of the land? There is no doubt that for that suit, or for that year's rent, the Court must be taken to have decided that question. But I am of opinion that, in the absence of a finding, we are not bound to imply that the matter was decided for the purpose of this suit.

I have already pointed out that the section deals with two classes of cases, *viz.*, trials of suit and trials of issues. Eminent Judges have lamented the application of the doctrine that the trial of an issue, which was not essential in the sense I have above pointed out, should be held to be a bar to the trial of the same question in a subsequent suit. That view was based on considerations arising from the conditions under which litigation is carried on in India. See Garth,

(9) 15 I. A. 106., 15 C. 800.

C. J., in *Denobundhoo Chowdhry* v. *Kristomonee Dossee* (10), Stuart, C. J., in *Babu Lal* v. *Ishri Prasad Narain Singh* (11) and *Muhammad Ismail* v. *Chattar Singh* (12), but the section itself places the matter beyond doubt, and the Judicial Committee have laid down the doctrine in decisions which we are bound to follow. However, to hold that an issue has been determined it must appear that the matter raised by that issue was alleged by one party and denied by the other, and that there was a finding of the Court thereon. The explanation (2) of the section states that a matter which ought to have been alleged should be taken to have been alleged. But it does not dispense with the necessity of a finding upon the issue by the Judge in the previous suit. An issue can hardly be said to be decided unless there is a finding thereon, and when there is no such finding it seems difficult to hold that in a second suit, that question cannot be tried. The principle that to plead a bar by a finding on an issue, there must be a determination by the Court is well-illustrated in the following two cases. In *Govind Chundar Koondoo* v. *Taruck Chunder Bose* (13) the Full Bench of the Calcutta High Court held that a decree for rent based on a finding that the plaintiff was entitled to the land is binding upon the defendant in that suit in a subsequent suit brought by the defendants to establish his title to the same land against the other parties to the previous suit. The ground of decision was that the self-same right and title was in issue, contested between them, adjudicated upon and decided against the plaintiff in the second suit. The judgment of the Full Bench was delivered by the Chief Justice Garth, C. J. In *Gobind Chunder Addya* v. *Afzul Rabbani* (14), where the question of title as between the parties to the second suit was not decided in the prior suit which was for rent and a declaration of title against another party, the Chief Justice held that, though a suit for rent would be barred, the same plaintiff's representative is not precluded from bringing any suit to try the title to the land on the ground that the question of title to the land in the previous suit was merely raised incidentally to the main question. Mr. Justice Field in the same judgment points out clearly the distinction. He states that the suit being only for rent and no cause of action arising out of the non-delivery of possession having been alleged or put forward, if the Court had tried the issue of title, the finding upon that issue would have the effect of *res judicata* between the parties, but inasmuch as that issue was not tried, the question raised thereby was not heard and decided and, therefore, the matter was not *res judicata*. His judgment shows that, if there had been any cause of action alleged arising out of the non-delivery of possession, then it is possible that a decision as to title may have been implied in the case. The learned Chief Justice has been erroneously charged with inconsistency by some text-writers and Judges on account of their failure to keep the distinction which I have above pointed out clearly in view. Further, the finding on the question must be clear and unambiguous. It must show that it was not merely intended to be binding between the parties only for the purpose of the suit but to be a decision finally declaring the title of the successful party. Thus, their Lordships of the Privy Council decided that a suit which was brought in a Subordinate Court by a plaintiff against the widow of his deceased brother claiming his property by right of survivorship, the issue in that suit being whether at the death of the latter the ownership of the brothers was joint or separate was not barred by decision of the same issue in a Munsif's Court in a prior suit brought by the widow against the same defendant. One of the grounds of decision was that a Munsif was not competent to finally decide the question. Having first so decided they added, "Having regard, however, to the subject-matter of the suit, to the form of the issue which has been above set forth and to some expressions of the learned Judge their Lordships are further of opinion that the question of title was no more than incidental and subsidiary to the main question, *viz.*, whether any and what rent was due from the tenant, and that on this ground also the judgment was not conclusive." [See *Run BahadurSingh* v. *Lucho Koer* (15)]. I am unable to say in this case that there was any decision in the pre-

(10) 2 C. 152.
(11) 2 A. 582 at p. 585.
(12) 4 A. 69.
(13) 3 C. 145.
(14) 9 C. 426.
(15) 11 C. 301.

vious suit on the issue as to the title to the land intended to bind the parties in another suit.

I will now refer to the decisions that have been cited in the course of the argument. In *Nil Madhub Sarkar* v. *Brojo Nath Singha* (6) a case very similar to this, it was pointed out as was also laid down clearly in the decisions in *Govind Chunder Koondoo* v. *Taruck Chunder Bose* (13) and *Gobind Chunder Addya* v. *Afzul Rabbani* (14), already referred to, that if the Court in the previous suits had determined the extent of the land and the rent annually payable, the decision would bind the parties in sub-equent suit, but not where it did not appear that the Court decided anything more than what was necessary for that suit, the rent payable to the plaintiff.

In *Kailash Mondul* v. *Baroda Sundari Dasi*, (17) the principle is laid down in terms which are capable of wider application. The decisions in *Woomesh Chandra Maitra* v. *Baroda Das Maitra* (8); *Rajendranath Ghose* v. *Tarangini Dassi* (19) and *Surjiram Marwari* v. *Barhamdeo Persod* (20) support the view taken by me.

As to the cases cited for the appellant, in *Venkatachalapathi* v. *Krishna* (1); *Natesa Gramani* v. *Venkatarama Redai* (21) and *Pittapur Raja* v. *Buchi Mitayya* (2) the question was expressly decided in the first suit. They are, therefore, no authorities. In *Sellappa Chettiar* v. *Velayuda Tevan* (22) both the suits were to enforce *pattas* and not for rent, and a decision that the *patta* is proper would necessarily involve a finding that the lands referred to in the *patta* belong to the plaintiff. It, therefore, falls within the first class of cases which I have already referred to. In *Sri Gopal* v. *Pirthi Singh* (23) the facts are these. On the 8th August 1888 one Sri Ram, a mortgagee brought a suit for sale on a mortgage of the 18th August 1876 and made the holder, the prior party mortgagee, to the suit. That prior martgagee pleaded his rights under a mortgage of the 21st July 1871 but he was the holder also of another mortgage of the 7th February 1874. He made no mention of this latter mortgage nor did he raise any question as to his rights under that mortgage. Sri Ram obtained a decree for sale subject to his redeeming the mortgage of the 21st July 1871. Subsequently, a suit was brought by the defendant mortgagee to enforce his claim on his mortgage of the 7th February 1874. It was decided by the Full Bench of the Allahabad High Court—and that decision was confirmed on appeal,—see *Sri Gopal* v. *Pirthi Singh* (5)—that he was barred from enforcing this mortgage—as he ought to have pleaded it in the previous suit. No possible objection can be taken to that decision, as any decree enforcing the mortgage of February 1874 would have been absolutely inconsistent with the decree in the first suit. The decree in the first suit enabling Sri Ram to sell the property subject *only* to the mortgage of 1871 negatives, as absolutely inconsistent with it, the existence of any other mortgage right in that defendant which may be set up as against the plaintiff. But in so holding the learned Judges of the Allahabad High Court make certain observations to which with all respect to them exception can be justly taken. Their Lordships say, "It is quite certain that in order to make section 13 applicable it is not necessary that the matter of the subsequent suit should have been heard or have been finally decided by a Court of competent jurisdiction in the first suit when the case is one to which explanation II applies. Indeed, explanation II to section 13 of the Code would be meaningless if it were necessary in a case which was covered by it that the matter should have been heard and finally decided in the previous suit." It was pointed out by my learned colleague in the course of the argument that, where the parties themselves do not raise a question but the Judge decides the suit on that question not raised by the parties, the matter would not be *res judicata* without that explanation (II), which is explanation IV in the present Code, as under explanation I of the old Code (explanation III of the new Code) the matter must have been alleged and denied or admitted. It may also be pointed out that the learned Judges do not recognise the distinction between the two classes of cases, as in the first class of cases where the decision of the suit itself must be taken to imply a decision of

(16) 21 C. 236.
(17) 24 C. 711.
(18) 28 C. 17.
(19) 1 C. L. J. 248.
(20) 1 C. L. J. 387.
(21) 30 M. 510; 2 M. L. T. 455; 17 M. L. J. 518.
(22) 30 M. 498; 17 M. L. J. 433; 3 M. L. T. 17.
(23) 20 A. 110.

the necessary issue, the explanation is necessary in order to show that the matter must be deemed to have been raised. I am unable, therefore, to accept that argument. The next case is *Jamadar Singh* v. *Serazuddin Ahamad Chaudhari* (24). In that case the plaintiff brought a suit for the recovery of money which he said ought to have been taken in part payment of rent which was due by him and for which a decree had been obtained against him. This case also obviously falls within the class of cases where the decision of the suit itself is a bar, as it directly involves the decisions of this question, because, as I pointed out already, a decree for rent implies the non-payment of any amount towards the payment of rent. The learned Judges make similar observations here as *Sri Gopal* v. *Pirthi Singh* (23).

That the learned Judges recognize this distinction appears to be clear from another judgment of the same Bench delivered about the same time [*Maharaja Manindra Chandra Nandy* v. *Upendra Chandra Hazra* (25] where the claim was held not to be *res judicata* as the decision in the previous suit did not decide the rate of rent but only decreed the amount claimed for a certain period. The next two cases *Kameswar Pershad* v. *Rajkumari Ruttan Koer* (26) and *Arunachelam Chetty* v. *Meyyappa Chetty* (27) are instances where a plaintiff was held to be barred from putting forward a claim which he ought to have advanced in a previous suit and on which there was, therefore, no decision. With reference to such cases we have to consider the effect of section 42 of the Civil Procedure Code of 1882. The Privy Council decision in *Kameswar Pershad* v. *Rajkumari Ruttan Koer* (26) was distinguished on that ground in *Ramaswamy Ayyar* v. *Vythinatha Ayyar* (28). We have also to bear in mind that the Madras High Court, and certain decisions of the other High Courts, rocognize a distinction for this purpose between plaintiffs and defendants, though other decisions refuse to make any such recognition. It is now well-settled that a defendant in possession of an estate is bound to put forward all his pleas to resist the plaintiff's suit to recover possession. But in the case of a plaintiff this Court has in a course of decisions held that this principle is not applicable to a plaintiff, and he is not bound to sue on all his causes of action, that even if he fails on one title he may recover on another title, *Ramaswamy Ayyar* v. *Vythinatha Ayyar* (28). From this it follows that he is bound to put forward his whole case only with reference to his cause of action or title, on which he sues [See *Kameswar Pershad* v. *Rajkumari Ruttan Koer* (26) *Ramaswamy Ayyar* v. *Vythinatha Ayyar* (28)]. No other title will be deemed to have been determined.

In other Courts, on the other hand, it has been held that he is bound to put forward all his titles, if possible. Otherwise, he will be precluded from relying upon any of his titles in a subsequest suit. If this is the correct view, it follows that any title which he may have will be deemed to have been decided in the previous suit, *Guddappa* v. *Tirkappa* (29). Mr. Justice Subramania Iyer in *Arunachalam Chetty* v. *Miyyappa Chetty* (27) took the view adopted by the Bombay High Court, that a plaintiff is bound to unite all the causes of action he may have against a defendant in respect of the relief or property for which he sues. From this it necessarily follows that, if he omits to sue on any cause of action, he is barred from again relying on it, either by section 42 of the Act of 1882 or by section 13. The dismissal of his suit implies, therefore, a rejection of any title may have to the land. This also falls, therefore, within the first class of cases to which I have already referred. It may be pointed out that this case has been overruled by *Ramaswamy Ayyar* v. *Vythinatha Ayyar* (28) and Mr. Justice Subramania Iyer has receded from the position he then took up in *Veerana Pillai* v. *Muthukumara Asary* (30). Similarily, as regards *Kameswar Pershad* v. *Rajkumari Ruttan Koer* (26), even if the second suit was based on the same cause of action as the first suit, as explained in *Ramaswamy Ayyar* v. *Vythinatha Ayyar* (28), the second suit is clearly barred. Or, if we take the view adopted by the Bombay High Court and in *Arunachalam Chetty* v. *Miyyappa Chetty* (27) that the Privy Council held that all causes of action must be united in the same suit if possible, then also there would

(24) 33 C. 979; 12 C. W. N. 862; 8 C. L. J. 82.
(25) 9 C. L. J. 343; 36 C. 604; 2 Ind. Cas. 828.
(26) 20 C. 79, 19 I. A. 234.
(27) 21 M. 91
(28) 26 M. 760 at p. 780.
(29) 25 B. 189.
(30) 27 M. 102.

be a bar, as there would be an estoppel by the decision in the suit not by a finding. There may be a difference of opinion, therefore, between the High Courts in deciding whether a question must be deemed to have been decided against a plaintiff, on account of his failure to make it a ground of attack. But where a question need not be deemed to have been decided on the ground that the decree in the previous suit requires such assumption to make it a decree rightly passed, I am not aware that the cases show that without a clear and express finding a party is precluded from raising any question in a subsequent suit.

For these reasons I would dismiss the second appeal with costs.

Appeal dismi sed.

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 1789 TO 1791 OF 1908.

March 14, 1911.

Present:—Mr. Justice Munro and Mr. Justice Sankaran Nair.

T. VENKATAGIRI AIYAR AND ANOTHER—APPELLANTS

versus

R. SADAGOPACHARIAR—RESPONDENT.

Mortgage—Prior and puisne mortgagees—Sale by both mortgagees—Right of the first purchaser to be confirmed in possession—Right of puisne incumbrancer to redeem—First mortgagee purchaser impleaded in suit of puisne mortgagee—How far his right under the prior sale affected—Right of puisne mortgagee decree-holder to sue first mortgagee decree-holder for possession—Position of prior and puisne mortgagees.

Where there are two mortgages in favour of two persons, neither of them being usufructuary, and the first mortgagee sells the property before the puisne mortgagee, there is nothing for the latter to sell and the first mortgagee is entitled to possession under his sale.

The second mortgagee has the same right to sell his mortgagor's interest but the first sale puts an end to the mortgagor's interest and conveys it to the purchaser.

Venkatnarsammah v. *Ramiah*, 2 M. 108; *Akatti Moidin Kutty* v. *Chirayil Ambu*, 26 M. 486; *Nanack Chand* v. *Toluckdye Koer*, 5 C. 265· 4 C. L. R. 358, *Dirgopal Lal* v. *Bolakee*, 5 C. 269; *Kutti Chettyar* v. *Subramanya Chettyar*, 32 M. 485; 19 M. L. J. 728; 4 Ind. Cas. 1077, referred to.

The right of the prior mortgagee purchaser is not lost to retain possession under his sale merely because he was impleaded in the suit of the second mortgagee.

The only right vested in the puisne mortgagee is the right to redeem the first mortgage.

Krishnan v. *Chadayan Kutti Haji*, 17 M. 17, *Mahomed Usan Routhan* v. *Abdulla*, 24 M. 171, referred to.

After redemption, as aforesaid, the purchaser in execution of the decree on the first mortgage may redeem the two mortgages vested in the same person.

Sivaraman Chetty v. *Kuppumuthu Chetty* 13 M. L. J. 72; *Govardan Doss* v. *Veerasawmi Chetty*, 26 M. 537; *Vencatrama Iyer* v. *Gompertz*, 31 M. 425; 3 M. L. T. 397; 18 M. L. J. 298, referred to.

If the purchaser does not redeem the puisne mortgagee who has obtained by redemption the right of the first mortgagee, the properties may be sold, the mortgagees paid, and the balance paid to the purchaser, as the representative of the mortgagor.

Vencatramana Iyer v. *Gompertz*, 31 M. 425; 3 M. L. T. 397; 18 M L. J. 298, *Nagammal* v. *Vencatagiri Aiyar*, 8 M. L. J. 29 , referred to.

The puisne mortgagee has got a right to sell the property even after sale by the first mortgagee, but he can exercise that right only after redeeming the first mortgage. The prior mortgagee cannot be deprived of his right to require the puisne mortgagee to redeem him, and in default, to enforce his rights under his instrument of mortgage by sale or foreclosure, and he may be allowed to do this even as defendant in a mortgage suit.

Rangaya Chettyar v. *Parthasarathy Naicker*, 20 M. 120, explained.

Second appeal against the decrees of the District Court of Salem in Appeal Suits Nos. 228 and 121 of 1907 and 26 of 1908, presented respectively against the decree of the Court of the Additional District Munsif of Salem in Original Suit No. 114 of 1907 and the decisions of the Court of the Head Quarters Deputy Collector of Salem in Summary Suits Nos. 6 of 1907 and 2 of 1908.

Mr. *S. Sreenivasa Aiyangar*, for the Appellants.

Mr. *T. Narasimha Iyengar*, for the Respondent.

JUDGMENT.

IN S. A. No. 1789 OF 1908.

The lands in suit were hypothecated to Lakshmana Goundan in 1877. He brought a suit (O. S. No. 8 of 1881) to enforce that mortgage, obtained a final decree in 1890 and purchased it in 1895. The plaintiff is his assignee: he obtained possession in 1897. He now sues the defendant for confirmation of and injunction against, any disturbance of his possession.

The defendant obtained a simple mortgage of the same lands in 1880. He sued in O. S. No. 12 of 1886 to enforce his claim, obtained a decree for the sale of the hypothecated property subject to the lien of Lakshmana Goundan, the prior mortgagee, who was the 8th defendant in the suit, brough

the equity of redemption to sale in 1905. He says he got possession in 1906.

The defendant was not a party to the prior mortgagee's O. S. No. 8 of 1881. In the District Court the question was raised whether the lands in suit were included in the mortgage of 1877. It was disallowed by that Court and we see no reason to allow it.

On these facts it is contended on behalf of the defendant, who is the appellant, before us, that the plaintiff has no right to the possession of the property against him and he is not, therefore, entitled to the declaration and injunction sought for.

In *Venkatanarsammah* v. *Ramiah* (1) there were sales in execution of decrees obtained by two simple mortgagees; neither made the other a party to his suit. It was held by Innes and Kernan, JJ., that the plaintiff, who was the prior mortgagee and first sold the property, was entitled to possession under the sale: the reason being that after the first sale to the plaintiff there was no right or interest in the mortgagors left to sell and the purchaser under the second sale, therefore, acquired no interest against the first mortgagee-purchaser. It was also held that the defendant's interest as mortgagee was not affected by the sale to the plaintiff. It will be observed that neither the plaintiff nor the defendant was a usufructuary mortgagee, and that, though the plaintiff was the prior mortgagee, nothing turned on the priority of the mortgage, but the priority of the sale determined the right to possession. It was accordingly held by Benson and Moore, JJ., following this ruling, that a puisne simple mortgagee who first sold the property and obtained possession was entitled to retain possession against a prior mortgagee whose sale was subsequent in time, neither mortgagee being a party to the other's suit. *Akatti Moidin Kutty* v. *Chirayil Ambu* (2). The decisions in *Nanack Chand* v. *Teluckdye Koer* (3) and *Dirgpal Lal* v. *Bolakee* (4) were also cited therein in support of this view. These decisions were followed by the Chief Justice and Abdur Rahim, J., in *Kutti Chettiar* v. *Subramania Chettiar* (5). The ground of decision is thus, in my opinion, correctly stated: "Both the mortgagees have an equal right to sell the property, and once it is sold at the instance of one mortgagee, there is no further saleable interest left in the judgment-debtor to be sold again." It was not argued before us that these cases were wrongly decided. It is not difficult to show that they are based on perfectly sound reasons. The first simple mortgagee has a right to sell the mortgagor's interest. The latter is entitled to carve out an interest in favour of any persons by granting him a simple mortgage which carries with it the right of redeeming the first mortgage. The mortgagor's interest which the first mortgagee is entitled to sell is thus vested by the creation of the subsequent incumbrance in such mortgagee and the mortgagor. The prior mortgagee thus becomes entitled to enforce his claim against the mortgagor and the puisne incumbrancer, and he is entitled in a suit brought for sale to compel the puisne mortgagee to exercise his right to redeem him or in default to sell the entire mortgagor's interest as it stood at the date of his mortgage. But if he does not make the second mortgagee a party to his suit for sale, he cannot thereby affect the interest vested in him as against himself, but there is nothing to prevent him from enforcing his claim against the residue of the interest that remains in the mortgagor after the creation of the second incumbrance and continues in him at the time of the sale, and such sale is valid to convey that interest. The second mortgagee has the same right to sell the mortgagor's interest. As both of them are entitled to do so, the first sale puts an end to the mortgagor's interest and conveys it to the purchaser. If, therefore, the first mortgagee sells the property before the puisne mortgagee, then there is nothing for the latter to sell. And in the case before us the plaintiff's assignor, the first mortgagor, first sold the equity of redemption in 1895 and obtained possession in 1897. When the defendant, therefore, sold the property in 1905, there was no interest vested in the mortgagor for him to sell and the sale, therefore, conveyed no interest as against the mortgagee, Lakshmana Goundan, who first purchased and who by his purchase became entitled to the possession of the property which was vested in

(1) 2 M. 108.
(2) 26 M. 486.
(3) 5 C. 265: 4 C. L. R. 358.
(4) 5 C. 269.
(5) 32 M. 485; 19 M. L. J. 728; 4 Ind. Cas. 1077.

the mortgagor, neither of the mortgages being usufructuary.

It was contended that as Lakshmana Goundan was a party to O. S. No. 12 of 1886 it is not open to him to deny the validity of the sale in that suit, and also that he took the property as purchaser in execution of his own decree subject to the result of that suit.

The plaintiff's claim is clearly not *res judicata*. Lakshmana Goundan's right as mortgagee was preserved by the decree. He had not then purchased the property and it cannot, therefore, be successfully contended that by reason of that decree he cannot rely upon his purchase, which gives him the right to possession; nor is there anything in the judgment or decree which precluded him from enforcing his lien for which he had already brought a suit.

Lakshmana Goundan's purchase is not affected by the doctrine of *lis pendens*. On this question there was no serious attempt to distinguish this case from the decision of the Chief Justice and Abdur Rahim, J., in *Kutti Chettiar* v. *Subramania Chettiar* (5). It was then argued that according to the opinion of the Full Bench in *Mulla Veetil* v. *Achutan Nair* (6) the defendant's rights are in no way affected by the proceedings and sale in O. S. No. 8 of 1881 to which he was not a party: he had, therefore, the right to sell the equity of redemption: he had sold that right and is, therefore, the person rightfully entitled to possession. It will be observed that this contention deos not turn upon the question whether the first mortgagee was a party to the suit of the puisne mortgagee; because he is not a necessary party to the suit which the puisne mortgagee is entitled to bring to sell the equity of redemption.

This was not the question referred to the Full Bench for their opinion. The facts did not raise it. In that case the puisne mortgagee, the first defendant, was entitled to possession as a usufructuary mortgagee and the plaintiff, the purchaser of the equity of redemption in execution of the prior simple mortgagee's decree for sale, did not, therefore, obtain the right to possession. The only question which the learned Judges considered of sufficient importance to refer to the Full Bench was whether the plaintiff was entitled to a decree for possession. The learned Pleader for the plaintiff, the respondent in that case, however, argued that the first defendant had lost his right to possession by the plaintiff's purchase in execution of his decree, and that he was only entitled to redeem the first mortgage; and that if he failed to do so he must surrender possession, and he also argued that, by reason of his purchase, he acquired the right of foreclosure. There is scarcely any Madras authority in support of the *view* that a puisne mortgagee in possession under his mortgage loses his right to such possession and is bound to surrender his property to a purchaser in execution of a decree enforcing a prior mortgage, in a suit to which he was not a party. But in the judgment other questions are also discussed, and it was apparently decided that a puisne mortgagee may sue the purchaser of the equity of redemption without redeeming the prior mortgage; and it is, therefore, contended that the defendant is entitled to sue the plaintiff for the sale of the equity of redemption purchased by him, and, as the plaintiff would not be entitled to retain possession after such sale, his suit must be dismissed. Perhaps, it is sufficient to point out in reply that, if the defendant has got the right to sue the plaintiff as purchaser, he has not yet exercised that right, his prior suit having been instituted before the purchase. The plaintiff was a party to it only as mortgagee, and according to the decisions of this Court an unnecessary party. Mr. Justice Innes has expressed a doubt in *Venkatanarsammah* v. *Ramiah* (1) whether the second mortgagee could bring a fresh suit. The judgment in *Muhammad Usan Rowthan* v. *Abdulla* (7) has been stated by the Full Bench to lay down the law correctly to the effect that a second suit will not lie. However that may be, till the defendant enforces his rights, obtains the right to possession by sale of such right now vested in the plaintiff, the claim of the latter must be upheld.

This is sufficient to dispose of this contention.

But it may also be pointed out that the cases above referred to have not been dis-

(6) 9 Ind. Cas. 513; 2 M. W. N. 165; 21 M. L. J, 213.

(7) 24 M. 171.

sented from: on the other hand, they have been cited with approval as laying down the law that the equity of redemption becomes vested in the purchaser in execution of the mortgage-decree, and that it could not be sold again by the puisne mortgagee as by the defendant in this case. Any general observations, therefore, that the mortgagee has the right to sell the property must be taken subject to the limitations imposed by the principles laid down in these cases. But it is true there are many observations which lead to the opposite inference, that is, that it is open to the puisne mortgagee to sue for the sale of the property or equity of redemption without redeeming the prior mortgagee. This seems opposed not only to the principles laid down in these cases. but also to almost all, if not all, the decisions of this Court, and the following considerations have to be borne in mind when the question arises for final decision.

Either the prior mortgagee or the puisne mortgagee may sell the property to enforce his claim, and the purchaser under the first sale acquires a title to hold it against the purchaser in execution of a decree to enforce the other mortgage. This seems to lead to the necessary inference that after the purchase the other mortgagee is entitled to sue the mortgagor for sale, though he was not a party to the proceeding which deprived him of his right to sue. The right to sell was only against the mortgagor and not against the prior mortgagee—Order XXXIV, rule 1. The purchaser takes the right which the prior mortgagee and the mortgagor could convey to him; he cannot, therefore, be disturbed so long as the first mortgagee's right to convey the title vested in himself and the mortgagor subsists, that is, until the first mortgage is redeemed. This right to redeem the first mortgage is, therefore, the right vested in the puisne mortgagee. If the second mortgagee again could sell the equity of redemption subject to the claim of the prior mortgagee, the latter could again sell it—each mortgagee might go on *ad infinitum* without making the other a party and it was, therefore, held by our High Court in a course of decisions that in such cases the puisne mortgagee's proper course is to redeem the first mortgage. *Krishnam* v. *Ghadayan Kutti Haji* (8) and *Muhammad Usan Rowthan* v. *Abdullah* (7) followed in later decisions hereinafter referred to. Then, the purchaser in execution of the decree on the first mortgage may redeem the two mortgages vested in the same person: See *Sivaraman Chetty* v. *Kuppumuthu Chetty* (9), (Boashyam Aiyangar and Moore, JJ.,) *Goverdhana Doss* v. *Veerasami Chetti* (10), (Chief Justice and Moore, J., confirming a judgment of Boddam, J.), *Venkataramana Iyer* v. *Gompertz* (11) (Chief Justice and Miller, J.); and if the purchaser does not redeem the puisne mortgagee who has obtained by redemption the right of the first mortgagee, the properties may be sold, the mortgagees paid and the balance paid to the purchaser, as the representative of the mortgagor: See *Venkataramana Iyer* v. *Gompertz* (11) and *Nagammal* v. *Venkatagiri Aiyar* (12). As pointed out by Mr. Justice Shephard in *Muhammad Usan Rowthan* v. *Abdulla* (7), this seems to follow from the decision in *Venkatanarasammah* v. *Ramiah* (1). These cases have not been overruled by the Full Bench and no reasons are given why these decisions should not be accepted as good law. The puisne mortgagee has got a right to sell the property even after sale by the first mortgagee as shown above but he can exercise that right only after redeeming the prior mortgagee. It is clear that the prior mortgagee cannot be deprived of his rights to require the puisne mortgagee to redeem him and in default to enforce his right under his instrument of mortgage by sale or foreclosure, and there is no reason why he should not be allowed to do this even as a defendant in a mortgage suit.

It was argued that the decision in *Rangayya Chettiar* v. *Parthasarathi Naickar* (13), recognises the right of the puisne mortgagee to sue for a sale of the property subject to the prior mortgagee's claim even after it has been sold by the first mortgagee; and as this decision has been declared good law by the Full Bench, the decisions above referred to, as they are inconsistent with *Rangayya Chettiar* v. *Parthasarathi Naickar* (13) should no longer be followed. The de-

(8) 17 M. 17.
(9) 13 M. L. J. 72.
(10) 25 M. 537.
(11) 31 M. 425; 3 M. L. T. 397; 18 M. L. J. 293.
(12) 8 M. L. J. 299.
(13) 20 M. 120.

cree in the case in *Rangayya Chettiar* v. *Parthasarathi Naickar* (13) was that the property which had been already purchased by the defendants Nos. 3 to 6, the prior mortgagees in execution of their decree, should be put up to sale, and "if the property be not bid for more than the amount due to them" the sale should be stopped and the defendants Nos. 3 to 6 should by virtue of their purchase hold the property and the suit of the puisne incumbrancer be dismissed, otherwise out of the sale amount the mortgagees to be paid in their order. This decree was confirmed by the High Court. It will be observed that the first mortgagee's purchase was to stand good or the properties were to be sold only on condition of his mortgage-debt being discharged. There was no sale *subject* to his mortgage. Certain observations in the judgment are apt to mislead as pointed out by the same learned Judge who delivered that judgment in his later judgment in *Muhammad Usan Rowthan* v. *Abdulla* (7), nor is this case followed in *Venkataramana Iyer* v. *Gompertz* (11), on this point as erroneously stated in the Full Bench judgment. It was followed only with reference to the question of improvements. For these reasons, we would dismiss the second appeal with costs.

IN S. A. Nos. 1790 AND 1791 OF 1908.

It is conceded by the Pleaders that, in accordance with the judgment in Second Appeal No. 17-9 of 1908, these second appeals also must be dismissed. They are accordingly dismissed with costs.

Appeals dismissed.

(s. c. 13 C. L. J. 339.)

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 405 OF 1893.

June 22, 1894.

Present:—Mr. Justice Norris and Mr. Justice Banerjee.

BHUBAN MOHUN MAITRA—DEFENDANT—APPELLANT

versus

GIRISH NARAIN MOONSHI AND OTHERS PLAINTIFFS—RESPONDENTS.

Patni Regulation (VIII of 1819), ss. 15, 27—Sale for arrears—Confirmation by Court, if necessary—Suit to set aside sale—Limitation, starting point of—Limitation Act (XV of 1877), Sch. II, Art. 12.

Article 12 of the Second Schedule of the Limitation Act of 1877 means that time begins to run from the date of the confirmation of the sale, only in those cases in which such confirmation is required by the law under which the sale is held, and in other cases from the date on which the sale becomes otherwise final and conclusive by the law under which it is held.

Therefore, since sales under Regulation VIII of 1819 of *Patni* tenures for arrears of rent do not require confirmation, time begins to run from the date when the sale becomes final and conclusive, that is, on payment by the purchaser of the full amount of the purchase-money. And a suit to set aside *patni* a sale should be brought within one year from the date when the full amount of the purchase-money was paid by the purchaser.

Appeal from the decree of the District Judge, of Rajshahi, dated the 28th December 1892, reversing that of the Subordinate Judge, Rajshahi, dated the 30th December 1891.

Sir *Griffith Evans* Babus *Mohini Mohun Roy*, *Kishori Lal Sarkar*, *Promotha Nath Sen*, for the Appellant.

Mr. *Phillips*, Babus *Sarada Charan Mittra* and *Golap Chandra Sarkar*, for the Respondent.

JUDGMENT.—The facts of this case, so far as it is necessary to state them, are as follows:

The plaintiff was an eight-anna *patnidar* under the defendants Nos. 1 to 4. The *patni* was sold on the 15th November 1889, under the provisions of Regulation VIII of 1819, for current arrears of rent, and was purchased by the defendant No. 5 who, on the lot being knocked down to him, paid fifteen per cent. of the purchase-money as required by section 9 of the Regulation; the balance of the purchase-money was paid on the 21st November, 1889.

A proceeding of the Collector, dated the 2nd December, 1889 (Exhibit No. 4 on the record), recites the sale, the payment of fifteen per cent. of the purchase-money on the date thereof, and the payment of the balance on the 21st November, 1889, and directs the granting of the certificate of the payment of the entire purchase-money, which, under section 15 of the Regulation, a purchaser is entitled to receive, to the defendant No. 5. Whether the certificate was, as a matter of fact, ever handed to the defendant No. 5 or not, does not appear: no such document or copy thereof is on the record.

On the 1st December 1890, the plaintiff instituted a suit in the Court of the Subordinate Judge of Rajshahaye for the setting

aside of the sale on the ground of various irregularities and illegalities in the conduct thereof. The defendant pleaded limitation, contending that the sale became final and conclusive on the 21st November, 1889, when the balance of the purchase-money was paid and that, under Article 12 of the second Schedule of the Limitation Act, the suit was barred. The Subordinate Judge decided the issue of limitation in favour of the defendants, and on this and other grounds dismissed the plaintiffs' suit; he deals with the point of limitation as follows:—

"According to Article 12, Schedule II, of Act XV of 1877, one year is the period of limitation for a suit to set aside the sale of a *patni taluk*, sold for current arrears of rent. This Article has four clauses relating to sales taking place under different circumstances. Clause (*a*) relates to a sale in execution of a decree of the Civil Court; clause (*b*) to a sale in pursuance of a decree or order of a revenue officer; clause (*c*) to a sale for arrears of Government revenue or for any demand recoverable as such arrears; and clause (*d*) to a sale of a *patni taluk* sold for current arrears of rent."

"I will now consider whether that Article bars the prayer for setting aside the sale in this case. From Exhibit 4 filed by the plaintiff it appears that the sale took place on the 15th November, the balance of the purchase-money was deposited on the 21st November, and the order confirming the sale was passed by the Collector on the 2nd December, 1889. The plaint was filed on the 1st December, 1890. The defendants contend that the time from which the period of limitation began to run was 21st November, but the plaintiff contends that it began to run from 2nd December. It is argued by the defendants that there is no necessity for confirming a sale under Regulation VIII of 1819; that the sale became final by operation of law; that the confirming Robakari (Exhibit 4) is surplusage; and that even if it is not surplusage, according to the printed form it should have borne the date of the payment of the balance of the purchase-money (*vide* original). The words of the first clause of section 15 of the Regulation are: "So soon as the entire amount of the purchase-money shall have been paid in by the purchaser at any sale made under this Regulation, such purchaser shall receive from the officer conducting the sale a certificate of such payment." There is no provision in the law for confirming such a sale and accordingly we find in the third column of Article 12, Schedule II, of the Limitation Act, the words: "or would otherwise have become final and conclusive had no such suit been brought." As regards sales in execution of a decree of a Civil Court we have a distinct provision for confirming them, but there is none in reference to the sale of a *patni taluk* for current arrears. Under the circumstances, I hold that the time began to run from the 21st November and not from the 2nd December 1889, and, therefore, the claim to set aside the sale is barred by limitation."

The plaintiff appealed, and on appeal, the District Judge has reversed the Subordinate Judge's finding on the question of limitation, and has decreed the suit. The District Judge's judgment on the question of limitation is as follows: "Clause (*a*) of Article 12 of Schedule II of the Limitation Act runs as follows:—"To set aside the sale of a *patni taluk* sold for current arrears of rent one year from the date when the sale is confirmed or would otherwise have become final and conclusive had no such suit been brought." The sale took place on the 15th November 1889, the whole of the purchase money was paid on the 21st November. The formal order confirming the sale was recorded on the 2nd December 1889, and the suit was instituted on the 1st December 1890. In Regulation VIII of 1819 there is no provision for recording an order confirming the sale, as there is in the Civil Procedure Code, section 312, so the Court below argues that the part when the sale is confirmed is not applicable to this case, it being applicable to cases where the sale has to be confirmed under the law, the latter part, *viz.*, "when the sale would have become final and conclusive had no such suit been brought" being applicable to this case. The point is not free from difficulty. Section 15 of the Regulation says,—"So soon as the entire amount of the purchase-money shall have been paid in by the purchaser at any sale made under this Regulation, such purchaser shall receive from the officer conducting the sale a certificate of such payment," and then it says how the purchaser will proceed to perfect his title and to obtain

possession. The entire amount or the purchase-money had been paid on the 21st November, but the order for the issue of the certificate was made on the 2nd December, and the same order confirmed the sale (Exhibit No. 4). The order recites that the whole of the purchase-money has been paid on the 21st November. That any other certificate of payment was granted has not been shown. If it be held that, notwithstanding the fact that the sale was actually confirmed by the formal order of the 2nd December, the sale had become final and conclusive on the purchase-money being paid on the 21st November, the suit must be held to have been barred by reason of its having been brought after the expiration of one year from the 21st November. If, on the other hand, it be held that the plaintiff ought to have one year from the date when the sale was, as a matter of fact, confirmed, he will be in time as the sale was confirmed on the 2nd December It has not been shown under what rule the order confirming the sale was recorded. The learned Pleader for the respondent shows a printed form of such order and argued from the word *adya*, *i.e.*, this day, used in that form that it is evidently intended that the certificate of payment, such as is contemplated by section 15 of the Regulation, is to be issued on the very day that the purchase-money has been paid. No doubt it is so, but a particular form will not affect the law unless it is shown that the form was prescribed by authority and the law empowered that authority to prescribe that form. It is certain that under the law the purchaser is entitled to a certificate of payment, and the law says that such certificate is to be issued so soon as the entire amount of the purchase-money shall have been paid. It is equally certain that no such certificate was issued before the 2nd December. But after all a certificate of payment is only evidence of payment. The law does not lay down definitely that such certificate must be issued on the day the money is paid. All that it says that so soon as the money has been paid the purchaser shall receive the certificate. So soon, *i.e.*, soon after the payment. In this case it was ordered to be issued 11 days after the money was paid. Now, whether the law requires the sale to be confirmed or not, the practice has been to record an order confirming the sale as the form indicates, and the law says that a suitor will have one year's time from the date the sale has been confirmed. The law of limitation is a law restrictive of the rights of parties, it must be interpreted literally. It does not say that only in such cases where under the law the sale has to be confirmed that the party is to get one year from the date of confirmation but it says one year from the date that the sale is confirmed, and we find that the sale was, as a matter of fact, confirmed on the 2nd December, so I do not see any reason why the plaintiff should not be entitled to have one year from the 2nd December. I hold that the suit is not barred by the one year's rule of limitation."

In second appeal it has been argued on behalf of the auction-purchaser that the District Judge was wrong in holding that suit was not barred by limitation, and that time began to run against the plaintiff from 2nd December 1889, that inasmuch as an auction-purchaser under Regulation VIII of 1819 is entitled under section 15 to get a certificate of payment of the purchase-money immediately on his paying the amount, the Judge should have held as a matter of law that the payment of the full purchase-money was as good as the receipt of the certificate and had the effect of making the sale final and conclusive on the day the payment was made, and that the Judge should have held that there being no provision of law requiring a formal order of confirmation of the sale, the order of the Collector of 2nd December, 1889, did not prevent limitation beginning to run against the plaintiff from the date of the payment of the balance of the purchase-money.

The first question we have to determine, is what is the true construction of Article 12 of the second Schedule of Act XV of 1877. Is it to be construed as meaning, that time began to run from the date of the confirmation of the sale in all cases in which, as a matter of fact, there has been such a confirmation, even though as a matter of law no such confirmation is necessary; or, on the other hand, is it to be construed as meaning that time begins to run from the date of the confirmation of

the sale only in those cases in which such confirmation is required by the law under which the sale is held, and, in other cases from the date on which the sale becomes otherwise final and conclusive by the law under which it is held.

If the former construction is the correct one, the decision of the lower Appellate Court is right, for the sale was confirmed on 2nd December, 1889, and this suit was brought on 1st December 1890. If the latter construction is correct, a further question arises, *viz.*, since sales under Regulation VIII of 1819 do not require confirmation, when does a sale thereunder become final and conclusive if no suit is brought to set it aside? We are of opinion, that the latter construction is the correct one.

We are of opinion that the words in the third column of Article 12 "when the sale is confirmed," must be held to refer to the time of confirmation of the sale as the starting point for limitation only in those cases in which such confirmation is required by the law under which the sale is held to make it final and conclusive; and that the remaining words in the third column "or would otherwise have become final and conclusive had no such suit been brought" refer to those cases in which no confirmation is required by the law under which the sale is held to make them final and conclusive, but which become final and conclusive by efluxion of time (see section 27 of Act XI of 1859) or immediately on the sale taking place. In this view we must hold that the lower Appellate Court was wrong in reckoning time from 2nd December 1889, the date of the confirmation of the sale. Time began to run from the date when the sale became final and conclusive; and we have now to determine what that date was. In the absence of any agreement to the contrary or of any statutory restriction, as sale of moveable or immoveable property becomes final and conclusive on the payment by the purchaser to the seller of the full amount of the purchase-money.

No special agreement is alleged in this case, and the Regulation under which the sale was held imposes no restriction. We must, therefore, hold that the sale became final and conclusive on 21st November 1889, when the balance of the purchase-money was paid. This view is supported by section 15 of the Regulation.

The learned Counsel for the respondents argued that as section 15 of Regulation VIII of 1819 requires the purchaser to take a certificate of payment, and as no such certificate was obtained in this case, the suit cannot be held to be barred by limitation. We do not consider this argument sound. In the first place, section 15 does not render the taking of a certificate necessary for the completion of the sale. And in the second place, even if it does render a certificate of payment of the purchase-money necessary for certain purposes such as obtaining mutation of names in the *zemindar's* office, that does not affect the present question. The sale must be held to have become final and conclusive so soon as the purchaser became entitled to obtain such certificate, that is, so soon as the entire amount of the purchase-money was paid. And the suit, having been brought more than one year after the date of such payment, when the sale became final and conclusive, must be held to be barred by limitation.

The appeal must, therefore, be decreed, the decree of the lower Appellate Court set aside and that of the first Court restored, with costs in this Court and in the Court of appeal below.

Appeal decreed.

CALCUTTA HIGH COURT.

SECOND CIVI APPEAL NO. 2263 OF 1908.

February 27, 1911.

Present: Mr Justice Mookerjee and Mr. Justice Teunon.

RAMSONA CHOUDHURANI AND OTHERS —PLAINTIFFS—APPELLANTS

versus

NABAKUMAR SINHA CHOUDHURI AND OTHERS—DEFENDANTS—RESPONDENTS.

Patni Regulation (VIII of 1819), ss. 5, 8 (2), 14—Sale under Patni Regulation not void but voidable—Title of auction-purchaser, whether can be impeached collaterally after expiry of the period for suit to set aside sale—Costs.

H., a *patnidar*, sold one-third share of the *patni* to defendant No. 1 who again conveyed it to defendant No. 2. *H.* then sold the remaining two-thirds share to defendant No. 4. The transferees did not register their names in the *zemindar's sherista* and there was default in the payment of rent to the *zemindar*, and the *patni* was sold under section 8, clause (2), of the Patni Regulation in 1894 and defendant No. 5 became

RAMSONA *v.* NABAKUMAR SINHA.

the auction-purchaser. Defendant No. 4 then brought a suit for reversal of the entire sale under section 14 of the Regulation against the auction-purchaser and the *zemindar*, and made the original *patnidar H.* and also the purchaser of the one-third share, defendant No 1, parties to the suit. A compromise was effected in that suit between the then plaintiff and the auction-purchaser, and the latter conveyed to the former a two-thirds share of the *patni*. The suit was then dismissed with costs in favour of the *zemindar*. The auction-purchaser then sold his remaining one-third share to the present plaintiff, who being unable to get possession brought this suit for possession in 1906. The defence was that the sale under the Patni Regulation was void and, therefore, no title passed to the vendor of the plaintiff or to the plaintiff:

Held, that a sale under the Patni Regulation is not void but voidable; that so long as the *patni* sale stood unreversed and as any suit if now commenced would be barred, the title of the auction-purchaser could not be impeached collaterally, and that the suit must be decreed.

Obiter:—In deciding the question of costs, a Court is entitled to consider not merely the conduct of the parties in the actual litigation, but also matters which led up to the litigation.

Appeal from the decree of the First Sub-Judge of Dacca dated June 17th, 1905, affirming that of the First Munsif of Naraingunge, dated May 24th, 1907.

Babu *Harendra Narain Mitra*, for the Appellants.

Babus *Jogesh Chandra Roy* and *Prokash Chandra Mozumdar*, for the Respondents.

JUDGMENT. The subject-matter of the litigation, which has resulted in this appeal, is a one-third share in a *patni taluk* created on the 19th July 1888 by Nawab Asanulla as *zemindar* in favour of one Hara Lochan Das. On the 10th August 1889, the lessee transferred to the first defendant Sonamala, the one-third share now in dispute which was subsequently conveyed by Sonamala on the 2nd January 1897, to the second defendant Nabakumar Singh. On the 14th April 1893, Hara Lochan transferred the remaining two-thirds share to Probhat Chandra Nag, now represented by his infant son, the fourth defendant, Prokash Chandra Nag. It does not appear, however, that either of the transferees got his name registered in the books of the landlord under the provisions of section 5 of the Patni Regulation of 1819. Default was made in the payment of rent to the *zemindar*, and the result was that the *patni* was sold on the 14th May 1894, under section 8, clause (2), of the Patni Regulation. The fifth defendant, Basantakumar Sen, was declared the purchaser at this sale for a sum of Rs. 51. On the 19th May, 1895, Probhat Chandra Nag, the transferee of a two-thirds share, commenced an action for reversal of the sale under section 14, against the purchaser Basantakumar and the *zemindar* Nawab Asanulla. The original *patindar* Hara Lochan, as also the transferee of the one-third share, the present first defendant Sonamala, were joined as parties defendants. The plaintiff, Probhat Chandra, asked for reversal of the entire sale, as he was bound to do upon the principle explained in the cases of *Unnoda* v. *Erskine* (1), *Soresh* v. *Akkori* (2) and *Ram Charan* v. *Drobomoyee* (3) that the sale of a *patni* cannot be declared good or bad in part. The plaintiff further stated that he had failed to induce his co-sharer Sonamala to join as a co-plaintiff, but had no objection if, upon her application, she was transferred from the category of defendant to that of plaintiff. The suit was resisted by the purchaser Basanta Kumar as well by the *zemindar* Nawab Asanulla; they denied that the sale was in any way irregular, and also suggested that the Court had no jurisdiction to entertain the suit, as the value of the disputed property exceed the limits of its pecuniary jurisdiction. During the pendency of this litigation the plaintiff came to terms with the purchaser, and the result was that on the 23rd November 1895, the purchaser executed a conveyance in favour of Probhat Chandra in respect of a two-thirds share of the *patni* for a sum of Rs. 300. This was intimated to the Court and the plaintiff declined to proceed with the suit, which was thereupon dismissed with costs in favour of the *zemindar*. On the 11th August 1899, the auction-purchaser, Basanta Kumar, transferred the one-third share, which still remained with him, in favour of the plaintiffs in the present litigation. The plaintiffs were unable to obtain possession, and commenced this action on the 26th February 1906, for declaration of title by purchase and for recovery of possession. The principal defendants resisted the claim on the ground that the sale under the Patni Regulation was void as contrary to law, and that, consequently, the plaintiffs had acquired no title under their purchase from the purchaser at that sale. In answer to this contention, it was argued on behalf of the plaintiffs that so long as the *patni* sale stood unreversed, their title could not be impeached

(1) 12 B. L. R. 370 (2) 28 C. 746.
(3) 17 W. R. 122.

collaterally. The Courts below have overruled this contention, and have treated the suit as if it were one brought by the *patnidars* for reversal of the sale. They have found that the plaintiffs had failed to prove that the notices required by the Regulation, had been duly served and have dismissed the suit on the ground that they had not acquired a valid title by their purchase. The plaintiffs have appealed to this Court, and on their behalf the decision of the Subordinate Judge has been assailed on the ground that as the *patni* sale has not been set aside in the manner provided by the Regulation, and as any suit now commenced for the purpose would be *prima facie* barred by limitation, the title of the plaintiffs cannot be successfully impeached, and there is, in substance, no valid answer to their claim. On behalf of the respondents, it has been argued that the validity of the *patni* sale may be collaterally impeached in the present suit as constituted, and that the plaintiffs are not entitled to succeed till they establish that they have an unimpeachable title. The question raised is one of considerable importance and apparently one of first impression, but we feel no doubt as to the manner in which it ought to be answered in view of well-recognised principles.

Section 14 of the Regulation VIII of 1819 provides that it shall be competent to any party, desirous of contesting the right of the *zemindar* to make the sale, whether on the ground of there having been no balance due or any other ground to sue the *zemindar* for the reversal of the sale, and upon establishing a sufficient plea to obtain a decree with full costs and damages, the purchaser should be made a party in such a suit, and upon decree passing for reversal of the sale, the Court shall be careful to indemnify him against all loss at the charge of the *zemindar* or person at whose suit the sale may have been made. Article 12 of the second Schedule of the Limitation Act provides that a suit to set aside a sale of a *patni taluk*, sold for current arrears of rent, must be instituted within one year from the date when the sale would become final and conclusive had no such suit been brought. These provisions plainly indicate that the sale is treated not as void but as voidable. A sale under Regulation VIII of 1819 does not require to be confirmed. Such a sale becomes final and conclusive when the whole of the purchase-money has been paid under section 9 of the Regulation, and the period of one year runs from the date of such payment [*Bhuban* v. *Girish* (4)]. It has not been suggested before us that arrears, for the recovery of which the sale was held at the instance of the *zemindar*, were not due, but even if such an allegation were made, it would be worthy of note that section 14 of the Patni Regulation contemplates a suit for reversal of the sale on the ground that no balance was due; consequently, in such a contingency, the question might arise whether the principle of the decisions in *Baij Nath* v. *Lalla Seetal Pershad* (5); *Harkhoo* v. *Bunsidhur* (6) and *Balkishen* v. *Simpson* (7), namely, that a sale for arrears of revenue when no arrears are due is not a legal sale because the Collector acts entirely without jurisdiction, would be applicable to *patni* sales held when no balance was due to the *zemindar*. In any event when a *patni* sale is impeached on the ground that the notice required by the Regulation have not been duly served, the sale must be treated as a voidable sale capable of reversal in a suit properly constituted and commenced under section 14 of the Patni Regulation. This view receives considerable support from the principle which underlies the decisions of the Judicial Committee in *Tasadduk Rasul* v. *Ahmed Husain* (8), *Gobinda Lal* v. *Ram Janam* (9) and *Malkarjun* v. *Narhari* (10). These decisions recognise the important doctrine that the omission to serve statutory notices, though it may affect the validity of a sale and render it liable to be reversed in an appropriate proceeding, does not render the sale a nullity which may be ignored by the person whose property has been sold. This principle may not be of universal application, as indicated by the decision of a Full Bench of the Court in *Purna Chandra Chatterjee* v. *Dinabandhu Mukerjee* (11), where it was ruled that the omission of the Collector to serve a notice under section 10 of the Public Demands Recovery Act of 1895, destroys his jurisdiction to hold the sale. In the case before us, how-

(4) 13 C. L. J. 339; 10 Ind. Cas. 87.
(5) 2 B. L. R. 1(F. B.); 10 W. R. 66.
(6) 25 C. 876; 2 C. W. N. 360.
(7) 25 C. 883; 25 I. A. 151; 2 C. W. N. 513.
(8) 21 C. 66; 20 I. A. 176.
(9) 21 C. 70; 20 I. A. 165.
(10) 25 B. 337; 27 I. A. 216.
(11) 34 C. 811; 2 M. L. T. 371; 5 C. L. J. 696.

ever, it is impossible for us to hold that the sale was a nullity, because the notices required by the Regulation were not proved to have been duly served. But reliance was placed by the learned Vakil for the respondents upon the cases of *Maharaja of Burdwan* v. *Tarasundari* (12); *Maharaja of Burdwan* v. *Kristo Kamini* (13); *Maharani of Burdwan* v. *Krishna Kamini* (14); *Mahomed Zamir* v. *Abdool Hakim* (15); *Surnomoyi* v. *Girish Chunder* (16); *Hurro Dayal* v. *Mahomed Gazi* (7); *Raj Narain* v. *Anantala* (18); *Rajoy Chand* v. *Atulya* (19); *Bhugwan* v. *Sudder Ally* (20); *Baikantha Nath* v. *Mahatab Chand* (21); *Haranath* v. *Jagannath* (22); *Raghab* v. *Brojonath* (23) and *Bejoy Chand* v. *Amritalal* (24) to show that compliance with the provisions of the Regulation, as to the issue and service of the regulation notices, is essential for the validity of the sale. These cases are clearly distinguishable; they merely show that the validity of the sale is affected by the failure of the *zemindar* to comply with the provisions of the Regulation, and the sale is liable to be annulled in a suit instituted under section 14 but they do not show that the sale may be treated as a nullity.

The learned Vakil for the respondents, however, strenuously contended that upon general principle, the validity of a statutory sale may be attacked collaterally in a suit for ejectment brought by the purchaser or his representative in interest, and in support of this view, he relied upon the analogy of the doctrine recognised in some judicial decisions that an objection to the validity of an execution sale may be raised by way of defence in a regular suit although the objection is one within the scope of section 244 of the Civil Procedure Code of 1882 *Bhiram Ali* v. *Gopikanth* (25); *Chandra Mani* v. *Halijennessa* (26); *Durga Charan* v. *Karamat Khan* (27); *Thathu* v. *Kondu* (28) and *Venkataramanachariar* v. *Meenakshisundaramaiyee* (29). In answer to this argument, it may be pointed out that the doctrine upon which reliance is placed has not uniformly been accepted in this Court [*Dwarka Nath* v. *Tarini Sankar Roy* (30); *Durga Charan* v. *Kali Prasanna* (31) and *Murulla* v. *Burulla* (32)]; the matter is, indeed, by no means free from difficulty, and when it arises directly for consideration it may require careful examination. In any event, the application of the doctrine would *prima facie* be limited by the conditions imposed by section 47 of the Civil Procedure Code of 1908, which provides in sub-section (2) that the Court may, subject to any objection as to limitation or jurisdiction, treat a proceeding under that section as a suit or a suit as a proceeding, and may, if necessary, order payment of any additional Court-fees. The restrictions indicated show conclusively that there are weighty reasons why the validity of the sale should not be allowed to be impeached collaterally in the present suit. In the first place, in a suit for reversal of the sale, the *zemindar* is a necessary party as is manifest from the provisions of section 14 of the Regulation. In the second place, as the validity of a *patni* sale must be challenged in its entirety, the jurisdiction of the Court in which the suit for reversal is instituted, must be determined with reference to the value of the entire *patni*, whereas in a suit for possession of a share of the *patni taluk* by the representative of the purchaser under the Regulation, it is the value of the share in controversy which determines the jurisdiction of the Court. In the third place, if a suit for reversal of the sale were now to be commenced, it would obviously be successfully met by the plea of limitation, because even if the defendants as plaintiffs in such a suit sought to avail themselves of the provisions of section 14 of the Limitation Act, for exclusion of the time during which they have defended the present suit [*Jugutendur* v. *Dindyal* (33) and *Mangulal* v. *Kandhui-*

(12) 9 C. 619; 10 I. A. 19.
(13) 9 C. 931; 13 C. L. R. 427.
(14) 14 C. 365.
(15) 12 C. 67.
(16) 18 C. 363.
(17) 19 C. 699.
(18) 19 C. 703.
(19) 32 C. 953; 3 C. L. J. 46.
(20) 4 C. 41.
(21) 17 W. R. 447.
(22) 11 W. R. 87.
(23) 14 W. R. 489.
(24) 27 C. 308.
(25) 24 C. 355; 1 C. W. N. 396.
(26) 4 Ind. Cas. 168; 9 C. L. J. 464.
(27) 7 C. W. N. 607.
(28) 32 M. 242; 1 Ind. Cas. 221; 5 M. L. T. 248.
(29) 19 M. L. J. 1; 4 M. L. T. 285; 1 Ind. Cas. 193.
(30) 34 C. 199; 11 C. W. N. 513; 5 C. L. J. 294.
(31) 26 C. 727.
(32) 9 C. W. N. 972.
(33) 1 W. R. 310.

Lal (34)], it could be of no avail as against the *zemindar* who is not party to this litigation, while if they relied upon the provisions of section 18, for exclusion of the time during which they had been kept by the alleged fraud of the purchase from knowledge of their right to ask for reversal of the sale, it could be of no avail as against *zimindar*, as the latter is not a party to this suit, and as they themselves must have been apprised of the fraud, if any, before the 29th May 1906, when they filed their written statement. But, even if these difficulties could be overcome, it would have to be shown that the dismissal of the previous suit against the *zemindar* was no bar to a second suit of similar scope and description. Apart, however, from these considerations, we are unable to accede to the contention of the respondents, that, as a matter of principle, the validity of such sales ought to be allowed to be challenged collaterally. The three decisions of the Judicial Committee to which we have already referred [*Tasadak Rasul* v. *Ahmad Husain* (8); *Gobind Lal* v. *Ram Janam* (9) and *Malkarjun* v. *Narhari* (10)] undoubtedly militate against such a theory. It must further be remembered that the tendency of Courts is against collateral impeachment, except in the case of private transactions before they have passed from the domain of contract into that of judgment [*Clough* v. *L. & N. W. Railway Company* (35); *Eastern Mortgage* v. *Rebati* (36); *Baroda* v. *Gajendra* (37)]. For illustrations, reference may be made to *Surnamoyi Dasi* v. *Ashutosh Goswami* (38) and *Gorachand* v. *Makhan* (39), although where a decree obtained by fraud is sought to be used against a person he is allowed, under statutory provisions (section 44 of the Indian Evidence Act) to show the true nature of the decree, notwithstanding that no steps have been taken by him for reversel of the decree [*Nistarini* v. *Nundo Lal* (40) and *Rajib Panda* v. *Lakhan* (41)]. In the absence of such a statutory provision and in the face of an express statutory mode for reversal of the sale, we are not prepared to hold that it ought to be allowed to be impeached collaterally. The general rule is that a judgment rendered by a Court having jurisdiction over the parties and the subject-matter, unless reversed or annulled in some appropriate proceeding, is not open to contradiction or impeachment in respect to its validity, verity, or binding effect, by parties or privies in any collateral action or proceeding. *Whyte* v. *Rose* (42); *Rogers* v. *Wood* (43); *Briscoe* v. *Stephens* (44). The same doctrine has been maintained in the American Courts in numerous cases, amongst which may be mentioned three decided by the Supreme Court of the United States, *Thompson* v. *Whitman* (45); *Dunham* v. *Jones* (46); and *Gunn* v. *Plant* (47); as also the case of *International Wood Company* v. *National Assurance Company* (48). No doubt, the position may be different when a judgment shows on its face that it is void for want of jurisdiction either of the person or the subject-matter; such a judgment may possibly be treated as a nullity and collaterally impeached by any person interested, wherever it is brought in question. But that doctrine has no application to a case like the present where the validity of the sale is plainly intended by the Legislature to be determined in a suit, properly constituted and brought in a Court of competent jurisdiction, within the time allowed by law and against parties sought to be affected by the result. We are, therefore, of opinion that the conclusion is inevitable that the defendants ought not to have been allowed to challenge the validity of the sale in the present suit. We do not, however, decide whether the defendants may not, subject to the law of limitation, have some remedy on the ground of fraud, if fraud is established against the purchaser at the *patni* sale and other persons who may have assisted him in the attainment of his fraudulent object.

The result, consequently, is that this appeal must be allowed, the decrees of the

(34) 8 A. 475 at p. 485.
(35) 7 Ex. 26; 41 L. J. Ex. 17; 25 L. T. 708; 20 W. R. 189.
(36) 3 C. L. J. 260.
(37) 1 Ind. Cas. 289; 9 C. L. J. 383 at p. 393.
(38) 27 C. 714.
(39) 6 C. L. J. 404; 11 C. W. N. 489.
(40) 26 C. 891.
(41) 27 C. 11.
(42) 3 Q. B 493; 61 R. R. 275.
(43) 2 B & Ad 245; 36 R R. 554.
(44) 2 Bing. 213; 27 R. R. 597.
(45) 18 Wallace 458; 21 Law. Ed. 897.
(46) 159 U. S. 584; 40 Law. Ed. 267.
(47) 94 U. S. 664; 24 Law. Ed. 304.
(48) (1904) 105 Am. St. Rep. 288; 99 Me. 415; 59 Atl. 544.

Courts below discharged, and the plaintiff awarded a decree for the one-third share of the *patni taluk* in dispute. In the circumstances disclosed, however, and in view of the great delay in the institution of the suit, we direct each party to bear his own costs throughout the litigation, for in deciding the question of costs, we are entitled to consider not merely the conduct of the parties in the actual litigation, but also the matters which led up to the litigation, - [*Harnett* v. *Vise* (49)].

Appeal allowed.

(49) 5 Ex. D. 307; 43 L. T. 645; 29 W. R. 7.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 37 OF 1908.

February 24, 1911.

Present :—Sir Ralph Benson, Judge, and Mr. Justice Sundara Aiyar.

UMAYURUBHUGUM PILLAI—PLAINTIFF—APPELLANT

versus

MADAVAR VILAGAM VAITHINATHASAWMI KOVIL, THROUGH ITS TRUSTEE, SHANMUGAM PILLAI AND OTHERS—RESPONDENTS.

Limitation Act (XV of 1877), Sch. II, art. 124—Suit for possession of an office—Starting point of limitation—Possession commenced by defendant adversly to plaintiff's right of succession—Absence of appointment to office for a period prior to defendant's nomination—Right of defendant to tack on period to his possession—Limitation.

One *V.* held the office of *Sri Pandaram* of a temple till 1884. In 1884 he relinquished the office and his widow, *T.*, was permitted by the trustee to perform the duties of the office by her proxy *A. A.* continued in office till 1829 when *T.* was dismissed. Afterwards, no one was appointed to the office till 1900 when defendant was appointed. From 1889 to 1900 the trustee had the duties of the office performed by his servants. In an action by plaintiff for possession of the office and of the properties attached thereto in 1905, on the ground that he was the reversioner entitled to them after *T*:

Held, that the suit was not barred under Article 124 of Schedule II of the Limitation Act as the defendant's possession did not commence to be adverse to the plaintiff before the date of his appointment in 1900 and that he was not entitled to tack on the possession of *A.* to his own, as *A.* only held on behalf of *T.* through whom the plaintiff claimed and the period between 1889 and 1900 could not enure to defendant's benefit as no one was appointed to the office during that period.

Appeal against the decree of the Subordinate Judge of Tuticorin in O. S. No. 32 of 1905, dated 2nd October 1907.

Mr. *T. R. Vencatrama Sastri*, for the Appellant.

Mr. *K. Balamukunda Aiyar*, for the Respondents.

JUDGMENT.—The plaintiff claims that he and the 9th and 10th defendants, as reversionary heirs of one Veerappapillai after the death of his widow Tirumalaiammal, are entitled to succeed to the office of *Sri Pandaram*, or accountant in a temple, and to the properties appertaining to the office. His case is that Veerappapillai was in possession of the office and the properties till his death in 1884 and his widow was in possession till her death in 1895. The suit is instituted in 1905 that is within 12 years after the widow's death. The first defendant, the trustee of the temple, denies that the office was held in hereditary succession, and asserts *inter alia* that Veerappapillai relinquished the office in April 1884; that plaintiff and the 9th and 10th defendants had, therefore, no right to it; that Tirumalai was allowed by the trustee to hold the office by her proxy, Audinarayanapillai, but was dismissed in 1889 and that the 2nd defendant was validly appointed to it in 1900. It is unnecessary for the disposal of this appeal to refer to the other contentions raised in the suit as the Subordinate Judge has disposed of the case on the 12th issue relating to the question whether the suit was barred by limitation. He finds that Yeerappapillai divested himself of the office in suit from the 25th April 1884, and the defendant's 2nd witness had been in possession of the plaint schedule properties from June 1884 or even before the death of Veerappapillai. He further finds that as the plaintiff alleged in O. S. No. 31 of 1906 that Veerappa could not validly transfer the office to Audinarayanapillai which he purported to do in 1884. Audinarayana must be treated as a trespasser. As the result of these two findings he holds that the suit is barred by limitation. The Subordinate Judge has not kept the provisions of Article 124, Schedule II, of the Limitation Act in view in arriving at his finding. The starting point of limitation according to that Article, in a suit of this nature is the time "when the defendant takes possession of the office adversely to the plaintiff." The 2nd defendant, who is said to be the present holder of the office, is alleged to have been appointed in 1900 and it is not

contended that he claims through Audinarayana who according to the lower Court, "has been in possession of the office from June 1884." The Subordinate Judge could not mean, we take it, that Audinarayana himself has been in possession from June 1884 up to the date of this suit as that is nobody's case. The contention of the defendants was that he was in possession as proxy of Tirumalai till 1889 and that the duties of the office were performed till the 2nd defendant's appointment in 1900 by servants appointed by the trustees, while the plaintiff contended that till Tirumalai's death in 1895, she was in possession through Audinarayana. It is not clear how in these circumstances, if the plaintiff had a hereditary right to succeed to the office, it could be barred by limitation. We are further unable to hold, on the evidence on record, that Audinarayana, if he got possession in June 1884 of the office or its emoluments, continued to be in possession in his own right. As already pointed out, the defendant's own case was that he was in possession as agent of Tirumalai. In April 1884 Veerappapillai transferred the office to Audinarayana by the deed of settlement, Exhibit II. In October 1884 a petition, Exhibit III, was addressed to the *Tahsildar* of Srivilliputtur that he had transferred possession of the office and its emoluments to Audinarayana and requested that the transferee's name might be substituted for his own in the *Inam* register In his deposition as defence 2nd witness Audinarayana merely states that he took possession under Exhibit II but does not say how long he retained possession in his own right; on the other hand, the *pattah* for the lands attached to the office was issued by the trustee in Tirumalai's name till 1895 (Exhibit B series). The question whether this was because Tirumalai was appointed by the trustee to the Office without any recognition of her right to it as the heir of Veerappa had not yet been tried. The Subordinate Judge thinks that as the *kist* book, Exhibit V, shows that as it was Audinarayana that paid the *kist* he must be taken to have been in possession, but the *prima facie* inference to be drawn from the fact would be that he paid on account of the *pattadar* Tirumalai. He does not explain in his deposition in what capacity he made the payment. The lower Court does not seem to have understood the facts necessary to be decided in connection with the question of limitation and we are unable to concur with it in its appreciation of the evidence on record. On the defendant's own case that Tirumalai was holding office as an appointee under the trustee until 1889 and that no one was appointed to the office until 1900, the suit cannot be barred under Article 124. What is required under that Article to bar the plaintiff is that the office should have been held adversely to the rightful succession by the defendant. The 2nd defendant is the present holder of the office. No doubt he might tack on to the period of his own possession the time during which any one else through whom he claims was in possession (See Mitra on Limitation, 4th Edition, page 1063, and the cases cited there) but according to the plea there was none holding the office from 1889 to 1900. We must reverse the finding of the Subordinate Judge on the 12th issue and remand the suit for fresh disposal on the merits. The costs of this appeal will abide the result.

Cause remanded.

MADRAS HIGH COURT.

CIVIL MISCELLANEOUS PETITION No. 1912. OF 1910.

(IN SECOND APPEALS NOS. 1706 AND 1707 OF 1908).

March 20, 1911.

Present:—Sir Arnold White, KT., Chief Justice, and Mr. Justice Sankaran Nair.

PAKRAM HAJI—PETITIONER

versus

KOVILIATH PARKUM PANOLI CHERIA THARUVAI AND OTHERS—RESPONDENTS.

Decree, amendment of—Dismissal of appeal—Right of Appellate Court to amend decree of lower Court.

An Appellate Court has power to amend the decree of a lower Court, when there is a patent variance between it and the judgment, even though it dismisses the appeal for default.

Pichuvayyangar v. *Seshayyar*, 18 M. 214 and *Asma Bibi* v. *Ahmed Husain*, 30 A. 290; A. W. N. (1908) 109; 5 A. L. J. 584, referred to.

Application praying that in the circumstances stated in the affidavit filed therewith the High Court will be pleased to direct the amendment of the lower Appellate Court's decree in A. S. No. 261 of 1907 decree from which S. A. Nos. 1706 and 1707

of 1908 were preferred so as to make the same more specific and clear and to bring the same in conformity with the judgment of the lower Appellate Court.

Mr. *T. K. Govinda Aiyar*, for the Petitioner.

Mr. *P. Kundu Panikar*, for the Respondent.

JUDGMENT.—It is conceded by the first defendant the appellant in S. A. No. 1706 of 1908 on the file of this Court that the decree of the District Court is not in accordance with the judgment of that Court.

The Counsel for the 11th defendant (the appellant in S. A. No. 1707 of 1908 on the file of this Court) when the appeal came on for hearing before this Court stated he had no instructions and the appeal was accordingly dismissed for default.

We are of opinion that the principle of the decision of the Full Bench in *Pichuvayyangar* v. *Seshayya* (1) [see too *Asma Bibi* v. *Ahmed Husain* (2)] is applicable here notwithstanding that the appeal was dismissed for default by this Court.

We accordingly order the amendment now prayed for.

There will be no order as to costs.

(1) 18 M. 214.
(2) 30 A. 290; A. W. N. (1908) 109; 5 A. L. J. 584.

PUNJAB CHIEF COURT.

CRIMINAL REVISION No. 19 OF 1911.

April 10, 1911.

Present:—Mr. Justice Johnstone.

Musammat FATTI—CONVICT—PETITIONER

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), *s.* 361—*Kidnapping*—*"Lawful guardian," meaning of*—*Purchaser of a minor girl from her husband is a lawful guardian.*

The husband of a minor girl, under 16 years of age, sold her to one *S.*: while she was living with *S.* she was persuaded by the petitioner to leave his house:

Held, that for the purposes of section 361, Indian Penal Code, *S.* was the lawful guardian of the minor girl and that the petitioner was consequently guilty of kidnapping her from lawful guardianship.

The term "lawful guardian" does not include a person who has himself gained possession of the minor by an offence under section 361, Indian Penal Code. But it does include not only the parents or relations, in whose house the minor lives and is brought up, but any other person with whom the minor resides by the consent, express or implied, of those who have the higher legal right.

Empress v. *Pamentle*, 8 C. 971, applied.

Queen v. *Baldeo*, 2 N. W.P.H.C.R. 286, distinguished.

Petition, under sections 435/439 of the Criminal Procedure Code, of the order of the Sessions Judge, Lahore, dated 29th October 1910 affirming that of the Magistrate, 1st Class, Lahore, dated 3rd August 1910, convicting the petitioner.

Mr. *Ganpat Rai*, for the Petitioner.

Mr. *Bevan Petman*, Government Advocate, for the Respondent.

JUDGMENT.—In this case the facts are quite clear. The girl Parbatti was the wife of one Surjan who becoming tired of her sold her to one Sain, a barber. She was living with Sain in Anarkali when she made the acquaintance of one Bishamber Babu, a Sub-Inspector of Police. The girl, being under 16 years of age, is a minor for the purposes of the criminal law. It seems that Bishamber paid the girl illicit attentions and also employed the accused in the present case, a sweeper woman, to urge the girl to leave Sain and go away with him, and on a certain day the accused actually persuaded the girl to leave Sain's house for this purpose. The gril pretends that the accused deceived her by saying that they would go and see the Museum but I think it is practically certain that she knew the accused's object was different. It is not necessary to detail the story here. It is enough to say that the accused did actually take away the girl from the guardianship of Sain, and as she is minor the only question for consideration is whether Sain can be said to have been her lawful guardian. Section 361 of the Indian Penal Code runs as follows:—

"Whoever takes, or entices any minor under fourteen years of age if a male or under sixteen years of age if a female or any person of unsound mind out of the keeping of the lawful guardian of such minor or person of unsound mind without the consent of such guardian is said to kidnap such minor or person from lawful guardianship."

And an explanation follows in these words:

"The words 'lawful guardian' in this section include any person lawfully entrusted with the care or custody of such minor or other persons."

The question is, then, whether Sain was a lawful guardian of the girl Parbatti. Mayne, in discussing the question of the meaning of the words "lawful guardian," says that the words include not only the parents or relations in whose house the minor lives and is

brought up, but any other person with whom the minor resides by the consent, express or implied, of those who have the higher legal right. It seems to me that, although the conduct of Surjan in selling the girl to Sain was immoral and reprehensible, nevertheless Sain is the lawful guardian of the girl for the purposes of section 361 of the Indian Penal Code. To hold the contrary would involve the denial of protection to the girl Parbatti altogether. Authority for this view will be found in *Empress* v. *Pemantle* (1) where the learned Chief Justice said:—

"We think that the somewhat liberal explanation of the words 'lawful guardain' under section 361 is intended to obviate the difficulty which would otherwise arise if the prosecution were required to prove strictly in cases of this kind that the person, from whose care or custody a minor had been abducted or kidnapped came strictly within the meaning of a guardian according to the legal acceptation of that word."

In *Queen* v. *Baldeo* (2) the circumstances were entirely different from those of the present case. The term "lawful guardian", of course, does not include a person who has himself gained possession of the minor by an offence under section 361, Indian Penal Code.

For these reasons I think that the decisions of the Courts below were correct and that *Mussammat* Fatti has been rightly convicted under section 363 of the Indian Penal Code. The petition is, therefore, rejected.

Petition rejected.

(1) 8 C. 971.
(2) 2 N. W. P. H. C. R. 285.

MADRAS HIGH COURT.
FIRST CIVIL APPEAL No. 267 OF 1909.
February 22, 1911.
Present:—Sir Ralph Benson, Judge, and Mr. Justice Sundara Aiyar
SIVA SUBRAMANIA MUDALIAR AND OTHERS—APPELLANTS
versus
GNANASAMMANDA PANDARA SANNADHI—RESPONDENT.

Transfer of Property Act (IV of 1882), s 55, sub-sec. 4, cl. (v)—Vendor and purchaser—Vendor's lien for unpaid purchase-money—Money which vendor directed vendee to pay to a third party—Whether lien subsists—Agency—Waiver of a portion of the amount by payee, whether enures for the benefit of the person authorising payment.

A person, who directs another to pay money to a third person, is entitled to countermand that order before that person has entered into direct relations with the third person and agreed to pay it to him.

Where an agent is directed or authorised by his principal to pay to a third person moneys existing or accruing in his hands to the use of the principal, and he expressly or impliedly contracts with such third person to pay to him, or to receive or hold the money on his behalf, or for his use, he is personally liable to pay such third person, or to receive or hold the money on his behalf, or for his use, as the case may be, even if he has had fresh instructions from the principal not to pay to such third person.

Griffin v *Weatherby*, L. R. 3 Q. B. 753; 9 B. and S, 726; 37 L. J. Q. B. 280; 18 L. T. 881; 17 W. R. 8, referred to.

—And if the person entitled to the payment excuses a portion of the amount in favour of the person directed to pay to him, that is a benefit derived by the latter from the creditor for which he is not bound to account to the person by whom he is directed to make the payment.

A vendor's right of lien for unpaid purchase-money can only be lost by an express or implied contract of waiver.

Webb v. *Macpherson*, 31 C. 57, referred to.

A vendor, who has directed the purchase-money or a portion thereof to be paid to a third party, must be taken to have waived by a contract, necessarily implied from his conduct, the right to a lien for any portion of the money to be paid to the third party under the agreement.

Abdulla Beary v. *Mammali Beary*, 7 M. L. T. 376; 33 M. 446, 5 Ind. Cas. 87, referred to.

In such a case the vendee cannot be regarded as holding the money as the vendor's agent.

Appeal against the decree of the Sub-ordinate Judge's Court of Tinnevelly in O. S. No. 37 of 1907.

Mr. *T. R. Venkatrama Sastry*, for the Appellants.

Mr. *K. Srinivasa Aiyenger*, for the Respondent.

JUDGMENT.—The plaintiff in the suit is the present Pandara Sannadhi of the Dharampuram Adhinam. The suit is for the recovery of a portion of the consideration which the plaintiff alleges to be due from the 1st defendant and from the defendants Nos. 16 to 20 for the sale of a village belonging to the Adhinam which was made by his predecessor in office in favour of the 1st defendant on the 12th July 1901 for Rs. 1,27,000. The plaintiff alleges that the portion of the consideration now sued for is still due from the vendee and he seeks in this suit to enforce his lien for the unpaid purchase-money under section 55, sub-section 4, clause (*v*), of the Transfer of Property Act. The vendor, Pandara Sannidhi, died subsequent to the sale and

the plaintiff is his successor in the office. The defendants Nos. 16 to 20 are members of the undivided family to which the 1st defendant belongs and have been impleaded on the ground that the property was purchased for the benefit of the family. The defendants Nos. 2 to 15 are purchasers and mortgagees of some of the properties sold to the 1st defendant. The lower Court gave a decree in the plaintiff's favour for a portion of the amount sued for. This appeal relates to two of the items which the lower Court found to be due to the plaintiff. The first of these items—a sum of Rs. 2,600—is described in the sale-deed, Exhibit A, as "the sum retained for payment to Sankaramurthi Mudaliar, as auction-purchaser of the lands sold in auction for arrears of revenue of the last *fasli* of Pattavilaham being Chidambaram Nataraja Kattalai and for obtaining a sale-deed in my name." The second item—Rs. 2,842 8-0—is stated in Exhibit A, as received by the vendor in cash, but the 1st defendant admits that it was not so paid, but was reserved with him for particular purposes which we shall refer to hereafter.

The plaintiff states in his plaint that the amount of the first item was not paid to Sankaramurthi Mudali as required under the sale-deed, and that the sale was not obtained in favour of the Adhinam. The defence with regard to this item was that the amount was paid to Sankaramurthi Mudali and was utilised by him for purchasing the Pattavilaham land referred to in Exhibit A, the purchase being made *benami* for the plaintiff's *mutt*. The plaintiff's case is that, on account of the defendant's failure to pay the amount to Sankaramurthi Mudali and to get a conveyance from him of the land in favour of the plaintiff's predecessor or the plaintiff, Sankaramurthi Mudali sold the lands to one Chidambaranatha Thambiran of the plaintiff's Adhinam for Rs. 4,000 on the 13th July 1906 (Exhibit F). The defendants pleaded also that the suit was barred by limitation, but the Subordinate Judge decided this issue in the plaintiff's favour on the ground that, as the suit was to enforce the plaintiff's lien, the period of limitation applicable was 12 years from the time when the money was payable. On the merits with respect to the first item, the Subordinate Judge held that Sankaramurthi Mudaliar, the purchaser at the revenue-sale, might have been *benamidar* for the Pandara Sannadhi, and he also held that Sankaramurthi Mudali received the sum of Rs. 2,600 required for the purchase from the 1st defendant, but he was of opinion that the amount was not paid by the 1st defendant on the plaintiff's account but as part of the sum of Rs. 5,000 which he had agreed to pay to Sankaramurthi as brokerage for his services in inducing the Pandara Sannadhi to sell the village to the 1st defendant, though the Pandara Sannadhi had already agreed to sell it to a third person. The Subordinate Judge seems to place considerable reliance on the statement in Exhibit VI, a sale-deed executed on the 15th September 1901, nearly two months after the date of Exhibit A, by the 1st defendant in favour of the 2nd and 3rd defendants of a portion of the village, that out of the consideration-money for that sale, Rs. 2,600 had been received by the 1st defendant to get back the Pattavilaham land which had been sold away at the revenue-sale, taking the statement to mean that so far as the 1st defendant was concerned, Sankaramurthi Mudali was the actual purchaser at the revenue-sale, and that "he took the loan from the 2nd defendant to be paid to the Pandara Sannadhi to enable him to re-purchase those lands from the Mudaliar." We are of opinion that the inference drawn by the Subordinate Judge from the statement in Exhibit VI just referred to is erroneous. Now the facts are that the plaintiff's predecessor entered into an agreement with the 1st defendant on the 2nd June 1901 to sell the village to him; that the Pattavilaham lands were brought to sale for arrears of revenue on the 25th June, on which date Sankaramurthi paid into the Taluk Office a sum of Rs. 400-0-0 on account of the deposit amount due by him as purchaser, that the Pandara Sannadhi sold the village in dispute to the 1st defendant under Exhibit A on the 12th July, and that Sankaramurthi Mudali paid into the Taluk Office the balance amount due by him as purchaser of Pattavilaham lands, Rs. 2,187, on the 24th July. On the date of Exhibit A, therefore, Sankaramurthi had yet to pay the major portion of the amount due for the revenue-sale. The 1st defendant had already received from the 2nd and 3rd defendants Rs. 400

for paying that deposit, and it had been agreed that the latter should pay Sankaramurthi Mudali the remainder of the amount required for the sale. The 1st defendant himself had previously agreed to sell a portion of the village to the 2nd and 3rd defendants and he received Rs. 2,600 from them for payment to Sankaramurthi. It was recited in Exhibit A that Rs. 2,600 was retained with the 1st defendant for payment to Sankaramurthi, although Rs. 400 out of the amount had been admittedly already paid to him, probably because nearly six-sevenths of the amount had still to be paid. The statement that a sale-deed should be obtained from Sankaramurthi in the plaintiff's favour is not inconsistent with the purchase being really for the benefit of the plaintiff, as it would be considered desirable to have a formal re-conveyance from the *benamidar*. The statement in Exhibit VI already referred to about getting back the Pattavilaham lands from Sankaramurthi is also consistent with that view. In our opinion, there can be no dobut on the evidence that Sankaramurthi was a mere *benamidar* for the plaintiff's predecessor. He belonged to the Tinnevelly District, and there does not appear to have been any reason for his purchasing land of which he knew nothing, in the Tanjore District. He was a man of small means possessed only of property worth Rs. 500. He took no immediate steps to get possession of the lands purchased by him at the auction. Mr. Srinivasa Iyengar contends that although all this may be true, and although the purchase was made with the intention that the land should be conveyed ultimately to the Pandara Sannadhi, still Sankaramurthi intended to make the purchase for his own benefit and to keep it until the Pandara Sannadhi should take a re-conveyance from him, and the amount of Rs. 2,600 was received by him from the 1st defendant, not on account of the Pandara Sannadhi, but in part payment of Rs. 5,000 due to himself for brokerage. We are altogether unable to believe that there was any agreement on the 1st defendant's part to pay Sankaramurthi a sum of Rs. 5,000 as brokerage. There is no document evidencing any such agreement. It is extremely improbable that such a large sum would be promised to a person in the position of Sankaramurthi for any help or service he might have agreed to render to the 1st defendant by inducing the Pandara Sannadhi to prefer the 1st defendant as purchaser of the village to the person to whom he had already agreed to convey it. There is no documentary evidence of any demand made by Sankaramurthi on the 1st defendant for the payment of this large amount, and it is admitted that, after the alleged payment of Rs. 2,600, Sankaramurthi had taken no effective steps to enforce the payment of the balance. No explanation is given for his failure to do so. He is utterly unable to give any satisfactory explanation of the use he made of the sum of Rs. 4,000 which he is alleged to have received by the sale of the village to Chidambaranatha Thambiran 5 years later (Exhibit F, dated 30th July 1906). The Subordinate Judge observes that Exhibits C and J conclusively prove that the 1st defendant promised to pay brokerage to Sankaramurthi; but we cannot agree with him in this view. Exhibit C does not state in what year it was written. It shows that Sankaramurthi had probably something to do with seeing that the sale of the village was made by the Pandara Sannadhi to the 1st defendant and not to the previous promisee, but it shows nothing more. Exhibit J is dated the 25th March 1903, and is addressed by the 1st defendant to one Palvanna Mudali, who is said to have been an honorary agent of the plaintiff's *mutt* in Tinnevelly. The 1st defendant tells the addressee in that letter not to be afraid with regard to a matter connected with a person called Sankaramurthi Chinnayya, and that he (the writer) had no evil intention with respect to that person in the least. The 1st defendant says that the man referred to as Sankaramurthi Chinnayya in Exhibit J is a cousin of the other Sankaramurthi, the purchaser of the Pattavilaham lands, and that the letter, refers to the carrying out of some promise, which the writer had made to the cousin from whom he had received Rs. 750 without any voucher. This version looks more probable than that of Sankaramurthi, the plaintiff's 1st witness, corroborated by the evidence of Palvanna Mudaliar. At any rate, we are not satisfied that Exhibit J contains any reference to the alleged promise to pay brokerage to Sankaramurthi. Palvanna Mudaliar had admittedly nothing to do with the brokerage beyond writing one letter to the 1st defendant which

he was not called upon to produce, and seeing that Sankaramurthi made no subsequent attempt to recover the balance of commission due to him, we are unable to act upon his evidence or that of the plaintiff's 2nd witness. The Pandara Sannadhi did not call upon the 1st defendant till the 20th June 1902, when he wrote Exhibit V, to carry out his promise to pay Rs. 2,600 to Sankaramurthi and to get a conveyance from him of the Pattavilaham lands. Before the date of that letter, quarrels had broken out between the present plaintiff, who was then Chinna Pandaram, and the Pandara Sannadhi, who had appointed him as Chinna Pandara Sannadhi to succeed to his office after his death. The Pandara Sannadhi charges the 1st defendant in Exhibit V with joining with the Chinna Pandaram in the quarrel and doing fraudulent acts against him and he calls upon him within one week from the date of Exhibit V to pay not only the two sums in dispute in this appeal but also a further sum of Rs. 7,000 stated in Exhibit A to have been received previous to its execution and now found by the Subordinate Judge to have been so paid. It appears very probable that the Pandara Sannadhi, irritated by what he considered improper conduct on the 1st defendant's part in joining the present plaintiff, was attempting to recover once again monies which the 1st defendant had already paid. It is immaterial for the purposes of this case whether the 1st defendant was really helping the present plaintiff in his quarrel with the senior Pandaram or not. The subsequent sale by Sankaramurthi in favour of Chidambaranatha Tambiran also appears to be open to much suspicion. Not only is Sankaramurthi unable, as already stated, to explain what he did with the sum of Rs. 4,000 alleged to have been received by him, but the plaintiff has also withheld evidence which would prove that it was a *bona fide* transaction. Chidambaranatha Tambiran who is a disciple of the plaintiff, has not gone into the box to swear to his purchase, and it looks unlikely that the plaintiff would allow the Pattavilaham lands, belonging to a *Kattalai* and held by him, therefore, as a trustee, to be sold for arrears of revenue and to pass away finally from the *Kattalai*. The Subordinate Judge's attention was not directed to the probabilities of the case referred to by us. We are of opinion that Sankaramurthi made the purchase of Pittavilaham land *benami* for the Pandara Sannadhi with the monies paid by the 1st defendant as part of the consideration for Exhibit A. We, therefore, reverse the finding of the Subordinate Judge with regard to this item.

The second item in the appeal relates, as already mentioned, to an amount stated in Exhibit A to have been paid in cash to the vendor on the date of the sale. As the 1st defendant admits that theamount was not paid then, the *onus* is on him to show that it was subsequently discharged. His case is that it was retained with him to be paid to the 2nd and 3rd defendants in the suit, who are prior mortgagees of some lands included in Exhibit A, on account of damages due to them from the Pandara Sannadhi in consequence of the irrigation facilities of the lands having been rendered defective by some works done by the Government. The Subordinate Judge finds that the Pandara Sannadhi had entered into an agreement with the 2nd and 3rd defendants to pay a sum of Rs. 1,500 a year on account of damages accruing to them in consequence of the change in the condition of the properties mortgaged to them. Exhibit A was executed on the 29th of *Ani* of *Pilava* year. The 1st defendant contends that, as the *Chithrai Kalavathi* of the previous year had then expired and two months of the *Pilava* year had run, the mortgagees (defendants Nos. 2 and 3) claimed damages at the rate of Rs. 1,500 a year both for the previous year and for the current year *Pilava*, that Rs. 3,000 was thus due to them, and that the sum of Rs. 2,842-8-0 was to be paid for the purpose, a small deduction being made as the damages for the *Pilava* year would be paid in advance before they were due. The Subordinate Judge decreed a sum of Rs. 1,492-8-0 in the plaintiff's favour for this item holding that it was not likely that the 2nd and 3rd defendants, who had already an agreement from the 1st defendant for the sale to them of the mortgaged property, would have insisted, in the circumstances, on the payment of the amount of damages due to them; but that the other persons, who were co-mortgagees with them to the extent of 3/5ths share of the mortgage, were likely to have insisted on the payment of their share of the damages. The 1st defendant having admitted that he was able to compound the mortgagees' claims for damages

by payment of a sum of Rs. 2,250-0-0, the Subordinate Judge held that the plaintiff was entitled to recover 2/5ths of that amount which he took not to have been paid by the 1st defendant. His view, therefore, must be taken to be that the Pandara Sannadhi agreed that the 1st defendant should pay the sum of Rs. 2,842-8-0 to the mortgagees towards their claim for damages, but, as the 1st defendant did not actually pay a portion of the sum to them, the plaintiff is entitled to recover that portion. He does not consider the question whether the 2nd and 3rd defendants ever agreed with the Pandara Sannadhi directly that a sum of Rs. 1,492-8-0 need not be paid. If they did not do so, but remitted the amount in favour of the 1st defendant, the plaintiff would have no title to recover the amount from him. A person who directs another to pay money to a third person, is, no doubt, entitled to countermand that order before that person has entered into direct relations with the third person and agreed to pay it to him. But, as stated in Bowstead on Agency, Fourth Edition, p. 414, "where an agent is directed or authorised by his principal to pay to a third person money existing or accruing in his hands to the use of the principal, and he expressly or impliedly contracts with such third person to pay to him, or to receive or hold the money on his behalf, or for his use, he is personally liable to pay such third person, or to receive or hold the money on his behalf, or for his use, as the case may be, even if he has had fresh instructions from the principal not to pay to such third person." [See *Griffin* v. *Weatherby* (1)]. And if the person entitled to the payment excuses a portion of the amount in favour of the person directed to pay to him, that is a benefit derived by the latter from the creditor for which he is not bound to account to the person by whom he is directed to make the payment. The 1st defendant swears that he paid a sum of Rs. 2,250, and that the rest was remitted in his favour by the mortgagees. There is no evidence to contradict his statement. There is, no doubt, some force in the argument for the respondent that this matter would then probably have been referred to in the sale-deed, Exhibit VI, executed by the 1st defendant in favour of the 2nd and 3rd defendants, and that it would have been appropriated as part of the consideration for that sale. But, on the other hand, it is improbable that the mortgagees, having an agreement in their favour entered into by the Pandara Sannadhi promising to pay them Rs. 1,500-0 as damages every year, would have agreed to waive the claim altogether. On the whole, we feel inclined to accept the statement of the 1st defendant that he did pay the amount of Rs. 2,250-0-0 to the mortgagees. But it is unnecessary to decide this question as, in our opinion, the plaintiff cannot claim a lien for the amount which, according to the finding of the lower Court, (and we concur in that finding), the plaintiff directed the vendee, the 1st defendant, to pay to the 2nd and 3rd defendants. A vendor's right of lien for unpaid purchase-money was considered at length by the Judicial Committee of the Privy Council in *Webb* v. *Macpherson* (2). As laid down in that case, the lien, no doubt, can be lost only by an express or implied contract of waiver. But it seems to us that a vendor, who has directed the purchase-money or a portion thereof to be paid to a third party, must be taken to have waived by a contract, necessarily implied from his conduct, the right to a lien for any portion of the money to the third party under the agreement. This question has been very recently decided in this Court after full conisderation by the Chief Justice and Krishnasvami Aiyer, J., in *Abdulla Beary* v. *Mammali Beary* (3). As stated in that case, "a promise to pay to a stranger is a mere covenant the breach of which must be compensated in damages, and there is no occasion for the statutory charge in favour of unpaid vendor to arise" No doubt in *Ramakrishna Ayyar* v. *Subramania Ayyer* (4), a decree was passed on the footing of the existence of a lien for purchase money ordered to be paid to a stranger. But, as pointed out in *Abdulla Beary* v. *Mammali Beary* (3), the question whether the lien would subsist in such cases, was not raised or decided in that case. Mr. Srinivas Aiyangar attempted to argue that the amount of Rs. 2,842-8-0 must be regarded as the plaintiff's money deposited with or paid to the 1st defendant as his agent to be paid to the mortgagees.

(1) 3 Q. B. 752; 9 B. & S. 726; 37 L. J. Q. B. 280; 18 L. T. 881; 17 W. R. 8.

(2) 31 C. 57; 8 C. W. N. 41.

(3) 7 M. L. T. 376; 33 M. 446; 5 Ind. Cas. 87.

(4) 29 M. 305.

But we are unable to accept this contention. There is a clear legal distinction, though a fine one, between a vendee owing money to the vendor being directed to pay it to a stranger and a person being entrusted with another's money to be paid to a stranger. In the one case, the money is received and kept by the person who is to make the payment as an agent. In the other, it is merely an obligation that he is bound to render and which he has been authorized to render to a third person. Even if any idea of agency on the part of the 1st defendant could be imported, the present suit cannot be regarded as one for an account; and the plaintiff by ignoring in his plaint the real facts of the case precluded himself from asserting that his so-called agent was guilty of any misconduct and when such misconduct took place. We are of opinion that the plaintiff has no lien with regard to the second item and that his right to recover the money from the 1st defendant, if it could be held to exist, is barred by limitation. The respondent contended that, as the 1st defendant failed to obtain a conveyance of the land in the plaintiff's favour as promised by him, the plaintiff is entitled to recover the amount claimed by him. But the suit is not framed as one for damages for non-execution of the conveyance. To such a suit the 1st defendant might have defences not open to him in the present suit. We must reverse the finding of the Subordinate Judge with regard to this item also.

In the result, we allow the appeal with costs in this Court and in the Court below, and the decree of the Subordinate Judge must be modified accordingly.

Appeal allowed.

MADRAS HIGH COURT

FIRST CIVIL APPEAL No. 44 OF 1907.

March 3, 1911.

Present:—Mr. Justice Munro and Mr. Justice Abdur Rahim.

RAJARATHNASAMI MUDALIAR AND OTHERS—APPELLANTS

versus

ANJI LATCHI AMMAL—RESPONDENT.

Hindu Law—Partition Partition effected by award of arbitrators—Partition between two branches of a family—Status of the members of each branch—Presumption—Separation of branches not separation of individuals.

Where by an award of arbitrators a partition was effected between two branches of a Hindu undivided family, and there was no provision for enjoyment by the individual members of each branch:

Held, that though the branches were divided, the members of each branch remained undivided in status as between themselves.

The separation of branches of a family does not imply the separation of the members of each branch.

Bilabux v. *Rukhmabhai*, 30 C. 725 at p. 736 and *Ringanatha Row* v. *Narayanaswami Naicker*, 31 M. 482 referred to.

Appeal against the decree of the District Court of Chingleput, dated 31st December 1906 in Original Suit No. 12 of 1905.

Mr. *T. R. Venkatrama Sastri*, for the Appellants.

Mr. *K. Srinivasa Aiyangar*, for the Respondents.

JUDGMENT.—In this case the District Judge has found the 3rd issue against the plaintiff and dismissed the suit. The third issue is, "Whether the award of 1898 created a status of division between the plaintiff and the defendant's husband." By Exhibit A of the 12th August 1898 four persons, two of whom belonged to one branch and two to anther branch of an undivided Hindu family, agreed to abide by the award of certain arbitrators dividing all the properties belonging to them in common in two villages according to shares and *shastras*. On the 22nd August 1898, the said four persons presented to the arbitrators the *Rajenamah*, Exhibit B, which was duly given effect to by the award, Exhibit C, passed on the 24th August 1898. Under Exhibits B and C, the two persons who belonged to the senior branch of the family were to enjoy the properties in Schedule B, while the plaintiff and the defendant's husband were to enjoy the properties in Schedule A. It is contended for the plaintiff that while the branches became divided by reason of the award, the members of each branch remained undivided in status as between themselves. For the defendant it is contended that the separation of the branches implied the separation of the members of each branch also, and for this the observations of their Lordships of the Privy Council in *Bilabux* v. *Rukhmabhai* (1) are relied upon. It is there laid down that there is no presumption when one co-parcener separates from the others that the latter remain

(1) 30 C. 725; 7 C. W. N. 642; 5 Bom L. R. 469.

united. As was, however, pointed cut in *Ranganatha Rao* v. *Narayanasami Naicker* (2) their Lordships do not say that in such a case the family in all cases is to be deemed to be divided. Now in this case we find that Exhibits B and C make special provision for the separate enjoyment by each of the four members of the family of all properties not mentioned in Exhibit B and its schedules. But with regard to the properties, the subject of the partition, there is no such provision. The only provision is for the separate enjoyment by each branch as such of the properties allotted to it. We think, therefore, that the fair inference to be drawn from Exhibits B and C is that the members of each branch did not contemplate a division of status as between themselves. No dobut, when Exhibit A was executed, such a division was contemplated but the parties seem clearly to have changed their minds and they were entitled to do so. There is no good evidence in this case that the plaintiff and the defendant's husband were in fact in separate enjoyment as divided members of the properties allotted to them. We, therefore, find the third issue in favour of the plaintiff. The District Judge has not determined the 5th and 6th issues in the suit. We must, therefore, ask him to do so taking fresh evidence if, as is stated before us, all the evidence bearing on these issues has not been taken. Findings should be submitted within six weeks from this date, and seven days will be allowed for filing objections.

In compliance with the above order, the District Judge of Chingleput submitted the following

FINDING.

Findings have been called for on issues V and VI. They are,—

V. Assuming that plaintiff gets the whole of the suit property by survivorship, what suitable provision has to be made for the maintenance and residence of defendant ?

VI. Is plaintiff entitled to mesne profits, and if so, how much ?

2. I will take issue VI first, as the answer to issue V depends on the ascertainment of the mesne profits. Plaintiff is, I think, entitled to mesne profits from February 1905. As to what the profits are, the evidence is very conflicting, the one side under, and the other over estimating them with an eye to the question of maintenance. Plaintiff puts them at, roughly, Rs. 90 a year. Defendant calculates them at something like Rs. 500, though it is admitted that they were less than half that amount during the *fasli* in question, as the seasons were unfavourable.

On the whole, I would put the profits at about Rs. 240 a year. The lands consist of one Pangu, comprising approximately 20 *kanies*. At a moderate estimate, one *kani* would be worth Rs. 200 or Rs. 4,000 for the whole *pangu*. It is in evidence (and, I think, generally conceded) that people expect a 6 per cent. return on landed investments At this rate the average income would be Rs. 240.

Plaintiff, however, claims (*vide* his plaint) only Rs. 30 for *fasli* 1315 and about Rs. 90 for each succeeding *fasli*. There is no reason why he should be awarded more than he claims; so I would give him Rs. 30 for 1905, and Rs. 90 for each of the following years.

3. Issue V. Plaintiff offers Rs. 5 per mensem and defendant claims Rs. 15. Taking the income from the lands as Rs. 240, I consider that Rs. 10 per mensem would be a suitable provision for defendant, which should be made a charge on the suit land.

As to residence, she is entitled to live in the family house. Plaintiff offers to build her a separate residence on a site opposite, but, for reasons of sentiment, she prefers a portion of the family house. A plan of the house has been filed, showing the portions she claims. I do not think her claim is at all excessive and it may be allowed.

4. Defendant would, of course, be entitled to deduct maintenance at Rs. 120 a year from the mesne profits. Assuming those profits to be really something like Rs. 240 a year, the award of only Rs. 90 leaves an ample balance for such maintenance; so that no deduction need be allowed on that account.

This appeal coming on for final hearing, after the return of the finding from the lower Court the Court delivered the following

JUDGMENT.—The District Judge having found that income from the property is Rs. 240, we think an allowance for main-

(2) 31 M. 482.

tenance of Rs. 120 per annum, or half the sum, is too high. We allow maintenance at the rate of Rs. 7 a month. No objection has been taken to the allotment of the portion of the house for the defendant's residence and we confirm it. We reverse the decree of the Court below and give the plaintiff a decree for possession with mesne profits as found by the District Judge. The decree will also provide for the maintenance and residence of the defendant as above set out. The plaintiff will have his costs throughout.

Appeal allowed.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 152 OF 1908.

March 14, 1911.

Present.—Sir Ralph Benson, Judge, and Mr. Justice Sundara Aiyar.

KUPPU NAIDU—APPELLANT

versus

SUBBARAYA REDDI AND OTHERS—RESPONDENTS.

Mortgage—Time fixed for redemption—Agreement between mortgagee and purchaser from mortgagor for redemption before expiry of mortgage term—Agreement that mortgagee will pay consideration to two stake-holders within a fixed time and purchase equity of redemption—Power of mortgagor's assignee to redeem in default—Death of one of the stake-holders—Breach of contract by mortgagee—Payment to surviving stake-holder, whether sufficient compliance with condition—Suit in ejectment—Defective frame of suit.

The suit properties were under mortgage with first defendant. Plaintiffs purchased the equity of redemption from the mortgagor and entered into an agreement with first defendant, whereby they were to convey the equity of redemption to the latter on the first defendant and one *L.* paying Rs. 1,350 to *A.* and *N.*, two stake-holders, before 15th October 1904. On first defendant's default in making payment, as aforesaid, plaintiffs were to have power to redeem 1st defendant's mortgage immediately, even though under the terms of his mortgage there were still 30 years more for the mortgage to run out. *N.*, one of the stake-holders, died before 15th October 1904, and first defendant not having paid the amount to the surviving stake-holder *A.* within the time, plaintiffs brought this suit in ejectment having deposited the amount of the mortgage in Court:

Held, (1) that the suit should have been one for redemption and was wrongly framed in ejectment;

(2) that under the terms of the agreement between plaintiffs and first defendant the mortgage could be redeemed even before the expiry of the term;

(3) that 1st defendant was not guilty of a breach of contract in not paying the amount to the surviving stake-holder as the intention of the parties was to pay to both the stake-holders together and it was the plaintiffs' duty, on the death of *N.*, to require the first defendant to agree to fresh arrangements before they could charge him with breach of the agreement, and that, therefore, plaintiffs were not entitled to enforce the covenant for redemption in their favour.

Appeal against the decree of the District Court of Chingleput in Orginal Suit No. 2 of 1907.

Messrs. *T. R. Ramachandra Aiyar*, *T. R. Krishnaswami Aiyar* and *M. Subramanya Aiyar*, for the Appellant.

The Hon'ble Mr. *P. S. Sivaswami Aiyar*, (Advocate-General), for the Respondents.

JUDGMENT.—The plaintiffs in this case sued to eject the first defendant from certain lands of which he was in possession as a mortgagee. According to the terms of the mortgage the defendant was entitled to remain in possession for a period of more than thirty years after the date of the suit. The original mortgagors were certain third parties from whom the plaintiffs in 1903 purchased the equity of redemption. The sale to the plaintiffs included the properties mortgaged to the first defendant as well as certain other lands mortgaged, to one Lingapa Naida and one Venkalakshmi Ammal. The right to eject was based on an agreement between the plaintiffs and the first defendant and Lingappa Naidu contained in two instruments Exhibits E and I, dated the 16th July 1904, the former being executed by the first defendant and Lingappa in favour of the plaintiffs and the latter in favour of the first defendant and Lingappa by the plaintiffs. According to the agreement, the plaintiffs were to sell the first defendant and Lingappa Naidu all the lands purchased by them including those mortgaged to Venkalakshmi Ammal for a sum of Rs. 1,350 in case they paid the consideration for the equity of redemption, *viz.*, Rs. 1,350 before the 15th October 1904, if they failed to do so the plaintiffs were to have the right of redeeming the mortgagees to the first defendant and Lingappa immediately and before the time fixed for redemption, provided they paid the amount due to them before the end of the month *Ani* corresponding to the 15th June 1905. The payment by the first denfendant and Lingappa for the purchase of the plaintiff's equity of redemption was to be made to two persons Narayana Iyenger and Annamalai Chetty. The document, Exhibit E, provides that after the

plaintiffs were informed of the payment to the two persons mentioned above "you should execute a sale-deed and receive the money from them". Narayana Iyengar, one of the persons to whom the payment was to be made, died some days before the 15th October 1904.

The plaintiffs' case is that the defendant having failed to make the payment stipulated for the sale of the equity of redemption they (the plaintiffs) gave the notice Exhibit C to him requiring him to receive the mortgage-money due to him and to give up possession of the land. The plaintiffs subsequently deposited the money with Annamalai Chetty. The first defendant having refused to receive the money and give up, the plaintiffs instituted this suit.

The first defendant's contention, so far as it is material for the disposal of this appeal, is that he was not guilty of any violtion of the agreement Exhibit E, and that the plaintiffs were not entitled to enforce the agreement for redemption before the period of the mortgage had expired. It was further contended in appeal before us that the plaintiffs were not entitled to recover possession of the lands in the possession of the first defendant alone on payment of the amount due to him, as the agreement was that the plaintiffs should pay jointly to the 1st defendant and Lingappa Naidu the amount due to both under the mortgage and simple bonds executed in favour of either of them. The District Judge held that the first defendant committed a breach of the agreement to pay before the 15th October 1904 the amount due to the plaintiffs as consideration for the sale of the equity of redemption. After the death of Naraina Iyenger the first defendant sent a notice Exhibit II, dated the 12th October 1904 requiring the plaintiffs to attend at the house of one Vethagiri Pillai for the appointment of another person in the place of Narayana Iyengar, as stake holder, and stating that if that was done he would pay the consideration-money with the time fixed. The parties were at issue in the lower Court as to whether the plaintiffs went to Vethagiri's house in response to Exhibit II. The plaintiffs admittedly sent no reply to Exhibit II but contended that they attended at the house of Vethagiri at the time fixed in Exhibit II but the first defendant did not put in an appearance himself. The first defendant contended, on the other hand, that he himself went to Vethagiri's house but the plaintiffs did not attend. The District Judge finds that the plaintiffs attended and the first defendant did not. Assuming the finding of the lower Court to be correct, the question we have to decide is whether the first defendant was bound, after the death of Narayana Iyengar, to pay the amount to the surviving stake-holder, Annamalai Chetty, before the 15th October 1904. The District Judge was of opinion that he was bound to do so and that he broke the agrreement between the parties by failing to do so, thus giving the plaintiffs the right to enforce the agreement to surrender possession of the properties before the time fixed for redemption. We are unable to agree with the lower Court in holding that the first defendant acted in violation of the agreement Exhibit E. That document clearly shows that the plaintiffs were to receive the considertion money from the two stake-holders, Narayana Iyengar and Annamalai Chetty, only after the execution of the conveyance of the equity of redemption in favour of the first defendant and Lingappa. The two stake-dolders were to keep the money till then. Their position was that of persons in whon the parties to the agreement reposed confidence. The intention was to secure the execution of the conveyance of the plaintiffs before they drew the money. It is impossible to say that after the death of Narayana Iyengar either of the parties was bound to transfer their confidence to Annamalai Chetty alone. If the first defendant had paid the money to him and the money finally failed to reach the plaintiffs in consequence of Annamalai's conduct the plaintiffs would have been entitled to repudiate payment to him. It is equally clear th t the first defendant was not bound to repose in Annamalai the confidence that he had placed in him and another together. When Narayana Iyengar died it wes then the duty of the parties to make fresh agreements as to the manner in which the consideration-money for the sale was to be paid and the plaintiffs were bound to require the first defendant to agree to fresh arrangements before they could charge him with breach of the agreement. Admittedly, the plaintiffs took no steps for the purpose. It was not enough that they attended at Vethagiri's house; assuming they did so, if the first defendant

did not meet them there it was their duty to call upon him to make other reasonable arrangements for the payment of the money. There was no agreement between the parties that they were to meet at Vethagiri's house the plaintiffs not having replied to Exhibits II accepting the first defendant's offer to settle the mode of payment at Vethagiri's house. We are unable to agree with the contention of the learned Advocate-General that the first defendant was bound to make the payment to the surviving stake-holder, Annamalai Chetty. There is nothing to show that such was the intention of the parties. See Bowstead on Agency, p. 431 and Farewell on Powers, p. 459. The plaintiffs, in our opinion, are, therefore, not entitled to recover the lands in suit under the special contract between the parties. We may point out that the suit in any event should have been for redemption and was wrongly framed as one in ejectment. We are unable to understand the observation of the District Judge that "there can be no suit for redemption at present as time had not run out yet and as the gareement is enforceable". The result of the agreement being enforceable was to entitle the plaintiffs to sue for redemption before the time had run out. The plaintiffs did not offer in their plaint to pay the amount due to the first defendant on the mortgages and simple bonds. The suit is liable to be dismissed on this ground alone, but as we are informed that subsequent to the decree of the lower Court the amount due to the first defendant was paid into Court and received by him without prejudice to this appeal, we have not thought it desirable to base our decision on the incorrect framing of the suit. Although the question whether the plaintiffs were entitled, on the correct construction of Exhibits E and I, to institute this suit without offering to pay the whole amount due to the first defendant and Lingappa was argued, we consider it unnecessary to decide it, especially as the point was not raised in the lower Court.

In the result, we reverse the judgment of the lower Court and dismiss the suit. The respondents Nos. 1 to 3 must pay the appellant's costs in this and the lower Court.

Appeal allowed.

MADRAS HIGH COURT.

CRIMINAL APPEAL No. 39 OF 1911.

March 27, 1911.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Sundara Aiyar.

THE PUBLIC PROSECUTOR—APPELLANT

versus

SHEIK AHMAD—ACCUSED.

Penal Code (Act XLV of 1860), s. 341—Emigration Agents refusing to permit intending emigrant to leave emigration depôt—Offence—Wrongful restraint.

Prosecution Witness No. 1 was presented as an emigrant at Messrs. Binny and Co.'s Emigration Depôt and he was treated as such, receiving meals and an advance of money.

When he desired to leave the Depôt, the accused, a watchman in the emplov of Messrs Binny & Co., prevented him from leaving:

Held, that the accused was guilty of wrongful restraint under section 341, Indian Penal Code.

Appeal under section 417 of the Code of Criminal Procedure against the judgment of acquittal passed on the accused in Calendar Case No. 31016 of 1910 by the second Presidency Magistrate, George Town Madras.

Dr. *S Swaminathan*, for the Accused.

JUDGMENT.—We are unable to agree with the Magistrate that the accused in this case was justified in refusing to allow the first prosecution witness to leave the Depôt without the permission of Messrs. Binny and Co. No doubt the story told by the first Prosecution Witness as to the circumstances under which he went to the Depôt in the evening and remained there until nearly noon on the next day is one that cannot be believed.

We think that he either was, or represented to be, an intending emigrant and went to the depôt and was there treated as such receiving meals and an advance of money. But the facts did not confer on Messrs. Binny & Co., or their watchman, the accused, any power to prevent him from leaving the depôt when he desired to do so. The accused was, therefore, guilty of wrongful restraint but under extenuating circumstances, as he, no doubt, thought he was justified by the orders of Messrs. Binny and Co., in refusing to let the first Prosecution witness leave without the Firm's permission.

The Crown Prosecutor on behalf of the Government states that he does not press for anything more than the correction of the erroneous decision of the Magistrate, also the powers of restraint exerciseable by Messrs. Binny and Co., and their agent the accused.

In all these circumstances the case is one that calls for only a nominal sentence. We set aside the acquittal and convict the accused Sheik Ahmed of an offence punishable under section 341 of the Indian Penal Code and sentence him to pay a fine of one rupee, or in default to suffer one week's simple imprisonment. *Acquittal set aside.*

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 1089 AND 1210 OF 1906.

March 24, 1911.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Ayling.

IN S. A. No. 1089.

MANKADA KOVILAGAM MANAGER VEDAPURATTI alias VALIA KARUPURATHI AVARGAL AND OTHERS—APPELLANTS

versus

MALANKATTIL KOPPAN NAIR AND OTHERS—RESPONDENTS.

IN S. A. N. 1210.

MANNARGHAT MOOPIL NAIR AVERGAL NAMED RAMAN UNNI—APPELLANTS

versus

MELAMKATTIL KOPPAN NAIR AND OTHERS—RESPONDENTS

Animals - Damage caused by vicious animals—Elephants, whether ferae naturae *—Liability of both owner and servant entrusted with keep of animals.*

The test for determining whether an animal is vicious by nature or not, is whether years ago and continuously up to the present time the progeny of this class of animals has been found by experience to be harmless.

Filburn v. *People's Palace Aquarium Co.* 25 Q. B. D. 258; 59 L. J. Q. B. 471; 38 W. R. 706; 55 J. P. 181, referred to.

In each case the question is, whether the particular class of animals is dangerous, though individuals may be tamed, and if a person keeps an animal belonging to a dangerous class, he must take the risk of any damage it may do.

The liability of the owner of an animal does not depend on the manner or extent of its employment, but on the nature of the class to which such animal belongs.

Elephants as a class are dangerous though individuals may be tamed and domesticated, and both the owner of the elephant and the servant to whose keeping it is entrusted are liable in damages for any harm done by it.

Mahadar Mohanta v. *Balaram Gagoi*, 35 C. 413; 12 C. W. N. 547, distinguished.

Maung Kyam Dun v. *Narayanan Chetty*, 2 U. B. R. 570, referred to.

Second appeals against the decree of the District Court of South Malabar in Appeal Suits Nos. 166 & 149 of 1906, presented against the decree of the Subordinate Judge's Court of South Malabar at Palghat in Original Suit No. 21 of 1904.

Mr. *V. Ryru Nambiar*, for the Appellants, in S. A. No. 1089.

Mr. *J. R. Ramachandra Aiyar*, for the Respondents in S. A. No. 1089.

Messers. *J. L. Rosario* and *V. Anantha-krishna Aiyer*, for the Appellant in S. A. No. 1210.

The Hon'ble Mr. *P. S. Sivaswami Aiyar*, (Advocate-General), and Mr. *K. P. Govinda Menon*, for the Respondent in S. A. No. 1210.

JUDGMENT.—This first defendant Mannarghat Nair had in his possession the elephants - both tuskers—of the plaintiff and of defendants Nos. 5 to 14 (who represent the Mankada Kovilagam) which he had obtianed from them for processional purposes in a temple. The Mankada elephant gored the plaintiff's elephant to death. The plaintiff brought this suit for damages. The Subordinate Judge found that the Mankada elephant was known by the defendants to be vicious and accordingly awarded damages against the first defendant and the Mankada Kovilagam. In appeal the Judge, Mr. Munro, held that the Mankada elephant is an animal *ferae naturae* and that it was, therefore, unnecessary to consider whether it was vicious or there was any negligence and confirmed the decree of the Subordinate Judge. It is contended in appeal that this finding is not correct in law and in the absence of any negligence or knowledge on the part of the defendants of the vicious nature of the elephant, if it is vicious, the defendants are not liable. There is also a further contention on the part of the fifth defendant that she is not liable in any event, as the elephant was in the possession of the first defendant when it killed the plaintiff's elephant.

The leading case is *Filburn* v. *People's Palace* (*Aquarium*) *Company* (1). In that case Lord Esher lays down, "the law of England recognises two distinct classes of animals and as to one of those classes it cannot be doubted that a person who keeps an animal belonging to that class must prevent it from doing injury and an action is maintainable whether he knows it to be

(1) 25 Q. B. D. 258; 59 L. J. Q. B. 471; 38 W. R. 706; 55 J. P. 181.

dangerous or not. As to another class the law assumes that animals belonging to it are not of a dangerous nature and any one who keeps an animal of this kind is not liable for the damage it may do unless he knew that it was dangerous." As to the latter class, he lays down that there are some animals which everybody recognises as not being dangerous on account of their nature though they might be *faræ naturæ* so far as rights of property are concerned; there is another set which the law has recognised in England as not being of a dangerous character such as horses, dogs, oxen, etc., unless an animal falls within these two classes, the man who keeps it must take the responsibility of keeping it safe. It is impossible to say, as the same learned Judge points out, that an elephant is harmless by nature. The contention before us is that it falls within the same category as a horse. The test according to Lord Esher for determining this is, whether years ago and continuously up to the present time the progency of this class of animals has been found by experience to be harmless. In that case the law assumes the result of this experience to be correct.

It is true that in ancient Rome it is said that elephants were bred in captivity and the Romans made use of them in war, in the amphitheatre, and in military pageants. The results of their experience have not been handed down to us. Though common in those days elephants are said to have been almost unknown for centuries in Europe after the decline of the Roman Empire. The Kings of Ancient India like the Carthegenians employed them in wars, but whether they were then bred in captivity, does not appear. It is certain, however, that, though elephants have been known to breed in captivity it is of the rarest occurrence in India, although in Burma it is said such births are common owing to the fact that domesticated females are allowed to roam in jungles. Domesticated or tamed animals in India have been re-claimed from the wild state—and it is conceded in this case that the Mankanda elephant was caught when wild—even after they are tamed their nature often asserts itself. If, therefore, we apply the test laid down by Lord Esher in India, we cannot presume that the elephant is not of a dangerous nature. Lindley, L.J., and Bowen, L.J., also lay down that the question is whether the particular class of animals, dangerous though individuals may be tamed; and if a person keep an animal belonging to a class which is dangerous he takes the risk of any damage it may do. Elephants undoubtedly as a class are dangerous though individuals may be tamed, and perhaps domesticated.

In Salmond on the law of Torts, page 365, the law is stated in the following terms:—"Whether any particular kind of mischief is natural or not to a particular species of animal is, it seems, a question of law. Thus, it is a rule of law and not a mere proposition of fact that it is not natural for a dog to be mischievous. 'The law,' says Lord Holt, 'takes notice that a dog is not of a fierce nature but rather the contrary.' So it has been decided that it is natural for strange horses to kick one another when left at large in a field or for a stallion to bite and kick a mare but that it is not natural for a horse straying in the highway to kick a human being". It is clearly in the nature of a tusker when left at large to attack another.

The case of *Mahadar Mahanta* v. *Balaram Gogoi* (2) refers to rights of property. It has no bearing on the question before us.

A case [*Maung Kyam Dun* v. *Ma Kyin and Narayana Chetty* (3)] has been cited in which Mr. J. White, sitting as a single Judge, laid down the law in these words,—"It could not, I think, be laid down in this country that a man is liable for any damage done by his elephant without any proof of negligence or that he knew it to be of a vicious disposition. In view of the manner in and extent to which elephants are employed in this country such a proposition would be manifestly unjust". These remarks apply where the circumstances are not altogether similar to those in India, but it was argued before us that, considering the extent to which elephants are employed in India, the same principle should be followed. The absolute liability of a person for any harm done by his animal independently of any interest as negligence on his part does not depend, as we have pointed out, on the manner or extent to which such animals are employed but upon the nature of the class to which such animal belongs or the particular kind of mischief committed.

We think that the Mankada Kovilagam

(2) 35 C. 413; 12 C. W. N. 517.
(3) 2 U. B. R. 570.

owner also is liable. Both the owner and the first defendant are responsible for the loss sustained by the plaintiff. No authority has been cited to support the 5th defendant's contention that the first defendant alone is liable. Whether on account of any implied contract between her and the first defendant the latter was not bound to take due care to prevent any damage and is not, therefore, bound to compensate the third defendant, is not a question that arises for consideration.

The second appeals are dismissed with costs of the plaintiff. *Appeal dismissed.*

MADRAS HIGH COURT.

FIRST CIVIL APPEAL NO. 21 OF 1908.

February 17, 1911.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Sundara Aiyar.

MUNDANCHERI KOMAN NAIR—APPELLANTS

versus

MUNDANCHERI PUVAYIL TEYYAN *alias* KUTAN *alias* KORNESHERI NAIR—RESPONDENT.

Stanom—*Suit for declaration of title—Suit for mere dignity, whether maintainable—Amendment of plaint.*

A suit for a mere declaration that the plaintiff is entitled to a *stanom*, to which no properties are attached, is a suit relating to a mere dignity and is not maintainable.

The plaint in this case was allowed to be amended by mentioning the properties attached to the *stanom*.

Appeal against the decree of the Court of the District Munsif of Otapalam in Revised Original Suit No. 112 of 1902.

Mr. *T. R. Ramachandra Aiyar*, for the Appellant.

Mr. *P. Kundu Panikar*, for the Respondent.

JUDGMENT.—The plaint asks for a declaration that the plaintiff is entitled to the *stanom* of Koheseri Nair, but does not state whether there are any properties attached to the *stanom*. If there are none, the suit would be one relating to a mere dignity and would not be maintainable. The plaintiff stated in his previous plaint that the *stanom* had some property attached to it. Having regard to this fact we think the plaintiff should have an opportunity of amending his plaint by stating that fact in his present plaint. If the plaintiff should be so advised, he may further amend the plaint by asking for possession of the property attached to the *stanom*. We have held in Appeal No. 180 of 1908 that there is no

community of interest between the plaintiff's and defendant's *tarwads*. We reverse the decision of the lower Court and remand the suit for trial *de novo* after the plaintiff amends his plaint. The defendants will, of course, have the right to put in a fresh written statement. The plaintiff must pay the costs of this appeal. The costs in the lower Court will abide the result of the fresh trial.

Appeal allowed.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL NO. 194 OF 1908.

March 15, 1911.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Sundara Aiyar.

RANGATHAYI AMMAL—APPELLANT

versus

NELLI MUNUSAWMY CHETTY, MINOR, BY GUARDIAN NYNAPPA CHETTY—RESPONDENT.

Hindu Law—Maintenance—Principles in awarding maintenance to widow—Rate of maintenance—Claim for arrears—Demand unnecessary—Costs in maintenance suits.

The amount which a Hindu widow is entitled to for her maintenance is an amount, which in the opinion of the Court would be required to enable her to live comfortably according to the standard of comfort obtaining in the community to which she belongs, regard being had to the extent of the property out of which she is entitled to receive maintenance.

No hard and fast rule can be laid down that she is entitled to a particular fraction of the income, although she could in no event claim more than the income of the share of the estate which her husband would have been entitled to, if a division had taken place during his life-time.

A Hindu widow is entitled to arrears of maintenance from the date of her husband's death. No formal demand is necessary.

Arrears of maintenance may be refused to a Hindu widow only where the person liable to make the payment has justifiable grounds for inferring that the claim was abandoned and had in consequence not set aside any portion of his annual income to meet the claim.

Raja Yarlagadda Mallikarjuna Prasadha Naidu v. Rajah Yerlaggadda Durga Prasada Naidu, 24 M. 147; 27 I. A. 151, referred to.

A widow may waive her right to maintenance by living separately from her husband's family, but the waiver cannot be inferred from the fact of separate residence alone.

The object of a maintenance suit being to ascertain the liability of the family estate, the costs of such suit should ordinarily come out of the estate.

Where a lesser maintenance is allowed to the widow than was claimed by her, the defendant should not be allowed proportionate costs on the amount disallowed unless the claim is exorbitant.

Appeal against the decree, dated the 10th

August 1908 of the Court of the Subordinate Judge of Kumbakonam in Original Suit No. 45 of 1907.

Mr. *K. Ramachendrier*, for the Appellant.

Mr. *N. R. K. Thathachariar*, for the Respondent.

JUDGMENT.—The main question for decision is what is the proper rate of maintenance to be awarded to the plaintiff, against the minor defendant, her step-son. The Subordinate Judge finds that the family property in the hands of the defendant would be worth Rs. 19,500 and that the annual income thereof might be taken to be Rs. 1,170. He awards maintenance to the plaintiff at Rs. 15 per mensem, being of opinion that one sixth of the income of the estate or one-third of the income of her husband's share would be a proper allotment to her. He made no award for the plaintiff's residence or any extraordinary expenses. The learned Vakil for the appellant objects to the principle adopted by the lower Court, and further offers to show that the value of the family property and the income derivable therefrom would be considerably more than what the Subordinate Judge has found them to be. We need hardly point out that what a Hindu widow is entitled to for her maintenance is an amount which, in the opinion of the Court, would be required to enable her to live confortably according to the standard of comfort obtaining in the community to which she belongs, regard being had also to the extent of the property out of which she is entitled to maintenance. No hard and fast rule can be laid down that she is entitled to a particular fraction of the income, although she could in no event claim more than the income of the share of the estate which her husband would have been entitled to if a division had taken place during his life-time. We do not consider it necessary to investigate the question of the exact value of the property in the defendant's possession. Having regard to the social status of the family and to the other circumstances of the case, we think that a sum of Rs. 20 a month would be a proper and sufficient amount to be allowed to the plaintiff. The amount will include her claim for house rent. We direct that Rs. 240 per annum be substituted in the decree of the lower Court for Rs. 180 and that necessary consequential alterations be also made therein. The plaintiff has objected to the refusal of the lower Court to decree arrears of maintenance from the date of her husband's death up to the 10th February 1904, when she made a written demand for maintenance. The Subordinate Judge says that till that date there was no wrongful withholding of maintenance. A wrongful withholding is not necessary to entitle a widow to arrears of maintenance, if by that expression is meant, that the withholding should be morally improper. No demand is necessary to give a right to receive arrears. Her status as the widow of one of the members of a joint family holding property in common is sufficient to entitle her to receive maintenance from the date of her husband's death. She may, no doubt, by living with her parents or otherwise, impliedly waive her right to be maintained by her husband's relations during the time that she lives away from them, but waiver cannot be necessarily inferred in every case from the fact of the separate residence alone. The true principle to be applied is laid down in *Raja Yerlagada Mallikarjuna Prasadha Naidu* v. *Raja Yerlagada Durga Prasadha Naidu* (1) by the Privy Council, that arrears will be refused only in cases where the person liable to make the payment had justifiable grounds for inferring "that the claim was abandoned" and had in consequence not set aside any portion of his annual income to meet such a claim. In the present case the plaintiff was removed by her relations from her husband's home, after his death on the ground that it was necessary to do so for her protection. The parties have been quarrelling ever since in the Courts. The defendant had no valid grounds for supposing that the claims for maintenance would not be pressed. We must, therefore, allow the claim for arrears from the date of the plaintiff's husband's death at Rs. 180 a year. The plaintiff will receive costs from the defendant on the relief awarded to her both in this Court and in the Court below. We do not think that in a suit for maintenance the defendant should be allowed proportionate costs on the amount disallowed to the plaintiff unless the claims be an exorbitant one. The object of such a suit is to ascertain the liability of the family estates and the costs of doing so should ordinarily come out of the estate. The defendant in this case is not

(1) 24 M. 147; 27 I. A. 151.

entitled to any costs and the plaintiff is entitled to hers in either of the Courts.

The memorandum of objection is dismissed with costs.

Decree modified.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 591 OF 1910.

March 21, 1911.

Present: Mr. Justice Richards.

KHUSHI RAM—DEFENDANT—APPELLANT

versus

MAHA SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Agra Tenancy Act (II 1901), ss. 11, 34—Holding of tenancy for over twelve years without payment of rent with consent of zemindar *—Acquisition of occupancy-right.*

A tenant who has been in possession of a holding for over twelve years with the consent of the *zemindar* can acquire an occupancy-right in the holding notwithstanding the fact that he has been paying no rent to the *zemindar*. Section 34 of the Agra Tenancy Act, 1901, does not apply to such a case.

Second appeal from the decision of the District Judge of Meerut, dated the 8th of April 1910.

Mr. *Girdhari Lal Agarwala*, for the Appellant.

Mr. *Peary Lal Banerji*, for the Respondents.

JUDGMENT. This appeal arises out of a suit for ejectment. The findings of the Courts below are as follows:—There was a plot numbered 541. The greater part of the whole plot has been in the physical possession and cultivation of the defendant for twenty-nine years. The defendant purchased the *zemindari* rights of co-sharer about 16 years ago. Prior to the sale to the defendant, there had been a partition at the instance of his vendor. The plot was divided and part thereof *viz.*, No. 541/2 fell to the lot of the defendant. Another portion No. 541/3 fell to the lot of the plaintiffs. This last mentioned plot, that is to say No. 541/3, is the bit of land in dispute. It is a small piece of land and it lies adjacent to No. 541/2. Apparently because there was no division between No. 541/2 and No. 541/3 and on account of the smallness of the area of No. 541/3 the plot being only some two *biswas* in extent the plaintiffs allowed the bit of land to remain in the possession of the defendant. As stated, it had already been in his possession before that, although not necessarily in his possession as a co-sharer. The defendant pleaded that in the events that had happened and having regard to the long time he had been in possession, he has acquired proprietary title. He claimed further that if he had no proprietary title he at least had acquired occupancy-rights. It seems to me that this is the fair meaning to be gathered from the written statement and such a defence was obviously open upon the facts. The Court of first instance decree the plaintiffs' suit. The lower Appellate Court referred certain issues and on return of the findings on those issues decided in the plaintiffs' favour affirming the decree of the Court of first instance. One of the issues which was referred was, whether or not the defendant was in adverse possession, the onus of showing that the defendant was in adverse possession being thrown on the defendant. This issue was decided against the defendant, the Court holding that the defendant was not in adverse possession. The Court also found that the defendant had been in possession for twenty-nine or thirty years and had never paid any rent. Section 11 of the Tenancy Act provides that a tenant who has held the same land continuously for a period of twelve years shall have a right of occupancy in such land. Now the defendant has had possession of this land for twenty-nine or thirty years. Even assuming that all his occupation prior to the partition is to be wiped out, he has held possession ever since the partition which took place fifteen or sixteen years prior to the institution of the suit. It is said that he is not a tenant and that only a tenant can acquire occupancy-right. If the defendant is not a tenant and held the land ever since the partition it is very difficult to see how the issue as to adverse possession was decided against him. However, I do not think it is open to the plaintiffs to contend that the defendant is not a tenant. If he was not a tenant, they should not have sued him in the Revenue Court. Furthermore, they have expressly sued him as a tenant. In my opinion the plaintiff having sued the defendant as a tenant ought not now to be allowed to say that he is a trespasser.

Reliance is placed on section 34 of the Tenancy Act, which provides that although the person occupying land without consent of the land-holder shall be liable to rent, nevertheless he shall not acquire occupancy-right

until he begins payment.. I do not think that this section helps the plaintiffs. I think it must be taken that the defendant was holding the land with the consent of the plaintiffs, otherwise, as I said before, the possession would be adverse and the defendant would have acquired proprietary right by reason of such adverse possession. It is lastly said that to contend that he is an occupancy-tenant is not open to the defendant having regard to the grounds of appeal. In my opinion, having regard to the defence set forth in the written statement and to the clear facts of the case, the defendant ought to be allowed to set up the case that he has acquired occupancy-right. The first ground of appeal really in effect sets up this case although it was framed more in accordance with the Rent Act of 1881 than with the present Act. If the defendant is entitled to occupancy-right, the plaintiff's suit, which is a suit for ejectment, must fail. But the decree must be without prejudice to the plaintiff's right to have the defendant assessed to rent in respect of the plot on the basis of his being occupancy-tenant. I, accordingly, allow the appeal, set aside the decree of both the Courts below and dismiss the plaintiff's suit with costs in all Courts.

Appeal allowed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 630 OF 1910.

February 23, 1911.

Present:—Mr. Justice Griffin.

FAKIR MUHAMMAD KHAN—DEFENDANT—APPELLANT

versus

ALI SHER KHAN—PLAINTIFF—RESPONDENT.

Mortgagor and mortgagee—Mortgagee escaping payment of rent for certain years—Who is to be benefited by such escape, mortgagee or mortgagor—Rights of mortgagee.

A. executed a usufructuary mortgage of an occupancy-holding to *B.* which provided that the mortgagee was to take the profits in lieu of interest after payment of the rent to the *zemindar*. During the subsistence of the mortgage the mortgagee escaped paying rent to the *zemindar* for several years:

Held, that the mortgagee was entitled to the benefit of such non-payment of rent to the *zemindar* and that the mortgagor was not entitled to redeem the mortgage on payment of the principal sum after deducting the rent not so paid.

Second appeal from the decision of the Small Cause Court Judge of Cawnpore, dated 4th April 1910.

Mr. *Govind Prashad*, for the Appellant.

Mr. *Ghulam Mujtaba*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit for redemption of a usufructuary mortgage of an occupancy-holding. The material conditions of the mortgage-deed were to the effect that the mortgagee was to appropriate in lieu of interest the balance of the profits remaining after payment of the rent to the *zemindar* and the mortgagor was to redeem the mortgage on payment of the sum of Rs. 160 in the month of *Jeth*. It so happened that the mortgagee escaped paying rent to the *zemindar* for several years. The question for decision was, who was to get the benefit of these sums which should have been paid to the *zemindar* but were, as a matter of fact, not paid. Both the Courts below have found in favour of the plaintiff and have held that he is entitled to the benefit of these sums and the Courts below have reduced the amount payable by the plaintiff to redeem by the total of these sums. The defendant comes here in second appeal and it is contended on his behalf that he is entitled, on the terms of the mortgage-deed, to recover the entire sum secured by the mortgage, *i. e.*, Rs. 160, and that he and not the plaintiff-mortgagor was entitled to the benefit of the sums which should have been paid to the *zemindar* as rent but were, as a matter of fact, not paid.

A somewhat similar question was decided in S. A. No. 690 of 1908 in which it was held that the mortgagee was entitled to the sums which should have been paid to the *zemindar* as rent, but which were not so paid.

In my opinion, the contention advanced on behalf of the appellants must be allowed. There was no provision in the mortgage-deed that accounts should be taken between the parties. The mortgagee was entitled to all the profits he could make out of the property. It so happened that he managed to add to the profits the rent of several years. There is also a clear and distinct provision in the mortgage-deed that the mortgagor was bound to redeem on payment of the mortgage-money in a lump sum.

I, therefore, allow the appeal, set aside the decree of the Courts below and decree the

plaintiff's suit for redemption on payment of a sum of Rs. 160. The decree will be drawn up in the form prescribed by law and six months will be allowed for payment. The appellant will get his costs in all Courts

Appeal allowed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 435 OF 1909.

April 10, 1911.

Present:—Sir Arthur Reid, KT., Chief Judge.

ISMAIL—PLAINTIFF—APPELLANT

versus

Musammat BOJI AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (XV of 1877), s. 18—Construction of the section—Pre-emption suit—Sale ostensibly in favour of one person—Real purchaser another person—Active concealment—Fraud—Limitation.

The sale of certain landed property was ostensibly effected in favour of one *B.* but the real purchaser was one *M.* who actively concealed the fact of the sale in his own favour:

Held, in a pre-emption suit against *M.*, that section 18 of the Limitation Act extended the period of limitation by making it run from the date of the pre-emptor's knowledge of the fraud:

Held, further, that as the suit was against *M.* who was guilty of the fraud, it was quite immaterial that a possibly infructuous suit against *B.* the ostensible purchaser, might have been instituted before the fraud became known to the pre-emptor.

The literal reading of section 18 of the Limitation Act is not against the view that the words "against any person" should be understood to follow the words "a suit" in the beginning of the section.

Second appeal from the order of the Additional Divisional Judge, Ferozepore Division, dated the 25th January 1909, confirming that of the Munsif, 1st class, Hissar, dated the 27th April 1908, dismissing the claim.

The Hon'ble Mr. *Mohammad Shafi*, for the Appellant.

The Hon'ble Mr. *Shadi Lal*, for the Respondents.

JUDGMENT.—The lower Appellate Court has found that the respondent Manphul fraudulently concealed from the plaintiff-appellant the fact that the sale ostensibly effected to Behari Lal was actually effected to Manphul, but has declined to hold that section 18 of the Limitation Act saved the suit from being barred by limitation on the ground that "the literal reading of the section" is against the view that the words "against any person" should be understood to follow the words "a suit" in the beginning of the section.

I am unable to concur in this conclusion.

The suit was against Manphul and Behari Lal.

The active concealment by Manphul of the fact that he was the actual purchaser delayed the appellant's suit against him

Manphul pleaded that he was the actual purchaser and that Behari was not the purchaser.

Had Behari been sued alone Manphul would doubtless have intervened or filed a separate suit based on his own title.

Under these circumstances it is, in my opinion, idle to contend that section 18 does not extend the period of limitation by making it run from the date of the appellant's knowledge of the fraud. The suit was against the person guilty of the fraud and it is immaterial that a possibly infructuous suit against the ostensible purchaser might have been instituted before the fraud became known to the appellant.

For these reasons I hold that the suit was within limitation.

I set aside the decree of the lower Appellate Court and I remand the appeal under Order XLI, rule 23, of the Code of Civil Procedure, for disposal in accordance with law.

Costs of this will be costs in the cause. Counsel's fee on the higher scale.

Appeal allowed; case remanded.

PUNJAB CHIEF COURT.

CRIMINAL REVISION No. 183 OF 1911.

April 17, 1911.

Present:—Mr. Justice Kensington and Mr. Justice Johnstone.

HARNAM SINGH—ACCUSED—PETITIONER

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s 562—Penal Code Act (XLV of 1860), s. 420—S. 562 inapplicable to conviction under s 420—Practice—Magistrate dealing with accused under s. 562 on conviction under s. 420—Re-trial not necessary—Remand of case for passing lawful sentence—Appellate or Revisional Court not competent to pass sentence.

Section 56 of the Criminal Procedure Code covers only the form of cheating punishable under section 417, Indian Penal Code, with one year's imprisonment and not the more serious form punishable under section 420 with seven years.

Crown v. *Neki Ram*, 23 P. W. R. 1905 Cr.; 8 Cr. L. J. 455; *Emperor* v. *Nga Pyi*, 3 L. B. R. 95; 12 Bur. L. R.

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91; 3 Cr. L. J. 21 and *Emperor* v. *Bapu Rao*, 4 N. L. R. 18; 7 Cr. L. J. 319, followed.

Consequently, section 562, Criminal Procedure Code, cannot be used upon a conviction under section 420, Indian Penal Code.

Where a Magistrate convicts a person of an offence under section 420 but deals with him under section 562, Criminal Procedure Code, the proper course for the Appellate or Revisional Court is not to direct a re-trial but to set aside the order under section 562 and remand the case to the Magistrate to pass a lawful sentence.

Emperor v. *Bapu Rao*, 4 N. L. R. 18; 7 Cr. L. J. 319; *King-Emperor* v. *Manohar Das*, 24 P. R. 1904 Cr., *Narayanaswami* v. *Emperor*, 29 M. 567; 5 Cr ,L. J. 136, followed.

An Appellate or Revisional Court itself cannot pass the proper sentence.

Petition, under section 439 of the Criminal Procedure Code, for revision of the order of the Sessions Judge, Amritsar Division, dated the 25th January 1911, affirming that of the Honorary Magistrate, first class, Amritsar, dated the 14th October 1910, ordering petitioner to furnish security under section 562, Criminal Procedure Code.

Bhagat *Govind Das*, for the Petitioner.

JUDGMENT.—In this case the accused Harnam Singh was tried and charged by a 1st class Magistrate of Amritsar under section 420, Indian Penal Code, at the instance of one Fazal Din. The learned Magistrate found him guilty and convicted him, but passing no sentence, dealt with him under section 562, Criminal Procedure Code. The accused applied to the Sessions Judge on the revision side whereupon that authority passed the following order :—

"No appeal was preferred and after considering the matter I referred the case to the Chief Court as the order of the Magistrate was illegal. Had an appeal been preferred I should certainly have ordered a re-trial. And there are certainly no grounds for entertaining this application for revision."

As a matter of fact, Harnam Singh had been found guilty in two separate cases, the facts being *mutatis mutandis* the same at the instance of Fazl Din and Chiragh Din, respectively, and the references to this Court will be found in Criminal Revision Nos. 1691 of 1910 and 89 of 1911 all three cases can be conveniently disposed of in one judgment.

Section 562, Criminal Procedure Code, as has more than once been pointed out, is not very happily worded. In it we find indications both ways as to the meaning to be assigned to the word "cheating" but to us it seems that the Legislature intended that the word should cover only the form of cheating punishable under section 417, Indian Penal Code, with one year's imprisonment, and not the more serious form, punishable under section 420 with seven years. We need not discuss the matter at length; it is enough to say that we follow *Crown* v. *Neki Ram* (1) *Emperor* v. *Nga Pyi* (2) and *Emperor* v. *Bapu Rao* (3). It is undeniable that there is some difficulty in seeing the real distinction between the offences mentioned in section 417 and section 420, Indian Penal Code, respectively, but we are not here concerned with this distinction or this difficulty. We hold, then, that section 562, Criminal Procedure Code, cannot be used upon a conviction under section 420, Indian Penal Code.

The question for us is what is the proper course for this Court now to pursue. Mr. Govind Das, for the convict Harnam Singh, urges that we should order a re-trial; but, in our opinion, we should follow the line taken by the Court in *Emperor* v. *Bapu Rao* (3), already quoted, set aside the orders under section 562, Criminal Procedure Code, and remand the cases to the Magistrate to pass lawful sentences. Accused might himself have appealed in the first instance, see *Emperor* v. *Manohar Das* (4), but he went up on the revision side instead. The learned Sessions Judge should have instructed him to *appeal*, or should have sent the cases up here on the revision side with a recommendation that the order under section 562, Criminal Procedure Code, should be set aside and the case be remanded not for re-trial but for the passing of a legal sentence. That this is the proper course for us now is clear from a perusal of section 439, Criminal Procedure Code, read with section 423, clause (*d*), as explained in *Narayanaswami Naidu* v. *Emperor* (5) and *Emperor* v. *Birch* (6). Mr. Govind Das is right in contending that we cannot ourselves pass sentence now, but he is hardly correct in his further contention that we can only order re-trial. Clause (*d*) aforesaid is very wide and fully empowers us to do what we are about to do.

(1) 23 P. W. R. 1908 Cr.; 8 Cr. L. J. 455.
(2) 3 L. B. R. 95; 12 Bur. L. R. 91; 3 Cr. L. J. 21.
(3) 4 N. L. R. 18; 7 Cr L. J. 319.
(4) 24 P. R. 1904 Cr.; 1 Cr. L. J. 1098.
(5) 29 M. 567; 5 Cr. L. J. 136.
(8) 24 A. 306

GAGAN SHEIK *v.* ABAJAN KHATUN.

We, therefore, set aside both the orders under section 562, Criminal Procedure Code, and remand the case to the first Court in order that it may pass legal sentences. If the sentences passed are appealable, Harnam Singh can, of course, appeal; if not, he can apply for revision on the merits.

Case remanded.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2219 OF 1908.

January 26, 1911.

Present:—Mr. Justice Mookerjee and Mr. Justice Teunon.

GAGAN SHEIK AND OTHERS—DEFENDANTS—APPELLANTS

versus

ABAJAN KHATUN—PLAINTIFF AND OTHERS—REMAINING DEFENDANTS—RESPONDENTS.

Landlord and tenant - Tenants represented by one in landlord's books - Whether one represents tenancy—Question of fact.

The decision in *Ashok* v *Karim*, 9 C. W N 843, does not lay down any rule of universal application that one person cannot represent a tenancy in the books of the landlord on behalf of himself and his fellow tenants The contrary view has been maintained in a long series of decisions.

Rupram Namasudra v *Iswar Namasudra*, 6 C. W. N. 302 and *Afraz Mollah* v *Kulsumannessa* 10 C. W. N. 176, referred to

The question whether one of several heirs of the original tenant represents the tenancy on behalf of all the persons interested, is essentially a question of fact.

Appeal from the decree of the Sub Judge of Faridpur, dated June 12th, 1908, reversing that of the Third Munsif of Bhanga, dated Spetember 19th, 1907.

Mr. *H. N. Sen*, Counsel, and Babu *Jatindra Mohan Sen Gupta*, for the Appellants.

Babu *Brojo Lal Chakravarti*, for the Respondents.

JUDGMENT. This is an appeal on behalf of three of the defendants in a suit for recovery of possession of land on establishment of title. The plaintiff prays for cancellation of a sale held in execution of a decree for arrears of rent against her mother and asks for recovery of possession. Her case in substance was that the decree was obtained by fraud and that in any event her interest in the disputed property could not be affected by a sale held in execution of a decree obtained against her mother.

In the Court of first instance the suit was dismissed on two grounds, namely, that fraud had not been established and that the mother of the plaintiff represented the tenancy in the books of the landlord. Upon appeal the learned Subordinate Judge has not entered into the question of fraud; but he has held upon the authority of the decision of this Court in the case of *Ashok Bhuiyan* v. *Karim Bepari* (1), that the title of the plaintiff could not be affected inasmuch as the decree was obtoined against her mother.

The defendants have now appealed to this Court and on their behalf it has been contended that the learned Subordinate Judge has taken an erroneous view of the effect of the execution-sale impeached by the plaintiff. In our opinion there is no room for controversy that the judgment of the Subordinate Judge cannot be supported. As was pointed out by this Court in the case of *Jagat Tara Dassya* v. *Daulati Bewa* (2), the decision in *Ashok Bhuiyan* v. *Karim Bepari* (1) does not lay down any rule of universal application that one person cannot represent a tenancy in the books of the landlord on behalf of himself and his fellow-tenants. Indeed the contrary view has been maintained in a long series of decisions amongst which reference may be made to those of *Rupram Namasudra* v. *Iswar Namasudra* (3) and *Afraz Mollah* v. *Kulsumannessa* (4). The question whether one of several heirs of the original tenants represents the tenancy on behalf of all the persons interested, is essentially a question of fact. The learned Munsif in this case found that the mother of the plaintiff represented the tenancy on behalf of the plaintiff and her sister, and he referred to circumstances from which this inference could be legitimately drawn. The learned Subordinate Judge has not taken into consideration any of these circumstances but he has held as inflexible rule of law that the mother of the plaintiff could not represent the tenancy so as to entitle the landlord to obtain in a suit brought against her a decree binding upon all the persons interested in the tenancy. Such a view cannot be maintained.

The result, therefore, is that this appeal is allowed, the decree of the Subordinate Judge set aside and the case remanded to him. He will consider the question raised in the

(1) 9 C. W. N. 843.
(2) 2 Ind Cas 605. 13 C. W. N. 1110; 37 C. 75
(3) 6 C. W. N. 302.
(4) 10 C. W. N. 176; 4 C. L. J. 68.

fourth issue, namely, "did the plaintiff allow Begum Bibi to represent the *jama* in suit? Is she thus estopped from impugning the validity of the decree and sale in execution thereof?" If this question is answered against the plaintiff the other questions that arise in the case must be decided. The cost of this appeal will abide the result.

Appeal allowed.

CALCUTTA HIGH COURT.
CIVIL RULE No. 1661 OF 1911.
March 27, 1911.
Present:—Mr. Justice Chitty and
Mr. Justice Chatterjee.
ELAHI BUKSH MANDAL AND OTHERS—DEFENDANTS—PETITIONERS
versus
RAM NARAYAN GHOSE—PLAINTIFF—OPPOSITE PARTY.

Mesne profits—Damages for catching fish—Immediate right of possession—Plaintiff not in possession—Importance of case—Pecuniary limit of claim

A plaintiff may perhaps recover mesne profits even though he be out of possession.

Dyamoyee Dayee v *Modhoo Soodun Mytee*, 3 W R. 147 and *Dwarkaram Misser* v. *Jogessur Lall*, 21 W. R. 276, referred to.

But to recover damages for fish, said to have been caught by the defendant from a tank, the plaintiff must at least show that he has an immediate right of possession, if he were claiming it. If he fails to do so and it is found that the defendant is in possession, the suit must fail.

Rule against the order of the Munsif of Balurghat, dated December 23rd, 1910, passed in exercise of his powers as a Judge of the Small Cause Court.

Babus *Dwarka Nath Chakravarti* and *Romesh Chandra Sen*, for the Petitioners.

Dr. *Rash Behari Ghosh* and Babu *Joy Gopal Ghosha*, for the Opposite Party.

JUDGMENT. This is a rule obtained by the defendant in a Small Cause Court suit calling on the plaintiff to show cause why the judgment and decree should not be set aside. The plaintiff sued for Rs. 5 as damages for fish said to have been caught by the defendants from a certain tank in the month of *chaitra* 1316 (March-April 1910). The main point in the suit was in whom the title to the tank lay? The Small Cause Court Judge was (we are told) asked to return the plaint for presentation to a Court having jurisdiction to determine the title, but he declined to do so and proceeded to investigate the question of title himself. This he was, no doubt, competent to do for the purpose of determining the question of the defendants' liability for damages, but if he did so it was incumbent on him to decide the question correctly and according to law. He has rejected the survey map produced by the defendant on the ground that the tank in dispute has not been clearly located upon it while he accepts the *thak* map produced by the plaintiff which was open to a precisely similar objection. Moreover, he finds that the defendant was in possession at the time in respect of which the suit was brought. Now, a plaintiff may perhaps recover mesne profits even though he be out of possession; see *Dyamoyee Dayee* v. *Modhoo Soodun Mytee* (1) and *Dwarkaram Misser* v. *Jogessur Lall* (2); but to recover damages in a case like the present he must at least show that he has an immediate right to possession, if he were claiming it. This the plaintiff has failed to do in this case. It was argued that *de minimus non curat lex*, and that the amount at stake being so small this Court would not interfere in revision. The importance of the case to the parties, however, is not to be measured by the pecuniary limit of the claim. It is notorious that before embarking on litigation as to title, litigants in this country frequently endeavour to obtain an advantage, or what they think will be an advantage, by securing in their favour a decree of a Small Cause Court or a decree under section 9 of the Specific Relief Act, or an order of a Criminal Court. That has, no doubt, been the object of the present plaintiff and it is not one which should be encouraged. That this Court has ample jurisdiction to interfere is not denied. The true principle to be followed is, we think, that enunciated by the Bombay High Court in *Poona City Municipality* v. *Ramji* (3). The powers conferred by section 25 of the Provincial Small Cause Courts Act are, no doubt, discretionary, but at the same time that section is somewhat wider in its scope than section 115 of the Civil Procedure Code.

We think that the judgment of the Small Cause Court is clearly not in accordance with law, and that it is a case in which we should interfere. We accordingly make the rule absolute and set aside the judgment and

(1) 3 W R. 147.
(2) 21 W. R. 276.
(3) 21 B. 255.

decree of the Small Cause Court and in lieu thereof order that the plaintiff's suit be dismissed with costs. The plaintiff must also pay the costs of this rule. We fix the hearing fee at two gold *mohurs*.

Rule made absolute.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL NO. 125 OF 1908.

February 28, 1911.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Sundara Aiyar.

S. R. M. CHIDAMBARAM CHETTY AND OTHERS—APPELLANTS

versus

MEENAKSHI SUNDARA NACHIAR—RESPONDENT.

Madras Rent Recovery Act (VIII of 1865), s. 39—Service of notice of demand—Service—Illegality of sale held without proper notice.

Before a sale for arrears of rent can be held under the Madras Rent Recovery Act, it should be shown that notice of demand for the arrears due was served in the manner required by section 39 of the Act.

The affixing of the notice to the defendant's house is not valid service under the section.

It should be shown that attempts were made to show the notice to the defaulter.

A failure to serve the notice of demand in the manner authorised renders the sale altogether illegal.

Dorasawmy Pillay v. *Muthusawmi Moopan*, 27 M. 94; and *Zemindar of Ettyapuram* v *Sankarappa Reddiar*, 27 M 483 (F. B.), referred to.

Where a notice of demand is taken inside the house of a defaulter and it is afterwards reported to the process-server that the defaulter refuses to receive it:

Held, that this is not sufficient service.

Appeal against the decree of the Court of Subordinate Judge of Madura East, in Original Suit No. 5 of 1906.

Mr. *C. V. Ananta Krishna Aiyar*, for the Appellants.

Mr. *T. Rangachariar*, for the Respondent.

JUDGMENT.—We concur with the Subordinate Judge in holding that notice of demand of the arrears due was not served on the plaintiff in the manner required by section 39 of the Rent Recovery Act. It is not proved that the plaintiff had a *stanapathi* of the name of Sangaru or that the notice was actually shown to the plaintiff. It is not sufficient to show that some woman took the notice inside the home of the plaintiff and afterwards reported to the process-server that the plaintiff refused to receive it. The defence first witness does not say that any attempt was made to deliver the notice to the plaintiff's husband, but only that he told him of the demand. This is not enough under the section. Service by affixing the notice to the plaintiff's home is, therefore, not valid. The faliure to serve the demand on the plaintiff renders the sale altogether illegal. See *Dorasawmy Pillai* v. *Moothusawmy Moopan* (1) and *Zemindar of Ettyapuram* v. *Sankarappa Reddiar* (2).

The appeal is dismissed with costs.

Appeal dismissed.

(1) 27 M. 94.
(2) 27 M. 483 (F. B.)

MADRAS HIGH COURT.

FIRST CIVIL APPEAL NO. 176 OF 1908.

March 7, 1911.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Sundara Aiyar.

PALANIAPPA CHETTY—APPELLANT

versus

ARUNACHELLAM CHETTY AND OTHERS—RESPONDENTS.

Bill of exchange—Hundi *drawn in favour of third person in discharge of debt due on a pro-note Conditional discharge—Receipt for the amount of* hundi—*Endorsement on the pro-note—Presumption of conditional discharge.*

As a general rule a bill of exchange or *hundi* given for a debt operates only as a conditional discharge of the debt but the contrary may be proved in any particular case.

D. owed a debt to *P.* on a pro-note. *P.* in his turn was indebted to *T.* At *P.*'s request *D.* drew a *hundi* for Rs. 1,000 in favour of *T.* and the payment of that amount was endorsed on the original pro-note of *D.* in favour of *P. T.* did not present the *hundi* to the drawee. The question was whether *P.* had accepted the *hundi* unconditionally in part satisfaction of the amount due from *D.*

Held, that as *T.* was under no obligation to present the *hundi* to the drawee, it did not amount to an unconditional discharge.

Held, further, that the endorsement of receipt on the pro-note was insufficient to rebut the presumption of the discharge being only conditional.

Appeal against the decree of the Subordinate Judge's Court of Madura East, in Original Suit No. 35 of 1908.

Mr. *S. Srinivasa Aiyangar*, for the Appellant.

Mr. *V. Viswanatha Sastry*, for the Respondents.

JUDGMENT.—The question in the appeal is whether the *hundi* Exhibit B for

Rs. 1,000 was accepted by the plaintiff in part satisfaction of the amount due. The established rule is that a bill of exchange or *hundi* given for a debt operates only as a conditional discharge of the debt, see *Jambu Chetty* v. *Palanaiappa Chettiar* (1), although it might be proved that in any particular case it was taken unconditionally in satisfaction of a debt. In this case the *hundi* was drawn by the defendant or his uncle in favour of a third person to whom the plaintiff had to pay money. That person was under no obligation to present it for payment to the drawee nor is there any evidence that when the *hundi* was drawn he discharged the plaintiff from the liability to pay him his debt. It is extremely improbable that the plaintiff would unconditionally accept the *hundi* in part payment of the debt under these circumstances. No doubt the fact that payment of Rs. 1,000 was endorsed on the original pro-note executed by the defendant's father to the plaintiff is in favour of the view that the *hundi* was accepted unconditionally. But it has been held that the execution of a formal receipt for the amount coverd by a bill of exchange, is not sufficient to rebut the presumption of the discharge being only conditional. See *Stedman* v. *Gooch* (2). In *Re Romer and Haslem* (3). An endorsement of receipt on pro-note in this case cannot stand on a higher footing. There is no case in which the *hundi* in favour of a third party who might or might not present it for payment has been held to be an unconditional discharge. We must modify the decree of the lower Court and give the plaintiff a decree as prayed for in the appeal. The plaintiff is entitled to his costs of the appeal, and to the whole of his costs in the lower Court. The first defendant must pay his own costs throughout.

Decree modified.

(1) 26 M. 526.
(2) 1 Esp. 4.
(3) (1893) 2 Q. B. 286; 62 L. J. Q. B. 610; 4 R. 486; 69 L. T. 547; 42 W. R. 51.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 174 OF 1911.

April 18, 1911.

Present:—Mr. Justice Kensington and Mr. Justice Johnstone.

RAKHIA—CONVICT—APPELLANT

versus

EMPEROR—COMPLAINANT—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 512—Evidence Act (I of 1872), s. 145—Statements previously made by witness and recorded in the absence of accused—Admissibility—Penal Code (Act XLV of 1860), s. 302—Murder—Killing by repeated blows—Husband murdering wife on suspicion of misconduct—Punishment—Transportation.

Statements previously made by a witness to Magistrates, and recorded in the absence of the accused, cannot be treated as evidence in the Sessions Court if the witness is living and can be procured.

Section 512 of the Criminal Procedure Code will apply only where the witness is dead or cannot be procured.

Although section 145 of the Evidence Act admits of previous statements being referred to for purposes of cross-examination it does not authorise a Court to treat such statements as evidence against an accused.

The fact that a person is killed with repeated blows conclusively negatives the plea that there was no intention to kill the deceased or that the deceased was killed by her mistake.

A. murdered his wife. He alleged that he caught her in the act of adultery with one *S.* whom only he intended to kill. From the evidence it appeared that there was doubt about the immediate circumstances under which the crime was committed and that there was indication of misconduct on the part of the deceased wife:

Held, that although the accused should be convicted of murder, the Court was justified in the circumstances in not imposing the capital sentence.

Appeal from the order of the Sessions Judge of Multan Division, dated the 14th February 1911, convicting the appellant.

JUDGMENT.—This case is before us on appeal by Rakhia and also under section 374 of the Criminal Procedure Code for confirmation of the capital sentence passed upon him for the murder of his wife *Musammat* Talah on the 9th November 1909.

The appellant absconded immediately after the murder and was not arrested till about a year later. Immediately after arrest he confessed to a Magistrate on the 19th November 1910 saying that he had caught his wife in the act of adultery with one Sona and had killed her in his blind rage though intending to kill Sona only. He has substantially adhered to this story throughout and repeats it in his appeal. It is, therefore, not open to doubt that he

killed his wife, inflicting three severe incised wounds on her head causing extensive fracture of the skull. The medical evidence shows that death was probably instantaneous.

We cannot believe that portion of the appellant's story in which he says that he really intended to kill Sona only and that he struck his wife by mistake. The repeated blows given to his wife are conclusive against that explanation of the affair. At the same time, we see no reason to doubt that the murder was due to grave suspicion of the relations subsisting between the woman and Sona. It is to be observed that *Musammat* Talah is said to have been aged twenty-five and that the appellant had subsequently married a second wife named *Musammat* Shero (witness No. 5) whose age is given as thirty. It may be noted also that the medical evidence shows that *Musammat* Talah was four months advanced in pregnancy. We can make no sort of assumption from this fact, but when taken with the fact of the second marriage it may possibly indicate the explanation that the appellant, who is a young man aged thirty-three; had some reason for believing that *Musammat* Talah was unchaste.

The principal witness in the case is *Musammat* Karmo, mother of the deceased (witness No. 2), and even she is in no sense an eye-witness. Her evidence is important because she alludes to a quarrel between the two wives the day before, and also because she professes to have seen Sona running away from the house just after the murder. The learned Sessions Judge appears to have thought that this latter item in her evidence was an after-thought and he has in consequence transferred to the Sessions record and admitted in evidence certain previous statements made by the witness to different Magistrates on the 12th November 1909 under section 164, Criminal Procedure Code, and on the 1st March 1910 under section 512, Criminal Procedure Code. Both of these statements were recorded in the absence of the accused and there is no authority under either of the sections quoted or under the Indian Evidence Act for now allowing these previous statements to be treated as evidence in the Sessions Court. Section 512 can be made applicable only where the witness is dead or cannot be procured and though section 145 of the Evidence Act admits of previous statements being referred to for cross-examination purposes, it gives no authority to a Court for treatement of such statements as evidence against an accused. It must be held that the Sessions Judge has acted improperly in making any use of either of these statements and the same criticism applies to similar previous statements which have also been irregularly incorporated in the record in respect of *Musammat* Wassayi (witness No. 4) and *Musammat* Shero (witness No. 5). It is necessary to make the irregularity of procedure clear, though in this particular case the only point of importance involved is whether *Musammat* Karmo really saw Sona running away and as to this we must in any case regard *Musammat* Karmo's evidence with suspicion quite apart from the fact that she had not previously mentioned the point.

Musammat Wassayi (witness No. 4) is the mother of the appellant. Her statement has been very briefly recorded and she practically adds nothing to the prosecution case. Witness No. 5 is the appellant's second wife named Shero. Her statement also has been too briefly recorded, but she declares that she had detected the deceased committing adultery with Sona the day before. She says that she said nothing about this to any one, which is hardly credible. Reading her statement with that of *Musammat* Karmo we can have little doubt that there had been very recently a serious quarrel between the two wives on account of suspected misconduct on the part of *Musammat* Talah, and we are justified in assuming that the matter had come to the ears of the appellant, and that this was the reason for his killing his wife the next evening.

Whether he actually discovered his wife committing adultery with Sona or not is a matter for conjecture only but it is by no means improbable that on coming home in the evening he found Sona hanging about the premises of his house and that he at once jumped to the conclusion that *Musammat* Shero's story must be true and immediately attackd his wife in a fit of frenzy without giving her time to explain. It will be observed that Ditta (witness No. 3) mentions that *Musammat* Shero was close at hand when the appellant left the house after the murder. This does not add much to the case, but it suggests that the quarrel

between the two wives had broken out again about the time of the murder.

The Sessions Judge quotes the assessors as finding that the appellant killed his wife intentionally and deliberately. This probably was the opinion of the assessors but it must be noted that their opinion as recorded is not worded so as to make this clear. We have no hesitation in upholding the conviction for murder but we think that there is sufficient doubt about the immediate circumstance, under which the crime was committed, and sufficient indication of misconduct by *Musammat* Talah to justify our taking a lenient view of the case and remitting the death sentence.

We accordingly direct that the appellant's sentence be altered to one of transportation for life, the appeal being otherwise rejected.

Appeal rejected.

PUNJAB CHIEF COURT,
CRIMINA REVISION NO. 209 OF 1911
April 8, 1911.

Present:—Mr. Justice Rattigan.

EMPEROR—PROSECUTOR

versus

BARKAT RAM—ACCUSED.

Criminal Procedure Code (Act V 1898), ss. 195, 476—Magistrate directing prosecution of witness of his own motion—Effect of order—Revision—Perjury—Contradictory statements explainable—Penal Code (Act XLV of 1860), s. 193.

The Chief Court has power to revise orders passed under section 476, Criminal Procedure Code.

Bishen Singh v. *Amritsaria*, 5 P. R. 1908 Cr.; 7 P. W. R. 1908 Cr.; 104 P. L. R. 1908; 7 Cr. L. J. 281, followed.

Where a Magistrate of his own motion directs the prosecution of a witness for perjury, he acts under section 476, Criminal Procedure Code.

B purchased certain property from *A*. who subsequently sold it to *C*. *C*. brought a complaint of cheating against *A*. In the course of proceedings in the case, *B* appeared as a witness. In his examinaton-in-chief he stated that no other bargain took place in his presence. In cross-examination he stated that *A*. and *C*. were bargaining in his presence:

Held, that the statement in cross-examination did not necessarily imply that *B*. knew that another bargain had beed duly made, and that his explanation, that no bargain was actually effected, though negotiations were going on, was *per se* plausible; his prosecution, therefore, for perjury was not admissible.

Petition, for revision of the order of the Magistrate, Ist class, in Gujranwala District, dated the 12th November 1910, sanctioning prosecution of petitioner under section 193, Indian Penal Code, case reported by the Sessions Judge, Gujranwala Division on the following

GROUNDS.—This is an application by way of appeal under section 195 (*b*), Criminal Procedure Code, in regard to an order passed by Lala Ram Chandra, Magistrate 1st class, sanctioning the prosecution of accused under section 193, Indian Penal Code.

As the Magistrate, however, himself took action against petitioner, it appears to me that he was acting under section 476, Criminal Procedure Code. No appeal lies, nor has this Court any power to interfere on the revision side.

As to the merits the two contradictory statements made by Barkat petitioner occur in his explanation and cross-examination on the same day. The case was one in which a second vendee accused his vendor of having cheated him by not disclosing the fact that he had previously sold property to some one else. Barkat petitioner is the first vendee. The witness was trying to prove that the vendor had made no other bargain and said so; in cross-examination he admitted that complainant and accused were bargaining when he passed. These two statements are not necessarily contradictory. Nor do I think it proper that a witness should be deterred by fear of a prosecution such as this from explaining in cross-examination statements made by him in examination-in-chief. I, therefore, propose to report the case to the Chief Court for exercise of the Court's powers on the revision side.

The Public Prosecutor has been heard in support of the order. He does not urge anything against the merits of what is stated in this Court's order of 13th January 1911, calling upon the District Magistrate to show cause but is doubtful whether the order is open to revision by the Chief Court.

The Punjab authority on the point is *Ganda Singh* v. *Bisakhi* (1). As regards the High Courts the authorities are collected and discussed on pages 960 to 963 of the 8th edition of Agnew and Henderson's Code of Criminal Procedure. On the merits, I consider that the Magistrate's order should be set aside for reasons given in this Court's order of 13th January 1911. As the authorities are conflicting in regard to the power of revision by a Chief Court or

(1) 18 P. R. 1902 Cr.; 78 P. L. R. 1902

High Court. I submit the record to the Chief Court with a recommendation that the order passed by Lala Ram Chandra on 12th January 1910 be set aside.

Rai Sahib *Sukh Dial*, for the Accused.

ORDER.—The facts are set forth in the two orders of the Sessions Judge dated respectively the 13th January and 4th February 1911. I agree with the learned Judge that the order of the Magistrate 1st class, must be regarded as one under section 476, Criminal Procedure Code, and also that upon the merits this was not a case which called for further action against the witness, Barkat Ram. I cannot believe that any Court would convict him of an offence under section 193, Indian Penal Code, in respect of the two statements made by him, the one in examination-in-chief and the other in cross-examination. The two statements are not necessarily contradictory and the latter one was intended (as the Sessions Judge points out) to explain the former. When examined-in-chief, he said, "I have purchased a shop form Ganpat for Rs. 560. The deed was registered on 6th *Sawan* last. The bargain took place 4 or 5 days before the deed was registered. He gave me the receipt. . . My brother went away, and accused asked me to go and get the deed registered. I then asked him to wait till my brother's return. No other bargain took place in my presence." &c.

In cross-examination, Barkat Ram said, "I passed by Dhanpat's shop on business after this and complainant was talking to accused and the former said he would get the shop only if I refused. I warned complainant that I had a previous receipt and he said he would see for himself. *Both were bargaining at that time.* My deed had not been registered by that time." I cannot accept the Magistrate's interpretation of the words italicised as necessarily implying that Barkat Ram knew that another bargain had been duly made; but he at first denied this fact, and that he was subsequently compelled to admit it, and I think that the witness' explanation that no bargain was actually effected, though negotiations were going on, is one which is *per se* plausible and would in any event make the question of his guilt so doubtful that no Court would feel justified in convicting him of perjury. I certainly do not think that the Magistrate was well-advised in diecting the prosecution of a witness for a dubious contradiction of this kind.

This Court has power to revise orders passed under section 476, Criminal Procedure Code [see *Bishen Singh* v. *Amritsaria* (2)] and I have no hesitation in the present case of availing myself of that power to set aside the order of the Magistrate, 1st class, dated 12th November 1911. The said order is accordingly set aside.

(2) 5 P. R 1908 Cr.; 7 P. W. R. 1908 Cr.; 103 P. L. R. 1908; 7 Cr.L.J. 281 (F. B.)

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 938 OF 1910.

March 31, 1911.

Present:—Sir John Stanley, KT., Chief Justice, and Mr. Justice Banerji.

THE GREAT INDIAN PENINSULA RAILWAY—DEFENDANT—APPELLANT

versus

GANPAT RAI PLAINTIFF—RESPONDENT.

Railways Act (IX of 1890), s. 77—Suit for compensation against Railway Company for non-delivery of goods—Notice of claim, proof of—Offer by Railway Company to pay—Waiver—Estoppel—Limitation Act (IX of 1908), Sch. I, art. 31.

In a suit for compensation for non-delivery of goods consigned to a Railway Company for carriage, the plaintiff must prove that the defendant Company was served with notice of his claim as contemplated in section 77 of the Indian Railways Act. The fact that an offer was made by the Railway Company to pay a certain amount in satisfaction of the plaintiff's claim would not estop the Railway Company from raising the plea of notice.

Great Indian Peninsula Railway Company v. *Chandra Bai*, 28 A. 552; A. W. N. (1906) 101; 3 A. L. J. 329, referred to.

Article 31 of the Limitation Act, 1908, would apply to a suit against a Railawy Company for compensation for non-delivery of goods.

Second appeal from the decision of the District Judge of Ghazipur, dated the 2nd of August 1910.

Mr. *Ladi Prashad* (with him Mr. *Sham-Narain Mushran*), for the Appellant.

Mr. *Ahmed Karim*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit for damages for non-delivery of a bale of goods consisting of gauze which was consigned by the plaintiff's agents in Bombay to him at Ghazipur on the 26th of March 1908. The goods were lost on the Great Indian Peninsular Railway and it is stated that they were stolen in transit and that the thief was tried and convicted of

the theft. Amongst the defences filed by the Great Indian Peninsula Railway Company, was one based on section 77 of the Indian Railways Act, namely, that no notice of action as required by law was given to that Company.

The Court of first instance found that no notice was given and dismissed the plaintiff's suit.

An appeal was preferred by the plaintiffs with the result that the lower Appellate Court held that the notice required by the Act had been waived by the defendant Company; and also in view of the fact that an offer had been made to the plaintiff for payment of a sum of Rs. 499-7-3 in satisfaction of his claim, the Company could not now be allowed to go behind this offer and set up the technical ground of defence that no notice of the claim had been served within the meaning of the section above referred to. Accordingly, that Court reversed the decision of the Court below, so far as regards the Great Indian Peninsula Railway Company, and allowed the plaintiff's claim as against that Company, but dismissed it as regards the East Indian Railway Company.

From the decree of this Court the present appeal has been preferred and the main grounds of appeal are two:—(1) that no notice having been served within the meaning of section 77 of the Indian Railways Act the suit was bound to fail as against the Great Indian Peninsula Railway; that there was no waiver of the requisite notice and that the Court below was, therefore, wrong in allowing the plaintiff's claim. There is a further ground of appeal, namely, that the suit is barred by limitation, not having been brought within one year from the date on which the goods ought to have been delivered.

As regards the first question it is not disputed that notice was not served upon the Great Indian Peninsula Railway Company pursuant to the provisions of section 77 of the Indian Railways Act. That section provides that "a person shall not be entitled to compensation for the loss of goods delivered to be carried by Railway unless his claim to compensation has been preferred in writing by him or on his behalf to the Railway Administration within six months from the date of the delivery of the goods for carriage by Railway. Under section 140 of the same Act a notice or other document required, or authorised by the Act to be served on a Railway Administration may be served in the case of a Railway administered by a Railway Company, as is the Great Indian Peninsula Railway Company or the Agent in India of the Railway Company, by delivering the notice, or other document to the Agent; or by leaving it at his office; or by forwarding it by post in a prepaid letter addressed to the Agent at his office and registered under Part III of the Indian Post Office Act of 1866." The mode of service upon the Great Indian Peninsula Railway Company would ordinarily, in the absence of a provision such as this, be effected by service upon the Company at their head office in London. This mode of service has been prescribed, no doubt, for the purpose of saving delay and the expense which would attend service in London. In this case no service either under section 140 or directly upon the defendant Company in London was effected. Consequently, it would seem that the learned Munsif was right in holding that the suit could not be maintained. The learned District Judge, however, was of opinion that section 140 was not exhaustive and that a mode of service was prescribed by a condition which appears on the back of the receipt form in use on the Great Indian Peninsula Railway on the consignment of goods to them for carriage. This condition runs as follows:—"That all claims against the Railway for loss or damage to goods must be made to the clerk in charge of the station to which they have been booked before delivery is taken, and that a written statement of the description and contents of the articles missing, or of the damage received must be sent forthwith to the Traffic Superintendent of the District, or Goods Superintendent at Bombay Wadi Bundar, in which the forwarding or receiving station is situated; otherwise the Railway will be freed from responsibility." The learned Judge observes that "This paragraph lays down the procedure to be followed by consignors in case of the loss of goods and it forms part of the legal contract between the Great Indian Peninsula Railway Company and the consignor." He held that

where a consignor sends in a claim in accordance with the provisions of the said paragraph, the Railway Company is bound to treat it as a proper notification of his claim to compensation within the meaning of section 77, and that it is not then necessary to serve a notice in any of the ways mentioned in section 140 or otherwise. He found upon the evidence that the plaintiff did prefer his claim in writing to the Traffic Superintendent of the district in which the receiving station is situate, and that the Assistant to the Traffic Manager, East Indian Railway, after communicating with the Great Indian Peninsula Railway, entertained the plaintiff's claim and offered to pay him Rs. 499-7-3, the value of the goods lost. He, therefore, held that the notice which was given by the plaintiff was sufficient notice within the meaning of section 77. He further found that by the offer of the Assistant Traffic Manager of the East Indian Railway to pay Rs. 499 odd, damages the Great Indian Peninsula Railway must be taken to have waived their right to the notice required by law. We are unable to agree with the learned District Judge in the view which he formed. If the learned Judge had read the condition on the receipt form following the one upon which he relied, he would have found that it was not the intention of the Company that the provision upon which he relied should relieve the plaintiff from the necessity of complying with section 77 of the Indian Railways Act. Condition 5 provides that by section 77 of the Indian Railways Act, 1890 "a person shall not be entitled to a refund of an overcharge in respect of animals or goods carried by Railway, or to compensation for the loss, destruction or deterioration of animals or goods delivered to be so carried unless his claim to the refund or compensation has been preferred in writing by him or on his behalf to the Railway Company within six months from the date of the delivery of the animals or goods for carriage by the Railway."

This condition gave notice to the consignors that section 77 of the Railways Act must be complied with. Paragraph No. 4 must be read in connection with it and reading the two conditions together it is obvious that it was not intended by condition 4 to get rid of the obligation which lay upon the plaintiff of giving notice of action as required by section 77 of the Indian Railways Act. This was expressly decided in the cases of *Great Indian Peninsula Railway Company* v. *Chandra Bai* (1) by a Bench of which one of us was a member. In that case the provisions of section 77 were considered, and also of section 140. It was pointed out that the notification of a claim prescribed by section 77 may be given either to the Railway Administration as defined in section 3, sub-section 6), or in any of the ways mentioned in section 140; that it was necessary for the plaintiff to prove service of notice of his claim upon the Great Indian Peninsula Railway Company, at their office in London or else in any of the ways prescribed in section 140, and that there having been no proof of any such service, and the time of such service having expired, the suit was not maintainable. The learned District Judge referring to this and other rulings observes that these rulings were in his opinion not applicable to the present case, as in none of the cases which resulted in those rulings, did the defendant Railway Company ever admit the claim of the plaintiff or offer to settle it out of Court. "Moreover, the question whether compliance with the directions contained in paragraph 4 of the notice mentioned hereinbefore meets the requirements of section 77 and renders the service of notice under section 140 unnecessary, was never raised in those cases." As we have pointed out, the directions contained in paragraph 4 obviously do not avail the plaintiff in view of the fact that in the subsequent paragraph the necessity for the observance of section 77 is expressly stated. It appears to us that the learned District Judge must have overlooked the paragraph which succeeds paragraph No. 5 upon which he relied.

Then, as to waiver; it is said that the Assistant Traffic Manager of the East Indian Railway stated that he had authority from the Deputy Traffic Manager of the Great Indian Peninsula Railway Company to offer to the plaintiff Rs. 499-7-3 compensation, and it is contended that this amounted to a waiver of notice on the part of the Great Indian Peninsula Railway Company. We are unable to hold that there was any waiver.

(1) 28 A. 552; A. W. N. (1906) 101; 3 A. L. J. 329.

In the first place, the District Traffic Manager of the Great Indian Peninsula Railway Company repudiated the allegation that he gave any authority for the making of any offer to the plaintiff. The Assistant Traffic Manager was not summoned to prove the letter of authority which he alleged he had received. There is nothing to show that the Great Indian Peninsula Railway Company ever waived their right to notice of the claim. On the contrary, they in their written statement relied upon the absence of notice; and there is nothing upon the record to justify us in holding that they waived their rights in this respect. Even if it be assumed that the Great Indian Peninsula Railway Company authorised the Assistant Traffic Superintendent of the East Indian Railway Company to make an offer, such an offer would be without prejudice to their rights, and the offer not having been accepted it could not be held that they were not entitled to rely upon the pleas which they had set up in their defence. Upon this point, therefore, we think that the learned District Judge was wrong in reversing the decision of the Court of first instance.

There is, besides this, another ground of defence which appears to us to be fatal to the plaintiff's claim, and that is the plea based on the statute of limitation. Article 31 of the Limitation Act, (Act No. IX of 1908), prescribed the period of limitation for a suit for compensation for non-delivery of goods. In this Article the former Article of limitation was modified and certain words introduced, so as to adapt the Article to the case of a claim such as the present one for damages or compensation for non-delivery of goods. The Article is as follows:—"Against a carrier for compensation for non-delivery of or delay in delivering goods, one year from the time when the goods ought to be delivered." The goods, as we have said, were consigned to the plaintiffs on the 26th of March 1908, and the suit was not instituted until the 9th of August 1909. The period within which the goods in this case ought to have been delivered would not exceed a fortnight, or at the outside three weeks from the time when the goods were consigned at Bombay. Several months over and above one year from this time, therefore, had elapsed before the suit was instituted. As an answer to this plea it is contended that there was an acknowledgment which took the case out of the statute of limitation. That acknowledgment is the letter from the Assistant Traffic Superintendent of the East Indian Railway Company offering to pay the sum of Rs. 499-7-3 in full satisfaction of the plaintiff's claim. There is no evidence before the Court which would justify us in holding that the Great Indian Peninsula Railway Company ever gave authority to the Assistant Traffic Superintendent of the East Indian Railway to make this offer. There is no evidence that the Great Indian Peninsula Railway Company ever admitted liability in respect of this sum. We, therefore, are unable to say that there was any such aknowledgment by the Great Indian Peninsula Railway Company such as would prevent the operation in their favour of the statute of limitation.

Upon these two main points which have been taken by the learned Vakil for the defendant Railway Company, we think that the appeal should be allowed, and we must set aside the decree of the lower Appellate Court so far as regards the Great Indian Peninsula Railway Company. We accordingly allow the appeal of that Company, set aside the decree of the lower Appellate Court and restore the decree of the Court of first instance. Under the circumstances, we make no order as to the costs of this appeal, or as to the costs in the lower Appellate Court.

Appeal allowed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 574 OF 1910.

March 24, 1911

Present:—Mr. Justice Richards.

SARDAR SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

BHOPAT SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Acquisition of property while family is joint—Whether joint property or self-acquired—Presumption—Onus.

Certain members of a joint Hindu family acquired property while the family was joint. They subsequently sued for a declaration that the property so acquired was their self-acquired property:

Held, that there was no presumption that the property was self-acquired and the plaintiffs must show that it was their self-acquired property.

Hem Nath Kai v. *Jankee Rai*, A. W. N. (1905) 212; 2 A. L. J. 658; *Shivgolam* v. *Baran*, 1 B. L. R. 164 referred to.

NALAN PADHMANABHAN *v.* BADRI NATH.

Second appeal from the decision of the Additional Judge of Bareilly, dated the 16th March 1910.

Mr. *M. L. Agarwala*, for the Appellants.

Mr. *Ghulam Mujtaba* (with him Mr. *Gulzari Lal*), for the Respondents.

JUDGMENT.—This appeal arises out of a suit for declaration of title and possession. Both the Courts below have decided against the plaintiffs. The main point argued arises out of one of the issues. It has been found by both the Courts that at the date of the acquisition of the property in dispute, the persons who acquired it constituted a joint Hindu family. It is said that the Courts below have presumed from the mere fact that the family was joint at the time of the acquisition of the property that the property was joint property and not self-acquired property. It is contended that this presumption was a mistake in law. Reliance was placed on the case of *Hem Nath Rai* v. *Janki Rai* (1). The learned Judge who decided this case, quoted a passage from the case of *Shivgolam* v. *Baran* (2). The quotation is as follows:—"To render it joint property the consideration for its purchases must have proceeded either out of ancestral funds or have been produced out of the joint property or by joint labour. But neither of these alternatives is a matter of legal presumption. It can only be brought to the cognizance of a Court of justice in the same way as any other fact, *viz.*, by evidence. Consequently, whoever's interest it is to establish it, he must be able to produce the evidence." In the absence of authority, I should have thought that there is a presumption that the property of an admittedly joint Hindu family is joint. It seems to me that if the property was not joint property there would be missing one of the chief, if not the chief, characteristic of a joint undivided Hindu family. However, even on the assumption that the quotation correctly states the law, it appears to me that in the present case it was the interest of the plaintiffs to show that the property was self-acquired and not joint. If there is no presumption in favour of the property being joint, there is certainly no presumption in favour of its being self-acquired. Furthermore, in the present case it is clear that there was certain property in possession of the joint family when this property was acquired which was joint. All that the Courts below did was to decide that, on the facts of this particular case, the onus lay on the plaintiffs of showing that the property was self-acquired. I think that the Court below was quite correct. The Court of first instance went fully into the other issues in the case including the issue whether the plaintiffs had been in possession within twelve years of the institution of the suit. The Court of first instance found that the plaintiffs had not been in possession and the lower Appellate Court says that it entirely agrees with the finding of the Court of first instance. I dismiss the appeal with costs.

Appeal dismissed.

(1) A. W. N. (1905) 212; 2 A. L. J. 658.

(2) 1 B. L. R. 164.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL NO. 54 OF 1908.

March 22, 1911.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Sundara Aiyar.

NALAN PADHMANABHAN—

APPELLANT

versus

SAIT BADRINATH SARDA AND OTHERS—

RESPONDENTS.

Opium Act (I of 1878), ss. 4, 5, 9—License—Condition prohibiting transfer of the privilege of vending opium—Admission by licensee of partner - Suit to enforce partnership—Contract Act (IX of 1872), s. 23—Contract forbidden by law—Public policy.

The provisions of the Abkari and Opium Acts are not intended to merely protect the public revenue, the prohibitions contained therein are based on public policy.

Marudamuthu Pillai v. *Rangasami Moopan*, 24 M. 401; *Hormasji Motabhai* v. *Pestonji Dhanjibhai*, 12 B. 422; *Thethi Pakurandasu* v. *Shamudu*, 26 M. 430, *Behari Lal* v. *Jagodish Chunder Shah*, 31 C. 798 and *Raghu Nath Lalman* v. *Nathu Herji Bhet*, 19 B. 626; referred to.

Defendants, who had obtained a license for the vend of opium from the Collector, admitted plaintiff as a partner, without the Collector's sanction and though the conditions of the license prohibited defendants from transferring or sub-letting the privilege. In a suit for dissolution and winding-up of the partnership between plaintiffs and defendants:

Held, (1) that the suit was not maintainable, as the combined effect of sections 4, 5 and 9 of the Opium Act was to nullify a transfer made in violation of the provisions of the conditions of the license and the plaintiff acquired no rights enforceable in law under it.

NALAN PADHMANABHAN v. BADRI NATH.

Judoonath Shaha v. *Nobin Chunder Shaha*, 21 W. R. 289; *Behari Lal Shaha* v. *Jagodish Chunder Shaha*, 31 C. 798; *Raghunath Lalman* v. *Nathu Herji Bhate*, 19 B. 626, referred to.

Natla Bapiraju v. *Puran Achutha Rajajee*, 1 M.W.N. 549; 7 M. L. T. 176; 20 M. L. J. 337; 5 Ind. Cas. 456, *Marudamuthu Pillai* v. *Rangaswami Moopan*, 24 M. 401; *Bhikanbhai* v. *Hiralal*, 24 B. 622 and *Abdulla* v. *Mammod*, 26 M 156, explained and distinguished.

(2) that the plaintiff's partnership with the defendants was a 'transfer' of the right of sale under the conditions of the license.

Gathercole v. *Smith*, (1881) 17 Ch. D. 1; 50 L. J. Ch. 671; 44 L. T. 439; 29 W. R. 434; *Gauri Shanker* v, *Mumtaz Ali Khan*, 2 A. 411, explained. *Thithi Pakuridasu* v. *Bheemudu*, 26 M. 430, approved.

Appeal against the deeree of the Court of the District Judge of Godavari in Original Suit No. I3 of 1904, dated the 30th September 1907.

Mr. *T. R. Ramachandar Aiyar*, for the Appellant.

Mr. *C. Madhavan Nair*, for the Respondents.

JUDGMENT.—The suit in this case is for the dissolution and winding-up of a partnership relating to an opium business. Defendants Nos. I and 2 were farmers of opium revenue under Government. They, through their agents, entered into an agreement with the plaintiff agreeing to take him as a partner in their business both with respect to their right to vend opium in the Godavari District which they had already obtained, and with respect to any further right they might thereafter obtain in adjoining Districts. The partnership existed for some years, the District Judge has dismissed the suit on the ground that the agreement of partnership on which the suit is based was opposed to public policy and unenforceable in law. The plaintiff who preferred this appeal contends that the lower Court's view as to the nature of the contract is incorrect.

The first and second defendants alone obtained a license from the Collector for the sale of opium. Clause 25 of the conditions subject to which the license was given, provides that "except with the permission of the Collector you shall not sell, transfer or sub-let your privilege. Nor shall you, if the Collector so orders, appoint any person as your agent for the management of your privilege without previously obtaining the Collector's approval of the Agent." It is admitted that the Collector's sanction was not obtained for the partnership agreement. The object and the intention of the agreement undeniably were that the defendants and their partner, the plaintiff, should be enabled to carry on the opium business without any license being taken out by the plaintiff, for the purpose. The question we have to decide is whether the partnership is not illegal and cannot, therefore, afford a cause of action to the plaintiff for any relief based on it. We are of opinion that the conclusion arrived at by the lower Court is right. Section 4 of the Opium Act (Act I of 1878) runs as follows:—"Except as permitted by this Act or any other enactment relating to opium for the time being in force, or by rules framed under this Act or under any such enactment no one shall (*a*) cultivate the poppy; (*b*) manufacture opium; (*c*) possess opium; (*d*) transport opium; (*e*) import or export opium or (*f*) sell opium".

Section 5 gives the local Government power to make rules absolutely or subject to any conditions deemed desirable for all or any of the matters including "(*f*) the sale of opium and the form of duties leviable in the sale of opium by re-trial." Section 9 makes it an offence on the part of any person to sell opium in contravention of the Act or of rules made and notified under section 5. Now, a contract entered into with the object of doing any act which is unlawful, because forbidden by law, is unlawful and void. The contract in this case was intended to enable the plaintiff to sell opium without a license, an act which is forbidden by section 4 and made penal by section 9. Mr. Ramachandra Iyer for the appellant contends that, according to the terms of Exhibit A, the agreement between the parties, the actual sale was not to be made by the plaintiff as the management of the business was left in the hands of the defendants, and that, therefore, it could not be said that any breach of section 4 was intended. This argument cannot be accepted, because all the partners must be taken to be selling the opium which belongs to the partnership as the sale is made by the managing partner as the agent and on behalf of all the partners. In *Judoonath Shaha* v. *Nobin Chander Shah*(1), Couch, C. J. and Glover, J., held that an agreement whereby the holder of a license for keeping a wine-shop let the shop and the use of the license for a fixed term, receiving rent, was contrary to public policy, although there was

(1) 21 W. R. 289.

in *the statute or in the rules no express prohibition of letting out the shop.* The agreement was held to be contrary to the prohibition of sale without a license. A license, it need hardly be said, is a personal privilege: see the judgment of Sale, J., in *Behari Lal Shaha* v. *Jagodish Chunder Shaha*(2)where that learned Judge pronounced against the validity of an agreement under which a license holder for the sale of liquor entered into an arrangement with another person whereby the business was to be carried on by the latter on his own responsibility but using the name of the plaintiff and he was to pay the plaintiff a certain sum per month. He observes, "section 11 says, no person shall sell any excisable article without the Collector's license. The plaintiff's object was to permit the defendant Basanto Kumar Shah, to sell articles without a license. I am of opinion, therefore, that the object of the agreement is to enable the defendant to carry on the business of vendor in liquor in contravention of the excise law." See also *Raghunath Lalman* v. *Nathu Herji Bhate* (3). Every partner is the agent of his co-partners and it would be unreasonable to hold that the defendants continued to be the sole vendors of the opium when they made themselves the agents of plaintiff by admitting him as a partner. The learned Vakil for the appellant cites *Natla Bapiraju* v. *Puran Achutha Rajajee* (4), as supporting his contention. In that case Miller and Krishnasawami Iyer,JJ., held that section 13 of the Abkari Act (Mad. Act I of 1886) "does not prohibit a person who has no license from holding an interest in the manufacture or vending of the liquor jointly with the licensed manufacturer or vendor," but the provision of law referred to by the learned Judges does not include the sale of liquor amongst the acts prohibited by it. We may also point out that the language of section 15 of the Abkari Act relating to the sale of liquor is "*no liquor* shall be sold without a license from the Collector" while as already pointed out section 4 of the Opium Act enacts "no one shall sell opium". Having regard to the difference in the provisions contained in two Acts, it is unnecessary to consider that decision any further. We may point out, however, that the learned Judges observed that they did not feel compelled to decide otherwise by *Marudamuthu Pillai* v. *Rangasami Moopan* (5), according to which "the provisions of the Abkari Act as a whole show clearly that every person carrying on Abkari business as a principal must be licensed," and according to which to hold that a person who has not got a license could still be a partner with one who has a license and as such partner carry on the business with or without the other would enable the licensed partner to evade the liabilities intended by the law to be cast on persons carrying on Abkari business." It is well-established that the provisions of the Abkari and Opium Acts are not intended merely to protect the public revenue and that the prohibitions contained therein are based on public policy. See *Thithi Pakurudasu* v. *Bheemudu* (6): *Behari Lal Shaha* v.*Jagodish Chunder Shaha* (2) and *Hormasji Motabhai* v. *Pestanji Dhanjibhai* (7). Two other cases cited on behalf of the appellant *Bhikanbhai* v. *Hiralal* (8) and *Abdulla* v. *Mammad* (9) are not in point as they relate to contracts of ferry and the provisions against the transfer and sub-letting in those cases were not statutory prohibitions. We ought, perhaps, to mention that the appellant's Vakil wishes to make out that his client did not really become a partner with the defendants but merely became entitled to a share of the profits of the business in consideration of financing it, but this contention is obviously contrary to the case set out in the plaint and we must decline to consider it.

We are also of opinion that the partnership in this case was illegal for another reason as it contravened the provisions of clause 26 of the license which prohibits the transfer of the right of sale granted to the defendants. It is contended for the appellant that the admission of the plaintiff to partnership with the defendants is not transfer. We are of opinion that it is. It is, no doubt, true that every contract of partnership is not necessarily a transfer but it is equally clear that such a contract may in many cases involve a transfer. Thus, if two persons agree to start

(2) 31 C. 798.
(3) 19 B. 626.
(4) 1 M. W. N. 549; 7 M. L. T. 176; 20 M, L. J. 337; 5 Ind. Cas. 456.
(5) 24 M. 401.
(6) 26 M. 430.
(7) 12 B. 422.
(8) 24 B. 622.
(9) 26 M. 156.

a business in partnership and to contribute capital therefor, there is no transfer involved in the transaction. But if the person carrying on a trade and possessing stock and capital admits another into partnership with himself making the stock and capitals the joint property of both, it is impossible to contend that there is not a transfer in such a case. The word 'transfer' says James, L. J., in *Gathercole* v. *Smith* (10) "is one of the widest terms that can be used" and according to Lush, J., in the same case, the word 'transferable' "is a word of the widest import and includes every means by which the property may be passed from one person to another." We are not concerned in construing a statute like the Opium Act with the mere form of the transaction but with the substance of it. The form may be material in interpreting instruments under other statutes such as the Stamp Act or the Registration Act. Our view is in accordance with that laid down in *Marudamuthu Pillai* v. *Rangasami Mocpan* (5). Reliance was placed for the appellant on *Gauri Shanker* v. *Mumtaz Ali Khan* (11) where Oldfield and Spankie, JJ., were apparently of opinion that co-partnership in that case did not involve a transfer. The decision itself, however, did not proceed on that ground. The case was one relating to a ferry and according to Oldfield, J., the statute relied on in the case did not prohibit a partnership. If the learned Judges intended to lay down the broad proposition that no partnership can amount to a transfer, we are, with all deference, unable to agree with them. The combined effect of sections 4, 5 and 9 of the Opium Act is to make a transfer in violation of the provisions of clause 26 in the license (Exhibit I) illegal and the plaintiff could acquire no rights enforceable in law under Exhibit A.

It is conceded that the form of the license used for Exhibit A was not sanctioned by the Revenue Board, and that the transfer is, therefore, not illegal. This objection was not raised in the District Court and the absence of sanction is not proved.

In the result we dismiss the appeal with costs of the first, third and fourth respondents.

Appeal dismissed.

(10) 17 Ch. D. 1.; 50 L. J. Ch. 671; 44 L. T. 439; 29 W. R. 434.

(11) 2 A. 411.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 510 OF 1910.

March 9, 1911.

Present:—Mr. Justice Shah Din.

GANDA SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

JAWALA SINGH—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), s. 5—Sufficient cause—Revision—Review—Rejection of review application—Subsequent delay in filing petition for revision.

The appellant in this case applied to the Appellate Court for review of its judgment; his application was rejected; very nearly two months afterwards he filed a petition in the Chief Court for revision of the judgment of the Appellate Court:

Held, that even if there were any reasonable grounds for filing a review application, the petitioner should have filed his petition for revision within a reasonable time after his application for review had been dismissed, and, consequently, there was no sufficient cause for not filing the revision within the prescribed period.

Second appeal from the order of the Divisional Judge, Lahore Division, dated the 2nd of June 1909, confirming that of the Munsif 2nd class, Kasur, dated the 15th February 1909, dismissing plaintiffs' claim.

Rai Sahib Pandit *Sheo Narain* and Lala *Sangam Lal*, for the Appellants.

Sardar *Kharak Singh*, for the Respondent.

JUDGMENT.—The respondent's Pleader has raised a preliminary objection that this appeal is barred by limitation, and after hearing the appellant's Pleader in reply, I think that this objection is well-founded and must prevail. The judgment of the lower Appellate Court, which is appealed from is dated the 2nd June 1909. On the 7th July 1909 the present appellant made an application for a review of that judgment, and that application was finally rejected on the 25th October 1909. The appellant waited for very nearly two months and then on the 21st December 1909 filed in this Court an application for revision under section 70, sub-section (1), clause (*b*), of the Punjab Courts Act, which was admitted by me as a further appeal, on the ground that a question of law, which required further consideration, was involved in the case. The respondent's Pleader urges that the time occupied by the review proceedings from the 7th July to the 25th October 1909, should not be deducted, inasmuch as there were no reasonable grounds for making an application for review [*Musadi*

Lal v. *Badhawa* (1)]; but he further contends that even if the above period were allowed to be deducted, the appellant was guilty of unreasonable delay in filing the petition for revision after the expiration of about two months from the date of the final order of the lower Appellate Court dismissing the application for review. I think that there is great force in this contention. In the first place, I do not think that there were reasonable grounds for filing a review application in the lower Appellate Court; but even if such reasonable grounds did exist, the appellant should have filed his petition for revision in this Court within a reasonable time after his application for review had been dismissed. This he did not do; on the contrary, he waited for close upon two months and then filed his petition for revision in this Court. In these circumstances, I am not prepared to hold that he had sufficient cause for not filing the petition for revision within the period of ninety days as required by proviso (*i*) to clause (*b*) of section 70 of the Punjab Courts Act.

The appeal fails and is dismissed with costs.

(1) 100 P. R. 1910; 43 P. L. R. 1911; 8 Ind. Cas. 1156.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1243 OF 1909.

April 18, 1911.

Present:—Mr. Justice Rattigan.

Pandit INDAR NARAIN SHIV PURI—PLAINTIFF—APPELLANT

versus

Pandit ONKAR LAL—DEFENDANT—RESPONDENT.

Will—Probate—Questions to be decided by Court—Limitation—"Disposing mind"—Proof—Burden of proof—Probate and Administration Act (V of 1881)—Limitation Act (IX of 1908), Sch. I, Art. 181.

In proceedings under Act V of 1881 when Probate of a Will is sought, the Court is bound to grant Probate unless it finds that the Will was not executed by the testator or that he was not in a state of mind competent to exercise his testamentary powers or that the Will was not the testator's own voluntary act. The Court has no concern with the questions whether the Will, if proved, will be effectual or valid, or whether it can affect certain parts of the property with which it purports to deal.

The mere fact that a Will, if proved, might, in view of a previous decree of a Civil Court, prove neffectual is no ground for refusing to grant Probate; nor is the Court competent to consider the question whether the Will is a valid disposition of property by the testator.

Musammat Bali v. *Musammat Hussaini Bibi*, 55 P. R. 1894, followed.

Harmusji v. *Dhanbaiji*, 12 B. 164; *Parat Parshotam* v. *Bai Muli*, 18 B. 749, referred to.

The provisions of Article 181 of the Limitation Act, 1908, have no application to petitions for Probate. Consequently, an application for Probate made 4 years after the death of the testator is not time-barred.

Kashi Chundra Deb v. *Gopi Krishna Deb*, 19 C. 48, followed.

The mere execution of a Will raises a presumption that the maker of it knew and approved of its contents.

Woomish Chunder Biswas v. *Rasomohini Dassi*, 21 C. 270, relied upon.

But the mere fact that a testator understands that he is making a Will and by it giving the whole of his property to one object of his regard is not sufficient proof that he had "a disposing mind." He must also have capacity to comprehend the extent of his property and the nature of the claims of others whom, by his Will, he is excluding from all participation in his property. He must be able to dispose of his property with understanding and reasons. He must be able to understand his position to appreciate his property, and to form a judgment with respect tothe parties whom he chooses to benefit by it.

Harwood v. *Baker*, 3 Moore, P. C. 282; *Sefton* v. *Hopwood*, 1 F. and F. 578, followed.

In the case of an unofficious Will, made behind the back, and to the detriment of, of one of the legal heirs and at a time when the testator was practically at death's door, the burden of proving that the testator had a "disposing mind" lies upon the propounder of the Will.

A Hindu lady, who had been ill for about a year before her death, executed a Will within a few hours of her death. At that time she was practicaliy unable to speak and had to communicate her wishes by signs. She left all her property to a child who had been adopted a few days before her death. The person who had a great deal to do with the drawing up of the Will was adverse to the legal heir. The testatrix had no reason to favour the child to the prejudice of the heir. An application for Probate was not made till after the expiry of four years from the date of her death:

Held, that when the testatrix executed the Will, she had not sufficient understanding to comprehend the extent and consequences of her act that by the Will she was depriving one of the heirs of all participation in the property. The petition for Probate was consequently refused.

Appeal from the order of the District Judge, Delhi District, dated the 23rd August 1909, rejecting the appellant's application for Probate of the Will of *Musammat* Indrani.

Bhagat *Govind Das*, for the Appellant.

The Hon'ble Mr. *Shadi Lal*, for the Respondent.

JUDGMENT.—On the 17th August 1907 Pandit Indar Narain applied, as one of the executors, for Probate of part of the

Will executed by *Musammat* Indrani on the 18th August 1903. The applicant desired Probate only in respect of an item of Rs. 3,800 which was in deposit with the Delhi and London Bank. His application was rejected by order, dated 25th January 1908, on the ground that a limited Probate of the kind asked for could not be granted. He thereupon applied for Probate of the Will as a whole, and a "caveat" was entered against the grant by the present respondent, Pandit Onkar Lal, who objected to the grant of Probate on two grounds, (1) that the testatrix had not "a disposing mind" at the time when the Will was executed, and (2) that Probate would be of no effect in view of the fact that in a previous suit brought by the objector, to which the beneficiary under the Will (Radhe Nath, a minor) was a party, it was held by this Court, on the 12th April 1907, that the said Will could not affect the right of the objector to half of the estate left by the husband of the testatrix.

The District Judge has found that the Will was duly executed by *Musammat* Indrani, but that "there is room for considerable doubt as to whether the *Musammat*, who was dying, properly understood what was going on and freely and of her own accord wished to dispose of the property in the manner described." He has, however, rejected the application not so much upon that ground, as upon the second objection. He holds that as this Court has declared the Will to be void, a Court of Probate is justified in refusing to grant Probate inasmuch as under section 50 (4) of Act V of 1881 the grant, if made prior to that declaration, would have become useless and inoperative, and that consequently it would be useless to grant probate in circumstances which render that grant practically inoperative. Pandit Indar Narain has appealed to this Court.

In my opinion, the learned District Judge erred in refusing to grant Probate on the ground upon which his order is based. In proceedings under Act V of 1881 where Probate of a Will is sought, the Court is bound to grant Probate unless it finds that the Will was not executed by the testator, or that he was not in a state of mind competent to exercise his testamentary powers, or that the Will was not the testator's own voluntary act. The Court has no concern with the questions whether the Will, if proved, will be effectual or valid, or whether it can affect certain parts of the property with which it purports to deal. As remarked by Sir Meredyth Plowden in *Musammat Bali* v. *Musammat Hussaini Bibi* (1) "a Court acting under Act V of 1881 is a Court exercising a special jurisdiction and the proceeding is of a special character even when it is a contentious proceeding, and is quite distinct from a suit in a Civil Court to cause or prevent a Will from being operative as a disposition of property. It is a preliminary proceeding to determine whether the whole document propounded, or any, and if so, what part of it, is the Will of the testator." [*Cf.* also *Hormusji* v. *Dhanbaiji* (2), *Parat Parshotam Kalu* v. *Bai Muli* (3)].

In the present case, therefore, the mere fact that the Will, if proved, might, in view of the decree of this Court in the former suit, have proved ineffectual, was no ground for refusing to grant Probate, nor was the Court competent to consider the question whether the Will was a valid disposition of property by the testatrix. The District Judge consequently erred in rejecting the petition for probate upon this ground.

Mr. Shadi Lal argued, however, that the order was right in effect, and supported it on the grounds (1) that the petition was barred by time under Article 181 of the present Limitation Act; and (2) that the testatrix had "no disposing mind" at the time when she executed the Will.

The first of these grounds is untenable, as it is abundantly established that the provisions of Article 181 (which correspond with Article 178 of Act XV of 1877) have no application to petitions for Probate, [see *Kashi Chundra Deb* v. *Gopi Krishna Deb* (4) and cases there cited]. I have no hesitation, therefore, in holding, both upon authority and principle, that the petition was not barred by limitation. The second ground is one of more difficulty. Upon the evidence given in this case, read with the evidence given in the previous suit, there can be no doubt that *Musammat* Indrani executed the Will, and that she knew that she was executing a Will, it is true that she was at the time on her death-bed and that she actually died within a few hours of the execution of the Will.

(1) 55 P. R. 1894.
(2) 12 B. 164.
(3) 18 B. 749.
(4) 19 C. 45.

It is also a fact that she was, to all intents and purposes, unable to speak. But it is clear from the evidence of Pandit Hari Kishen Kaul, a Government servant of high standing and unimpeachable character, that she was well aware of the fact that she was making her Will, and the other witness, Dwarka Nath, fully corroborates him in this respect.

I did not understand Mr. Shadi Lal to seriously dispute the fact that the testatrix actually executed the Will in question, and that she was cognisant of the nature of her act. As I understood the learned Advocate's argument, his contention was that the lady though partially sensible, did not comprehend the full extent and consequences of her a t, and that she was disposing of property in favour of one heir and to the prejudice of another heir equally entitled thereto.

Now it is well-established that while the mere execution of a Will raises a presumption that the maker of it knew and approved of its contents, [*Woomish Chunder Biswas* v. *Rasomohini Dassi* (5)] the mere fact that the testator understood that he was making a Will and by it giving the whole of his property to one object of his regard, is not sufficient proof that he had "a disposing mind." As their Lordships of the Privy Council observed in the case of *Horwood* v. *Baker* (6), he must also have capacity to comprehend the extent of his property and the nature of the claims of others whom, by his Will, he is excluding from all participation in his property." Or, in the words of Crosswell, J. in *Sefton* v. *Hopwood* (7): "It is not sufficient in order to make a Will that a man should be able to maintain an ordinary conversation and to answer familiar and easy questions. He must have more mind than suffices for that. He must have what the old lawyers called a disposing mind; he must be able to dispose of this property with understanding and reason. This does not mean that he should make what other people may think a sensible Will or a reasonable Will or a kind Will. But he must be able to understand his position; he must be able to appreciate his property, to form a judgment with respect to the parties whom he chooses to benefit by it after his death, and if he has capacity for that, it suffices."

Mr. Shadi Lal contends that, viewed in the light of the above *dicta*, the Will of *Musammat* Indrani cannot be held to be the Will of a person who had full testamentary capacity. It is not now denied that, but for the Will, Pandit Onkar Lal, the caveator, would have been entitled to one-half of the property; that *Musammat* Indrani had been very ill for about one year before her death; that the Will was executed within a few hours of her death, and that at the time when it was executed, she was practically unable to speak and had to communicate her wishes by signs. It is also in evidence that the child, Radhe Nath, to whom she bequeathed everything was certainly not adopted more than a few days before her death, indeed, in the previous litigation it was held by this Court that he was not adopted until after the death of the testatrix. And, finally, it is not denied that Pandit Janki Nath, who is not friendly with the caveator, had a great deal to do with the drawing up of the Will and was present during the whole time when Pandit Dwarka Nath and Pandit Hari Kishen Kaul saw the lady. Taking all these facts into consideration, I am of opinion that *Musammat* Indrani, though she may have been aware of the fact that she was executing a Will, had not sufficient understanding to comprehend the extent and consequences of her act, and that by this Will she was depriving one of the heirs of all participation in the property. So far as I can see, she had no reason to favour the child, Radhe Nath, to the prejudice of Pandit Onkar Lal, and in this connection the facts that the Will was actually drawn up (as found by the District Judge in the former case) by Pandit Janki Nath, who is adverse to the caveator, and that Pandit Janki Nath apparently never left the room when the lady was dying during the time when the witnesses were called to attest the Will, are, I think, important as showing that the dying woman had really no free and independent volition in the matter. While, therefore, I agree with the District Judge that the testatrix did in one sense signify her assent to the Will in the presence of the two witnesses and that they both thought that she understood what she was doing, I do not think (and it is clear that the District Judge was of the same

(5) 21 C 279.
(6) 3 Moore. P. C. 282.
(7) 1 F and F. 578.

opinion) that she really knew and understood, the full consequences of her act. The Will is unofficious; it was made behind the back, and to the detriment, of the caveator, who is one of the legal heirs, and it was made practically at death's door. In the circumstances, I think that the onus of proving affirmatively that the testatrix had in fact "a disposing mind" rested upon the propounder of the Will, [See *Musammat Bali* v. *Hussaini Bibi* (1).] In arriving at this conclusion, I have not been able to lose sight of the significant fact that application for Probate was not made until after the expiry of four years from the date of the testatrix's death, and that it is one only of the two surviving executors named in the Will who asks for Probate, the other executor declining to take action in the matter. I hold, therefore, though upon different grounds, that the petition for Probate was rightly refused and I accordingly dismiss this appeal with costs.

Appeal dismissed.

PUNJAB CHIEF COURT

CIVIL REVISION No. 1297 OF 1910.

March 23, 1911.

Present:—Sir Arthur Reid, KT., Chief Judge, and Mr. Justice Kensington.

KHAN CHAND AND OTHERS—PLAINTIFFS—PETITIONERS

versus

GOLAB RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Revision—Material irregularity—Dismissal of suit on technical construction of a statutory provision—Punjab Courts Act (XVIII of 1884*), s.* 70 (a)*—Negotiable Instruments Act (XXVI of* 1881*), ss.* 1, 83*—Scope of s.* 83*—Inapplicable to* hundis*—"All previous parties" include drawer*—Hundi—*Presentation for acceptance not obligatory—Dishonouring of* hundi *eleven days after presentation—Liability of drawer.*

The dismissal of a suit solely on a technical construction of section 83 of the Negotiable Instruments Act constitutes 'material irregularity' under section 70 (*a*) of the Punjab Courts Act.

The words "all previous parties" in section 83 of the Negotiable Instruments Act should be construed as including the drawer.

The twenty-four hours' rule specified in section 83 was not intended by the Legislature to apply to bills of exchange generally or to *hundis*.

Section 83 applies only to bills of exchange in which acceptance by the drawee is obligatory. The only form of bill of exchange for which such acceptance is required by the Act is described in the Act as a bill of exchange "after sight."

Section 83 of the Act has been inadvertently placed in Chapter VII instead of, what would seem to be its proper place, immediately after section 63.

The ordinary *hundi* of this country comes under the class of bills which require presentation for *payment only* and not for acceptance.

Ram Chand v. *Shadi Ram*, 19 P. R. 1888, referred to.

A *hundi* was duly presented to the drawee who, after taking eleven days to consider whether he would honour the draft, dishonoured it on the ground that he had no assets belonging to the drawer:

Held, that section 83 of the Negotiable Instruments Act was not applicable and that the drawer was liable on the *hundi*.

Judgment in Civil Appeal No. 83 of 1907 overruled.

Per *Kensington, J.*, (in his order of reference).—The Negotiable Instruments Act does not affect any local usage relating to any instrument in an oriental language.

The words "all previous parties" in section 83 ought not to be construed as covering the drawer.

Nilkund v. *Menshi*, 10 B. 346; *Ram Ravji* v. *Pralhaddas*, 20 B. 133, referred to.

Petition, under section 70 (*a*) of Act XVIII of 1884 as amended by Act XXV of 1899, for revision of the order of the Divisional Judge, Shahpur Division, dated the 4th October 1909, reversing that of the Munsif 1st class, Lyallpur, dated the 22nd January 1909, decreeing the claim.

Rai Bahadur Lala *Lal Chand*, for the Petitioners.

Rai Sahib Lala *Sukh Dial* and Mr. *Ganpat Rai*, for the Respondents.

ORDER OF REFERENCE TO DIVISION BENCH.

KENSINGTON, J.—(*February 28th*, 1911.) This is a revision under clause (*a*) of section 70 of the Punjab Courts Act; but there appears to be no force in the defendant's plea that revision does not lie. The judgment of the lower Appellate Court, dismissing the plaintiffs' suit solely on a technical construction of section 83 of the Negotiable Instruments Act, XXVI of 1881, constitutes a material irregularity; whether that particular point has or has not been rightly decided. The lower Appellate Court is clearly in error in thinking that this is the only question to be determined upon the evidence in the case.

The suit is brought upon four *hundis* drawn by defendants Nos. 1 to 3, as representatives of a firm, Ram Chand Jiwan Das, in July 1906; on an Amritsar firm. The *hundi* were in favour of plaintiffs and were payable

after various periods of from 134 to 286 days. They were made over to plaintiffs, who sent them to another Amritsar firm, by which they were presented to the drawee on various dates as they became due. The drawee in each case took eleven days to consider whether he would honour the drafts and then dishonoured them on the ground that he had no assets belonging to the drawer. It is not clear whether the plaintiffs as holders then gave notice to the drawer prior to institution of the present suit on the 18th October 1907.

Various defences were raised by the defendants, including one to the effect that the suit is bad in law because the drawee took more than twenty-four hours on presentment to consider whether he would honour the *hundis* or not. On this point issue No. 8 was framed, evidently with reference to clause 83 of the Negotiable Instruments Act. The Munsif found against the defendants on all the defences and thereon decreed in plaintiffs' favour, but this particular issue No. 8 was briefly disposed of by saying that, "according to law it was not necessary to realise the consideration for the *hundis* within twenty-four hours nor was it their (plaintiffs') duty to do so." In their appeal to the Divisional Judge the defendants, *inter alia*, raised this point again specifically. The learned Division Judge observed that the appeal raised four separate questions, but he discussed none of them except the legal objection based on section 83 of the Act. As to this, he has found that section 53 clearly discharges the drawer from liability and he has in consequence accepted the appeal and dismissed plaintiffs' suit.

I must observe that the lower Appellate Court has dealt with the matter far too briefly. The question involved is one of difficulty and importance, and in dealing with a highly technical point arising out of the construction of an Act with which Courts in the Punjab are not very familiar, there should at least have been some indication that the Judge consulted his works of reference. There is this much to be said for the lower Appellate Court, although no mention is made of it in the judgment, that there was on his record a copy of a judgment, dated the 27th May 1907, by a learned Judge of this Court in Civil Appeal No. 83 of 1907, containing passages which go to support the Divisional Judge's finding. At the same time, the remarks made therein were clearly in the nature of an *obiter dictum*, the case then before the Chief Court being finally disposed of on another ground. Moreover, the lower Appellate Court, even if right in holding that section 83 of the Negotiable Instruments Act applies to a drawer, was clearly wrong in assuming that the plaintiffs' suit must, therefore, necessarily fail. Section 1 of the Act expressly provides that nothing therein contained affects any local usage relating to any instrument in an oriental language. There is evidence on the record, which should have been considered, showing that in Amritsar a local usage prevails giving the drawee of *hundis* a period of eleven days in which to decide whether he will pay or not. Whether this evidence establishes the local usage or not has still to be determined. I express no opinion on the point, as it is a matter with which the lower Appellate Court must deal before dismissing plaintiffs' suit.

At the hearing of this revision I was of opinion that on this ground alone there should be a remand to the lower Appellate Court for re-hearing of the appeal, but on further consideration I think that the question of the proper construction of section 83 of the Negotiable Instruments Act, so far as the drawer is concerned, and the question whether the previous *dictum* of this Court already quoted is correct in law are matters of such importance, not only to the plaintiffs in this particular case but also to the commercial community generally, that the point should be considered by a Division Bench. I accordingly refer the whole case to a Division Bench to determine what order should be passed in revision.

The point to be immediately determined, before dealing with any other part of the case, is whether the words "all previous parties" in section 83 of the Act include a drawer. My learned brother has held that they do, giving no authority for his conclusion beyond a reference to section 42 of the English Act of 1882. The Act is given as Appendix I to Bhashyam and Adiga's Commentary on the Negotiable Instruments, Edition 1909. The words "against the drawer and indorsers" no doubt appear in that section 42, but I do not understand the section quoted as having any immediate applicability, as it merely provides that the holder must treat a non accepted bill as dishonoured. The sectio-

which should really have been quoted seems to me to have been clause 2 of section 40 and there also the words "drawer and all indorsers" no doubt, occur, but the clause has to be read with section 43. The argument of my learned brother may be correct, though he may have inadvertently referred to the wrong section. It is, however, permissible to express a doubt whether the full consequences of his pronouncement were realized or whether if they had been an *obiter dictum* so far-reaching in its results would have been given. I will make the matter clear by taking a very simple instance of a kind readily understood by all who have to deal with cheques, which are the simplest form of Negotiable Instruments known to the Act, and which, equally with *hundis*, come under the category of bills of exchange (see section 6 of the Act). A person *A.* draws a cheque in favour of *B.* on a Bank. The cheque is presented by *B.* for payment by the Bank, which either through pressure of business, or possibly through negligence on the part of some subordinate, neglects to dishonour the cheque with the usual formula (no assets, refer to drawer) within twenty-four hours after presentment. If I have correctly understood the *dictum* of my learned brother, the result of this delay would, in his opinion, be that the holder of the cheque would lose all remedy against the drawer *A.* I cannot suppose that section 83 of the Negotiable Instruments Act was drawn with this intention, though it is possible that owing to defective drafting the section should be given this remarkable interpretation.

It does not, however, appear to me that there is any authority for interpreting the words "all previous parties" in section 83 as including a drawer. It will be observed that the English Act in the corresponding section 40 to 43 is less stringent as regards time than the Indian Act. It only uses the words "within a reasonable time" and does not provide any specific period within which the drawee must decide on acceptance or dishonour. It appears to me that as part of the distinction made in the Indian Act rigidly prescribing twenty-four hours the words "drawer and all indorsers" used in the English Act have been designedly given up and the words "all previous parties" adopted, I am doubtful whether, even if we look to the terms of section 83 alone, these words "all previous parties" should be interpreted as including the drawer. I can only say that if they should be so interpreted there appears to be some conflict between section 83 and sections 30 and 93 which refer more particularly to the liabilities of a drawer. It would be for serious consideration, if section 83 of the Act is really so misleading on the question of a drawer's release from liability, whether the matter should not be brought to the notice of the Legislature in order to remove a patent blot on the Act.

My own view for what it is worth, and as at present advised, is that the words used in section 83 ought not to be construed as covering the drawer as well as indorsers. I have been unable to trace any ruling directly bearing on the point, but a convenient summary of case-law is given under section 93 at page 323 of the Commentary already quoted. There are also two rulings of the Bombay High Court to some extent in point. In *Nilkund* v. *Menshi* (1), it is held that presentation for acceptance within reasonable time is a condition precedent to a right of action on a bill or *hundi* payable after sight. From this it would appear that the High Court, giving judgment in 1886, did not consider the twenty-four hours' rule applicable in favour of a drawer, the words used being "within rensonable time." *Ram Ravji* v. *Prathaddas* (2) deals with a case in which other points were concerned, but the exposition of the law about *hundis* given on pages 140 and 141 is of distinct assistance, and I take it that the High Court then also did not contemplate that a drawer could raise a plea such as has been allowed in the present case by application to him of the terms of section 83 of the Act. In *Ram Chand* v. *Shadi Ram* (3) the point directly concerned was one of limitation, but the effect of sections 7, 64, 66 and 105 of the Negotiable Instruments Act was considered, and, a sharp distinction was drawn between presentation for acceptance and presentation for payment, from which it would seem that the learned Judges recognised that the drawer's liability was not avoided by delay in acceptance only. In this connection *Phul Chand* v, *Ganga Ghulam* (4) has some bearing on the point,

(1) 10 B. 346.
(2) 20 B. 133.
(3) 19 P. R. 1888.
(4) 21 A. 450.

though that was a case dealing with a promissory-note. The Full Bench ruling in *Shirji Ram* v. *Hem Raj* (5) does not appear to me to be of much assistance.

I have indicated my present opinion more with the object of making the case clear than because of any very decided opinion about the proper construction of section 83 if read alone, apart from other sections of the Negotiable Instruments Act. It is difficult to believe that the Legislature can, when framing the Act, have intended to give section 83 the very wide interpretation now placed on it. If that interpretation is correct, the Act would seem to require amendment, and the matter is not one which can be properly deal with by a single Judge. The conclusion that a dishonest drawer of every sort of bill of exchange has merely to arrange with the drawee that there shall be a trifling delay in acceptance on maturity of over twenty-four hours, in order to secure his own release from liability, cannot be contemplated as a deliberate ruling of the Chief Court without serious misgivings as to its consequences in matters covering the daily practice of the whole commercial community.

The case is accordingly referred to a Division Bench.

JUDGMENT.—The circumstances of this case appear sufficiently from the order of reference to a Division Bench. Objection has again been raised before us on behalf of the defendants-respondents that no revision lies under clause (*a*) of section 70 (1), Punjab Courts Act. We overrule the objection holding that the omissions from the judgment of the lower Appellate Court constitute a material irregularity.

No rulings bearing on the point under discussion have been traced other than those quoted in the order of reference. We are inclined to hold that the words "all previous parties" appearing in section 83 of the Negotiable Instruments Act XXVI of 1881 should be construed as including the drawer. To this extent we agree with the previous Single Bench ruling of this Court, dated the 27th May 1907 in Civil Appeal No. 83 of 1907. We are, however, quite clear that section 83 does not lay down any general ruling applicable to all bills of exchange in the way in which the section has been interpreted by our learned brother. We take it as certain that the twenty-four hours' rule specified in the section cannot possibly have been intended by the Legislature to apply to bills of exchange generally, or in particular to *hundis* such as those in dispute in the 1907 case and in the case before us. We need not, perhaps, lay stress on the extreme case of cheques, suggested in the order of reference, inasmuch as cheques are specifically provided for by section 84 of the Act at the same time, apart from the provisions of the Indian Stamp Act, there is no real distinction between a post-dated cheque and an ordinary *hundi* payable after a certain number of days. Both are essentially bills of exchange made payable after a certain time, and if the twenty-four hours' rule applies to *hundis*, it is difficult to see how it could be held that it would not also be applicable to all bills of the same nature. When we look closely to the terms of section 83, we find that it applies only to bills of exchange in which acceptance by the drawee is obligatory. The only form of bills of exchange for which such acceptance is required by the Act is that described in the Act as a bill of exchange "after sight". These words "after sight" are defined and explained in section 21. The procedure on such bills is laid down in Chapter V of the Act dealing with presentment, under sections 61-63. It will be observed that section 63 prescribes the twenty-four hours' rule, and the only conclusion we can come to is that when the Negotiable Instruments Act was framed, section 83 was inadvertently placed in Chapter VII instead of in what would seem to be its proper place immediately after section 63. We have naturally some hesitation in putting forward an explanation of this nature, but when we read section 83 with many other sections of the Act, specially section 30, we think it impossible to come to any other conclusion. We are fortified in this conclusion by various passages in the Commentaries on the Negotiable Instruments Act by Chalmers, Edition 1897, and of Bhashyam and Adiga, Edition 1909, under sections 21, 30, 61, 63, 83 and 93 of the Act. The English Act 45 and 46 Vict. C. 61, specifies reasonable time in similar cases, and it may very well be that reasonable time is understood in England to mean twenty-four hours. We have, however, to bear in mind that bills of exchange after sight are more commonly used in England than in India, and cannot be safely assumed

(5) 57 P. R. 1900.

that the Legislature intended to apply the English practice to bills other than those of which acceptance is necessary. In this connection the discussion at page 54 of the ruling in *Ram Chand* v. *Shadi Lal* (3) is instructive in so far as it draws a distinction between presentment for acceptance and presentment for payment. We do not desire to lay down any general rule regarding the practice of commercial bills in India, but we entertain no doubt that the ordinary *hundi* of the country comes under the class of bills which require presentation for payment only and not for acceptance. The previous Single Bench decision of this Court, dated the 27th May 1907, is, in our opinion, erroneous in so far as it applies section 83 of Negotiable Instruments Act to *hundis* of the usual type payable after a certain number of days. We desire to make this quite clear as the ruling in question is undoubtedly misleading as it stands, and has apparently caused the lower Appellate Court to go wrong in the present case, we observe that it was prominently referred to in No. 4 of the grounds of appeal to the lower Appellate Court.

The first Court distinctly found that the drawees had no money of the drawer with them, and on that account they refused payment on presentation of the *hundis* in suit. This finding was not specifically attacked in appeal by the defendants and we understand that there is no doubt regarding its correctness. The plaintiffs, as holders of the *hundis* in suit have shown sufficient diligence in suing the drawer, and it is quite clear that the *hundis* were presented for payment within a reasonable time. This disposes of nearly all the contentious matters in the suit, but we are unable to give a final decision, as the lower Appellate Court has omitted to deal with Nos. 1 and 4 of the points enumerated in its orders of the 2nd August 1909 and the 4th October 1909, and we have had no argument before us to enable us to deal with these two points. We accordingly accept the revision, and set aside the Divisional Judge's decree as having been given on an erroneous decision that the drawer is relieved of responsibility under the provisions of section 83 of the Act. We must remand the case to the lower Appellate Court for fresh decision of the appeal before it with reference to the specified points Nos. 1 and 4, and to those only.

Court-fee in this Court will be refunded to the plaintiffs-petitioners, and the remaining costs of revision will be costs of the cause.

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CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1521 OF 1909.

March 20, 1911.

Present:—Mr. Justice Coxe.

JOTE KUMAR MUKHERJEE—PLAINTIFF —APPELLANT

versus

INDRA NARAIN MUKHERJEE AND ANOTHER—DEFENDANTS—RESPONDENTS.

Mortgage—Purchaser of mortgaged property—Mortgage suit—Purchaser not made party—Mortgage, whether to be proved against him again.

When a mortgagee has obtained a decree on his mortgage, the validity of the mortgage must again be proved against a purchaser who was not a party to the suit on the mortgage and who ought to be given an opportunity of redeeming it, if valid.

Protab Chandra Mandal v. *Ishan Chandra Chowdhry*, 4 C. W. N. 266, distinguished.

Defendant No. 2 executed a mortgage in favour of the plaintiff. Defendant No. 1 purchased the mortgaged property and got possession of it. The plaintiff obtained a decree but defendant No. 1 was no party to it. In execution, the property was put up for sale and purchased by the plaintiff. Defendant No. 1 filed a claim which was successful and the plaintiff sued for confirmation of possession:

Held, that as the plaintiff had not proved the genuineness of the mortgage in the presence of defendant No. 1, who denied it, and had also not given him an opportunity of redeeming, the suit as framed was not maintainable.

Har Pershad Lal v. *Dal Mardan Singh*, 9 C. W. N. 728; 1 C. L. J. 371; 32 C. 891 and *Ganga Das Bhattar* v. *Jogendra Nath Mitter*, 11 C. W. N. 403; 5 C L. J. 315, referred to and distinguished.

Appeal from the decree of the Sub-Judge of Hooghly, dated April 19th, 1909 reversing that of the Munsif of Serampore, dated April 24th, 1908.

Babus *Hara Kumar Mitra* and *Sarat Kumar Mitra*, for the Appellant.

Babu *Shoshi Sekhar Bose*, for the Respondents.

JUDGMENT.—The father of the 2nd defendant in this suit is said to have executed a mortgage in favour of the father of the plaintiff in 1891. The 1st defendant is said to have bought the same property in 1872 but this has been disbelieved. It is clear, however, that he bought it in 1901 at a sale under the Public Demands Recovery Act and after

bringing a suit for possession, he obtained possession in 1903. In 1902, the plaintiff sued on the mortgage, obtained a decree, and in execution put up the land for sale and bought it himself. He obtained possession in 1906. The 1st defendant then filed a claim which was successful, and the plaintiff in consequence brought the present suit for confirmation of possession.

The Munsif decreed the suit but the learned Subordinate Judge on appeel has dismissed it on the grounnd that the plaintiff ought to have given the 1st defendant an opportunity both of attacking the validity of the mortgage and also of redeeming it, if valid. As the plaintiff had not proved the genuineness of the mortgage in the presence of the 1st defendant and had also not given him an opportunity of redeeming, the lower Appellate Court held that the suit, as framed, was not maintainable and dismissed it.

The plaintiff appeals and it is contended on his behalf (1) that he need not prove the mortgage in this suit nor give the defendant an opportunity to redeem, and (2) that in any case the suit ought to be decreed after allowing the defendant to redeem.

The learned Pleader for the appellant has called my attention to paragraph 1758 of Mr. H S. Gour's work on the Law of Transfer in British India. The paragraph, however, appears to deal more with English than with Indian practice. In India according to paragraphs Nos. 1765, 1773 *et seq.*, it would seem that a purchaser not joined in a mortgage-suit is unaffected by the decree and can have the accounts re-opened and presumably the genuineness of the mortgage proved. Reference has also been made to the case of *Protab Chandra Mandal* v. *Ishan Chander Chowdhury* (1). In that case it was held that a puisne purchaser, in a case of this nature, could only have a right to redeem and could not sue prior mortgagees, who had purchased in execution of a decree on their mortgage, for possession. It is argued that if in such a case the puisne purchaser could not sue for recovery of possession, the prior mortgagee must be entitled to sue for confirmation of his possession, if it is threatened. But, as pointed out in *Sarat Chandra* v. *Shiekh Meher* (2), the point was decided the other way in *Girish Chunder Mandal* v. *Iswar Chander Rai* (3); and, moreover, I observe that even in *Protab Chandra Mandal* v. *Ishan Chandra Chowdhury* (1), the case was at first remanded for a finding whether the mortgage was genuine.

The case of *Har Pershad Lal* v. *Dal Mardan Singh* (4), simply shows that the prior mortgagee in a case of this nature, can sue for possession, if he gives the defendant an opportunity to redeem. But in that case the mortgage was admitted, being recited in the defendant's title deed. In *Ganaga Das Bhatter* v. *Jogendra Nath Mitter* (5) also, the validity of the original mortgage was not questioned in this Court, thought it had been contested in the Courts below and had been decided in mortgagee's favour.

I can find no authority for the proposition that when a mortgagee has obtained a decree on his mortgage the validity of his mortgage must be taken as established, and need not be proved again against a purchaser, who was not a party to the suit on the mortgage. And I observe that the opposite view is taken in Dr. Ghose's Work on Mortgages, page 364 (3rd Edition).

It seems only just that the decree obtained by the plaintiff on his mortgage should not be binding on the 1st defendant, and in that case I can see no reason why he should not be entitled to attack the validity of the mortgage as he has done in this suit. The genuineness of the mortgage was denied in the written statement and definitely raisd in the issues. The question was not decided by the Munsif who, I regrt to observe, did not attempt in his judgment to decide the issues, one by one. He held that on that point defendant No. 1 was bound by the plaintiff's decree, which is certainly not the case, as the learned Subordinate Judge has rightly pointed out. The Sub-Judge found that the mortgage had not been proved, and as the bond was not even produced, his decision on this point cannot be assailed.

In these circumstances, I think the suit was rightly dismissed. On the evidence as it stands, a remand for a finding whether the mortgage was genuine would clearly be of no use to the plaintiff, and he has no right to ask for an opportunity to give further evidence. The genuineness of the bond was,

(1) 4 C. W. N. 266.
(2) 4 C. L. J. 480.
(3) 4 C. W. N. 452.
(4) 9 C. W. N. 728; 1 C. L. J. 371; 32 C. 891.
(5) 11 C. W. N. 403; 5 C. L. J. 315.

as I have said, denied from the first in the written statement and was put definitely in issue. I do not think that any good reason could be recorded under Order XLI, rule 27, for permitting the introduction of further evidence, which seems to have been deliberately withheld. The appeal will accordingly be dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL NO. 1858 OF 1908.
January 29, 1911.
Present:—Mr. Justice Mookerjee and
Mr. Justice Teunon.
HARIHAR CHATTOPADHYAYA—
PLAINTIFF—APPELLANT)
versus
DINU BERA—DEFENDANT—RESPONDENT.

Bengal Tenancy Act (VIII of 1885*)*, *ss.* 21, 44, 45, 182—*Homestead*—Raiyat *holding land at another village under different landlord—Ejectment—Non-occupancy* raiyat—*Expiration of term.*

The land in dispute was let to the defendant in 1896 for three years. Upon the expiry of that term, he was allowed to hold over and on October 12th, 1905, the plaintiff-landlord served him with notice to quit the land on April 14th, 1906. A suit for ejectment was filed on December 4th, 1906:

Held, that as the notice was not served within six months before the expiration of the term, nor the suit instituted within six months after the expiration of the term, the suit was barred under sections 44 and 45 of the Bengal Tenancy Act.

Obiter dictum.—The provisions of the Bengal Tenancy Act are applicable to the homestead of a person who is a *raiyat*, although he is not a *raiyat* of the village in which the homestead land is situated and is not a *raiyat* of the same landlord as the landlord of the homestead land.

Kripa Nath Chakravarti v. *Sheikh Anu.* 4 C. L. J. 332; 10 C. W. N. 944, relied upon.

Appeal from the decree of the Sub-Judge of 24-Pergannahs, dated May 8th, 1909, reversing that of the Munsif of Alipur, dated July 9th, 1907.

Babus *Mohendra Nath Roy* and *Dhirendra Nath Kastagir*, for the Appellant.

Babus *Basanta Kumar Bose* and *Atul Krishna Roy*, for the Respondent.

JUDGMENT.—This is an appeal on behalf of the plaintiff in a suit for ejectment and recovery of rent and damages. The case for the plaintiff was that the land in dispute was let out to the defendant on the 20th July 1896 for a term of three years; that after the expiration of the term of the tenancy, the defendant was allowed to hold over; that on the 12th October 1905, the plaintiff served upon the defendant a notice to quit the land on the 14th April 1906; that in spite of the service of such notice the defendant has continued in occupation, and that consequently on the 4th December 1906 the plaintiff commenced this action to eject the defendant as a trespasser. He further claimed rent for the year 1312, that is, up to the date on which the defendant was asked to vacate the premises, and damages for use and occupation thereafter. The defendant resisted the claim, substantially on the ground that his tenancy was not terminable, and that as a matter of law it had not been validly terminated by the steps taken by the plaintiff.

The Court of first instance found that the defendant was not shown to be a *ryot* in respect of other lands in the same village; that he had not acquired a right of occupancy in the land in dispute which had been taken by him for purposes of homestead and had been used by him as such, and that consequently his tenancy in respect of this land was terminable and had been terminated by the notice to quit served upon him. In this view the Court of first instance decreed the suit, both as regards the prayer for ejectment and the claim for rent and damages.

Upon appeal, the learned Subordinate Judge has reversed this decree. He has held that the combined effect of sections 21 and 182 of the Bengal Tenancy Act is to confer upon the defendant the status of an occupancy *ryot* in respect of the land in suit, and that consequently he is not liable to be ejected. In this view the Subordinate Judge has dismissed the suit.

The plaintiff has now appealed to this Court and on his behalf it has been contended that the defendant has not acquired a right of occupancy in the land in suit, that the Subordinate Judge has overlooked material evidence on the question of the occupation of other lands in the village as a *ryot*, and finally, that in any event the plaintiff is entitled to a decree for rent up to the date of the institution of the suit.

In our opinion, in so far as the claim for ejectment is concerned, the plaintiff cannot

possibly succeed. But before we deal with the question of the status of the defendant, it is necessary to advert for a moment to the finding of the Subordinate Judge that the defendant is a *ryot* in respect of other lands in the village. That finding has been attacked on behalf of the appellant on the ground that the Subordinate Judge has erroneously stated that the plaintiff has not adduced any evidence to rebut that on the side of the defendant, to prove that he holds other lands in the village under different proprietors and that he has acquired a right of occupancy in these lands. No doubt, the expression used by the learned Subordinate Judge is open to criticism, but we are unable to hold that he has overlooked the evidence mentioned in the judgment of the Court of first instance. We must, therefore, proceed on the assumption that the defendant has been rightly found by the Subordinate Judge to be *ryot* in respect of other lands in the same village. In fact, the Subordinate Judge has found that the defendant has been a cultivating *ryot* of other lands in the village for more than 25 or 30 years before the suit. In other words, he was a settled *ryot* in respect of those lands at the time when the lease of the land now in dispute was granted to him. The question, therefore, arises whether section 21 of the Bengal Tenancy Act read with section 182 is sufficient to confer upon the defendant the status of an occupancy *ryot* in respect of the homestead land now in dispute.

Now, section 182 provides that when a *ryot* holds his homestead otherwise than as part of his holding as a *ryot*, the incidents of his tenancy of the homestead shall be regulated by local custom or usage, and, subject to local custom or usage, by the provisions of the Act applicable to land held by a *ryot*. In the case before us, no evidence has been adduced on behalf of either party to show that there is any local custom or usage applicable to the incidents of the tenancy in question. Consequently, the incidents of the tenancy must be governed by the provisions of the Act applicable to land held by a *ryot*. The learned Vakil for the appellant has, however, contended that as the land now in dispute is not held under the same landlord as the land cultivated by the defendant, section 182 has no application. This contention is opposed to the judgment of Mr. Justice Geidt in the case of *Protap Chandra* v. *Biseswar Pramanick* (1) and to the decision of this Court in the case of *Kripa Nath Chakravarti* v. *Sheikh Anu* (2). The case last mentioned lays down that the provisions of the Bengal Tenancy Act applicable to the homestead of a person who is a *ryot*, although he is not a *ryot* of the village in which the homestead land is situated and is not a *ryot* of the same landlord as the landlord of the homestead land. It may be observed that this view is justified by the language used in section 182 and we see no reason to restrict the operation of that section by importing into it words not to be found therein. Consequently, we must hold that, although the land in dispute is homestead land, as it is held by the defendant, who is a *ryot* otherwise than as part of his holdings as a *ryot*, the incidents of his tenancy are, in the absence of any local custom or usage, regulated by the provisions of the Bengal Tenancy Act applicable to land held by a *ryot*. *Prima facie*, therefore, the provisions of section 21 are applicable. But the learned Vakil for the appellant has contended that before section 21 can be applied, it must be shown that the land in suit has been held by the defendant as a *ryot*, because sub-section (1) of section 21 provides that every person who is a settled *ryot* of a village within the meaning of section 20 shall have a right of occupancy in all land for the time being "held by him as a *ryot* in that village." The learned Vakil for the appellant has conceded that his contention is opposed to the decision of Mr. Justice Rampini in the case of *Munshi Golam Mollah* v. *Abdul Sowar* (3), but he has argued that in that decision sufficient weight was not attached to the qualifying words 'held by him as a *ryot* in that village.' Upon the arguments which have been addressed to us, we need not decide this question for the purposes of the case before us and when it arises in a case where it really calls for decision, the matter may require further consideration. But we are of opinion that the plaintiff must fail on another ground. The suit is clearly barred under sections 44 and 45 of the Bengal Tenancy Act. Section 45, as it stood

(1) 9 C. W. N. 416.
(2) 4 C. L. J. 332; 10 C. W. N. 944.
(3) 13 C. L. J. 255; 9 Ind. Cas. 922.

at the time of the institution of the suit, provides that a suit for ejectment on the ground of expiration of the term of a lease shall not be instituted against a non-occupancy-*ryot* unless notice to quit has been served on the *ryot* not less than six months before the expiration of the term and shall not be instituted after six months from the expiration of the term. Now, the defendant has been found to be a *ryot*. Even if it is assumed that he is not an occupancy-*ryot* in respect of the disputed land because, as the learned Vakil for the appellant contends, section 21 has no application to the land in suit, he is at least a non-occupancy-*ryot*. Hence before the defendant is ejected, the requirements of section 45 must be fulfilled. But it cannot be disputed that no notice to quit was served on the defendant within six months before the expiration of the term, that is, within six months before the 20th July 1899. Nor has the present suit been instituted within six months after the expiration of the term. It is obvious, therefore, that section 45 is a bar to the claim for eviction of the defendant and the refusal of the Court below to make a decree for ejectment was correct.

In so far as the claim for rent is concerned, the learned Vakil for the respondent has conceded that the matter has been overlooked by the Subordinate Judge. We observe, however, that interest was claimed by the plaintiff at the rate of 75 per cent, per annum under the terms of the lease. Under section 178, sub-section (3) clause (*g*), of the Bengal Tenancy Act, nothing in any contract made between a landlord and a tenant after the passing of the Act, can affect the provisions of section 67 relating to interest payable on arrears of rent. Consequently, the plaintiff is not entitled to claim interest at a rate higher than 12 per cent. per annum. A decree, therefore, will be made in favour of the plaintiff for the rent of the year 1312 and the first two instalments of 1313 with interest at 12 per cent. per annum.

The result, therefore, is that the decree of the Court below, in so far as it dismisses the claim for ejectment, must be affirmed: but in so far as it dismisses the claim for rent and damages it must be reversed, and in lieu thereof a decree will be made in favour of the plaintiff as stated. The plaintiff must pay the defendant his costs in the Court of first instance and in the Court of appeal below; but there will be no order for costs in this Court.

PUNJAB CHIEF COURT.

CIVIL REVISION No. 328 OF 1910.

April 18, 1911.

Present:—Mr. Justice Rattigan.

SINGER MANUFACTURING COMPANY, DELHI—PLAINTIFF—PETITIONER

versus

YAR MUHAMMAD KHAN AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. VI, r. 14, O. XIX, r. 1—Plaint—Signing and verification—Plaintiff company incorporated in foreign country—Signature and verification by person holding general power-of-attorney—"Principal officer."

There is nothing in rule 1, Order XIX, Civil Procedure Code, to exclude from its operation a foreign company which is not incorporated as such in this country.

Singer Manufacturing Company v. *Baij Nath*, 30 C. 103, followed.

A plaint was filed in the Delhi Court on behalf of the Singer Manufacturing Company, which is incorporated in the United States of America and carries on an extensive business in respect of the sale of sewing-machines in various parts of this country. The plaint was signed and verified on behalf of the company by one *M.*, who had been appointed agent for the company at Delhi by *P.* who, in his turn, held a general power of attorney from the Company's accredited English Agents authorizing him to act for the Company as their general attorney and agent in British India and to appoint sub-agents therein:

Held, that the plaint was duly signed and verified on behalf of the Company, *M.* being the person having special knowledge of the facts relating to the claim and holding a general power-of-attorney for the Delhi District, by which he was duly authorized to sign the plaint on behalf of the absent company, and that he was also the 'principal officer' of the Company within the meaning of Order XIX, rule 1, and competent, as such, to sign and verify the plaint.

Petition, under section 25 of Act IX of 1887, for revision of the order of the Judge Small Cause Court, Delhi, dated the 16th November 1909, rejecting petitioner's plaint.

Messrs. *Bevan Petman*, and *Obedulla*, for the Petitioner.

Mr. *Abdul Kadir*, for the Respondent.

JUDGMENT.—In this case the Judge of the Small Cause Court, Delhi, has rejected the plaint on the ground that it is not duly signed and verified. The plaintiff is the Singer Manufacturing Company, a Company which appears to have been incorporated in the U. S. A.

and which carries on an extensive business in respect of the sale of Sewing-Machines in various parts of this country. The present plaint has been signed and verified on behalf of the said Company by one Macaddum who has been appointed agent for the Company at Delhi by a Mr. Petell who, in his turn, holds a general power-of-attorney from the Company's accredited English agent authorizing him to act for the Company as their general attorney and agent in British India, and to appoint sub-agents therein. It is not denied that Mr. Macaddum has special knowledge of the fact relating to the present claim and that he holds a general power-of-attorney from Mr. Petell for the Delhi District, but it is urged that his signature to the plaint is not sufficient for the purposes of Order VI, rule 14, of the Civil Procedure Code. I do not think there is any force in this argument. The plaintiff-Company is "absent" and Mr. Macaddum is, in my opinion, duly authorized by the power-of-attorney which he holds, to sign the plaint. As the agent of the Delhi branch, moreover, he is a "principal officer" of the Company within the meaning of Order XXIX, rule 1, of the Code, and competent, as such, to sign and verify the plaint. In this connection, I might add that I see no reason to differ from the decision of the High Court of Calcutta in *Singer Manufacturing Company* v. *Baij Nath* (1), to the effect that there is nothing in this rule to exclude from its operation a foreign Company which is not incorporated as such in this country. I also find that in Circular No. 28 of 1898 the Allahabad High Court held that a plaint which had been signed by an agent of this very Company in circumstances similar to those of the present case, had been duly signed for the purposes of section 51 of the Civil Procedure Code of 1882. The Judge of the Small Cause Court in rejecting the plaint as not duly signed relies upon *Niharku* v. *Madho* (2); but as that case is in no way in point I can only surmise that he has given a wrong reference. I have, however, consulted the authorities and I cannot find any ruling of this Court which supports his conclusions. I accordingly accept this petition, and setting aside the order of the lower Court I direct that the record be returned to it with orders to accept the plaint and proceed with the hearing of the case. Costs to abide the event.

The delay in disposing of this petition has been due to the fact that Mr. Abdul Kadir who appears for respondent No. 2 alone, was erroneously supposed by the officers of this Court to be Counsel for both respondents, with the result that notice was not issued to respondent No. 1. The latter has now received notice, but has put in no appearance and this order is consequently *ex parte* against him.

(1) 30 C. 103.
(2) 107 P. R. 1907.

PUNJAB CHIEF COURT.
CIVIL REVISION No. 2180 OF 1910.
April 18, 1911.

Present:—Mr. Justice Rattigan.

ALLAH DITTA—PETITIONER

versus

KARAM CHAND—RESPONDENT.

Limitation Act (IX of 1908), s. 19—Acknowledgment—Deposition, when an acknowledgment—Application signed by mortgagor's widow.

A deposition, containing an admission, may amount to an acknowledgment within the meaning and for the purposes of section 19 of the Limitation Act, provided it is duly signed by the deponent.

Venkata v. *Parthasaradhi*, 16 M. 220; *Periavenkanudaya* v. *Subramanian Chetti*, 20 M 239, referred to.

An application signed by the widow of a deceased mortgagor distinctly admitting the mortgage constitutes an acknowledgment sufficient to save limitation.

Petition, under section 70 (*a*) of Act XVIII of 1884, as amended by Act XXV of 1899, for revision of the order of the District Judge, Gurdaspur, dated the 29th April 1910, reversing that of the 1st Class Munsif, Pathankot, in Gurdaspur District, dated the 16th March in plaintiff's claim.

Mr. *Roshan Lal*, for the Petitioner.

Lala *Hari Chand*, for the Respondent.

JUDGMENT.—The so-called acknowledgments by Labhu to which the District Judge refers, were statements made by him during certain execution proceedings but in neither case was the statement "signed" by Labhu. A deposition, contaning an admission may possibly amount to "an acknowledgment" within the meaning and for the purposes of section 19 of the Indian Limitation Act. [*Venkatta* v. *Parthasadhi* (1), *Periaven kanudaya* v. *Subramanian Chetti* (2)] but only if it is duly "signed" by the deponent.

Mr. Hari Chand, however, points out that

(1) 16 M. 220.
(2) 20 M. 239.

Musammat Kauri (the widow of Labhu) in her written application, dated 10th May 1904, distinctly admitted that a house was on mortgage with Labhu Shah (plaintiff's father), and that this application was duly signed by the woman. I find that this is so, and that this acknowledgment is sufficient to save limitation. I accordingly reject this petition. Costs in this Court will abide the event.

Petition rejected.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 518 OF 1910.

February 16, 1911.

Present:—Mr. Justice Karamat Hussain.

MAKHDUM BUKHSH—DEFENDANT—APPELLANT

versus

MUHAMMAD NAZIR KHAN—PLAINTIFF AND ANOTHER—DEFENDANT—RESPONDENT.

Muhammadan Law—Pre-emption—Talab-i-mowasabat—"Mera shufa", *whether constitutes valid demand.*

The words "*mera shufa*" repeated twice do not by themselves constitute a valid *talab-i-mowasabat* under the Muhammadan Law.

Ahsanulhuq v. *Kallan*, 6 A. L. J. 15; 1 Ind. Cas 85; *Ahmad Shah Khan* v. *Abadi Begam*, A. W. N. (1897) 23; *Muhammad Yunis Khan* v. *Muhammad Yusuf*, A. W. N. (1897) 93, distinguished.

Second appeal from the decision of the Additional Subordinate Judge of Mainpuri, dated the 7th of April 1910.

Mr. *Abdul Raoof* (with him Mr. *Ahmad Kareem*), for the Appellant.

Mr. *Govind Prashad*, for the Respondents.

JUDGMEMT.—This was a suit for pre-emption on the basis of the *Hanafi* Law, and the question to be decided is whether the expressions used by the pre-emptor in making the *talab i-mowasibat* do or do not amount to a claim for pre-emption. The first Court came to the conclusion that they did not. The lower Appellate Court came to the conclusion that they did and decreed the suit. The defendant comes here in second appeal and his learned Counsel contends that the expressions used by the pre-emptor are not sufficient to constitute the first demand.

The lower Appellate Court in its judgment remarks as follows:—"In the present case the words used were '*mera shufa*' repeated twice. The plaintiff also asked these present to bear witness to it. He then immediately went inside the house, brought the money and, being accompanied by the witnesses, went to the vendee, offered him the money and made the second demand. The words uttered at the first demand amply and clearly show that the plaintiff had a clear intention of demanding his right vide *Ahmad Shah* v. *Abadi Begam* (1); *Mohammad Yunis Khan* v. *Mohammad Usuf* (2); *Ahsanulhuq* v. *Kallan* (3).

The *Hanafi* Law on the question of first demand is very clear. Some expressions showing that the pre-emptor claims pre-emption must be used. The expression used in the present case, as found by the lower Court is "*mera shufa*", which only gives an information that the pre-emptor has the right to pre-empt. There is nothing in the expression to show that, in addition to the information given by him, he claims to pre empt. A pre-emptor may say "I am a pre emptor but I do not claim to pre-empt" or he may say "I am a pre-emptor and I claim to pre-empt". The fact that the expression "I am a pre-emptor" may be used together with a *claim* to pre-empt as well as with a *waiver of that claim*, conclusively shows that the expression "I am a pre-emptor" does not in any way convey the idea that the pre-emptor does claim to pre-empt. The point is covered by an unreported decision of this Court in S. A. No. 1059 of 1901 decided on the 1st of December 1903 and I quote the following extract from the judgment: "As to the decision of the case upon the principle of Muhammadan Law, we find ourselves driven to the conclusion that no right has been acquired by the plaintiff under that law. We cannot find that merely for the plaintiff to say 'I am a pre-emptor, my right extends to the land' constitutes a *talab i-mowasibat* either by express terms or by implication. There is a concurrence of authority upon the subject. It is immaterial according to the *Hedaya* in what words the claim is preferred. It is sufficient that they indicate a claim. But we have nothing in the expressions used in this case to make it possible to say that such a claim has been made or can be inferred Mr. Justice Amir Ali, in his work upon Muhammadan Law, Vol. I, page 597, following the past authorities, says

(1) A. W. N. (1897) 23.
(2) A. W. N. (1897) 93.
(3) 6 A. L. J. 15; 1 Ind. Cas . 85.

If a pre-emptor were to say to the purchaser, I am thy pre-emptor a *shafee* it would be void. The result of this is clear that a mere expression or declaration of his right does not itself show that he wishes to enforce that right. We find ourselves constrained to overrule the claim of the pre-emptor-appellant and hold that the first demand necessary under the Muhammadan Law has not been made."

In addition to the authorities cited in the unreported case, I cite the following from Baillee's Muhammadan Law "There is some difference as to the words in which the demand should be expressed. But the better opinion is that it is lawful in any words that *intelligibly express the demand*. So that if the pre-emptor should say "I have demanded or I demand pre-emption" it would be lawful; but if he were to say "I am, thy *shafee* or pre-emptor, or, 'I take thy mention' it would be void" (Book on Pre-emption. Ch. III, page 487, Edition 2nd). There is nothing technical in this rule of Muhammadan Law. It is based on the canons of interpretation which determine the intention of a person. The intention is to be gathered from expressions used by that person and not from words which have not been used by him. The expression 'I am a pre-emptor' only gives information that the speaker is a pre-emptor of what the pre-emptor is going to do, but the words "I have demanded" or "I do demand pre-emption" show an intention to claim pre-emption.

The case of *Ahsanulhaq* v. *Kallan* (3) has no application to the facts of the present case, because according to the remarks made by the learned Judges in that case, it appears, that a demand was made. The learned Judges say,—"The plaintiff in his evidence states that as soon as he heard of the purchase from a friend he at once said 'I am a pre-emptor', I have a claim (*main shafee hun mera haq hai*). The words the plaintiff used were probably equivocal but a witness named Abdul Ghafoor was called and he says that when the plaintiff was informed that the house was sold he at once said that he was a pre-emptor and would take the house and told Nanhi, his brother, to take money and asked us to accompany him". The rulings in *Ahmad Shah Khan* v. *Abadi Begam* (1) and *Muhammad Yunis Khan* v. *Muhammad Usuf* (2) do not apply to the facts of this case.

The result is, that I hold that the expression found by the lower Appellate Court to have been used by pre-emptor "*mera shufa*" does not constitute a *talab-i-mowasabat* within the meaning of that expression under the Muhammadan Law. I, therefore, allow the appeal, set aside the decree of the lower Appellate Court and restore that of the Court of first instance with costs including fees on the higher scale.

Appeal allowed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NOS. 468 OF 1910.

April 3, 1911.

Present:—Mr. Justice Banerji and Mr. Justice Griffin.

Pandit BENI MADHO AND OTHERS—
—PLAINTIFFS—APPELLANTS

versus

BHAGWAN PRASAD AND OTHERS—
DEFENDANTS—RESPONDENTS.

Assignment of Government revenue—Right of Government to remit such revenue—Assignee bound by remission.

The assignee of Government revenue takes the assignment subject to all the rights of Government to assess, enhance, reduce, remit or suspend the revenue. Hence, if the Government remits a portion of the assigned revenue the assignee cannot realize that portion from the *zemindars*.

Second appeal from the decision of the District Judge of Muttra, dated the 21st February 1910.

Mr. *Mohan Lal Sandal*, for the Appellants.

Mr. *G. L. Agarwala*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiffs-appellants, who are assignees of Government revenue, to recover from the defendants, who are landholders, arrears of revenue payable by them. It appears that during the period in respect of which arrears of revenue are claimed a portion of the revenue was remitted by Government on account of famine. The defendants claimed a deduction of this amount out of the arrears claimed. The Courts below have granted the deduction prayed for. Hence this appeal. The contention on the part of the appellants is that the Government having assigned the revenue was not competent to grant a remission, and that such remission could not deprive the plaintiffs of their right to the revenue assigned to them,

It appears that the assignment in favour of the plaintiffs was originally made by the Maharaja Sindia and was continued by the British Government. There is nothing to show that under the terms of the assignment it was agreed between the Government and the assignees that there should be no alteration in the amount of the revenue assigned. In the absence of any such agreement we must hold that the assignees took the assignment subject to the ordinary rights of the Government to assess or reduce or in seasons of calamity to remit the whole or a part of the revenue. This is manifest from the provisions of section 58 sub-section (2) of Act No. III of 1901. That sub-section provides that "revenue may be assessed on land notwithstanding that the revenue by reason of its having been assigned, released, compounded for or redeemed is not payable to the Government." Again, in the case of fluvial action, the Government has the power under section 99, sub-section (2), to revise the assessment, and the rules framed by the Board of Revenue for such revision contain a distinct provision to the effect that assessment of *mahals* of which the revenue has been wholly assigned will be liable to revision in the same manner and to the same extent as *mahals* with payable revenue [see rule 56 printed on page 158 of Mr. Agarwala's Edition of the Land Revenue Act.] Any other view would cause immense hardships both to land-holders and tenants under section 51 of the Agra Tenancy Act where remission of revenue is granted the land-holder is bound to grant a remission of rent to the extent of twice the amount of the revenue remitted. If the contention of the appellants is right, although under section 51 the land-holder would be bound to grant a remission to his tenants, he himself would be liable notwithstanding the remission to pay the full amount of revenue to the assignees of it. It is urged on behalf of the appellant that it is only in the case of revenue payable to Government that a remission can be granted to tenants under section 51 and that, therefore, land-holders will not be prejudiced; assuming this contention to be valid, tenants would have no remedy in times of calamity if the land occupied by them happens to be situated in a locality the revenue of which has been assigned by the Government to a third party. Such surely could not be the intention of the Legislature. In our opinion an assignee of Government revenue takes the assignment subject to all the rights of Government to assess, enhance, reduce, remit or suspend the revenue, so the defendants land-holders are, therefore, entitled to the benefit of the remission granted by Government. In this view the Courts below were right and this appeal must fail. We accordingly dismiss it whith costs.

The objection under Order XLI, rule 22, of the Code of Civil Procedure is not pressed and is dismissed with costs.

Appeal dismissed

S. N. D.
Advocate High Court
Jammu & Kashmir

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 330 OF 1910.

March 17, 1911.

Present:—Mr. Justice Richards.

PAL AHIR AND OTHERS—DEFENDANTS—APPELLANTS

versus

ASGHAR HUSAIN—PLAINTIFF—RESPONDENT.

Specific Relief Act (I of 1877), *s.* 9—*Suit based on title cannot be decided on possession alone—Occupancy holding sold as fixed-rate tenancy—Validity of sale—N. W.-P. Rent Act* (*XII of* 1881), *s.* 9.

An occupancy-holding was mortgaged by the defendant or his predecessor-in-title as a fixed-rate holding and was purchased as such by the plaintiff at a Court-sale. Plaintiff was subsequently dispossessed by the defendant and now sued to recover possession:

Held, that the suit was not maintainable, the holding being an occupancy-tenancy had not been validly sold to the plaintiff and the defendant was entitled to deny that the holding was a fixed-rate tenancy.

Ashu Tosh Sikdar v. *Bihari Lal Kirtainia*, 35 C. 61; 11 C. W. N. 1011; 6 C. L. J. 320; *Madho Lal* v. *Katwari*, A. W. N. (1888) 41; 10 A. 130, referred to.

Held, further, that a plaintiff suing for possession on the basis of title cannot get a decree for possession under the first paragraph of section 9 of the Specific Relief Act.

Lachman v. *Sambhu Narain*, 7 A. L. J. 1078; 7 Ind. Cas. 495, followed.

Second appeal from the decision of the Subordinate Judge of Jaunpur, dated the 16th February 1910.

Mr. *Muhammad Ishaq Khan*, for the Appellants.

Mr. *Ghulam Mujtaba*, for the Respondent.

PAL AHIR *v.* ASGHAR HUSAIN.

JUDGMENT.—This appeal arises out of a suit for possession of immoveable property. The merits of the case seem to be with the plaintiff, who obtained a decree in both the Courts below. It appears that the defendants or their predecessor-in-title mortgaged the property now in suit. In the mortgage the property was described as being held as a fixed-rate tenancy. A suit was instituted on foot of the mortgage. A decree was granted and the property was sold as a fixed-rate tenancy. The auction-purchase took place on the 23rd August 1897 and the sale was confirmed on the 2nd of November 1897. The plaintiff in his plaint alleges all these facts and further that he was dispossessed by the defendants on the 17th of October 1908. The suit was instituted on the 21st of November 1908. Notwithstanding the description of the property in the mortgage and in the decree as also at the time of the auction-sale, it now turns out that all along the property was held as an occupancy-holding and not as a fixed-rate tenancy. The plaintiff comes into Court having to admit that the holding is an occupancy-holding. The lower Appellate Court has held that the holding is an occupancy holding but that the defendants are estopped from setting up this defence. In my opinion the defendants are entitled to succeed. Section 9 of Act XII of 1881 provides that a right of occupancy shall not be transferable in execution of a decree. The result is that the plaintiff has to come into Court and ask for possession on the basis of an alleged sale of, and interest in, land which the law in the most express terms provides shall not be sold. A number of authorities have been cited. In the case of *Ashu Tosh Sikdar* v. *Behari Lal Kirtania* (1) it was held that a sale in contravention of the terms of section 99 of the Transfer of Property Act is not a nullity but merely voidable. In that case the property had been attached and sold on foot of a simple money-decree there being at the time subsisting mortgage against the property vested in the decree-holder. The appeal arose out of an application to set aside the sale and not as in the present case a suit to recover possession based on the sale. Furthermore, the provisions of section 99 of the Transfer of Property Act are not altogether analogous to the provisions of section 9 of Act XII of 1881. In the case of *Madho Lal* v. *Katwari* (2) it was held that in execution of a decree for enforcement of a hypothecation bond by sale of specific property an objection by the judgment-debtor that the property is not transferable with reference to section 9 of the North Western Provinces Rent Act could not be entertained. This case also arose out of execution proceedings. In the present case the plaintiff has to come into Court admitting that he is not in possession and that he is seeking possession of property which he has to admit was not transferable by the Court. In other words, the plaintiff has to say himself the very thing which it is claimed the defendants are estopped from saying. I am asked to hold that the decrees of the Courts below may be supported by virtue of section 9 of the Specific Relief Act. The plaintiff it was said being in possession and being wrongfully dispossessed brought his suit within six months. I am afraid that this contention is not open to the plaintiff. Even assuming that the plaintiff was dispossessed by the defendants otherwise than in due course of law, if he had wished to recover possession on this ground, he ought to have instituted the suit on this ground alone and not, as he has done in the present case, by bringing a suit for ejectment on title. It has been clearly and distinctly held by a Full Bench of this Court in the case of *Lachman* v. *Shambhu Narain* (3) that a plaintiff suing for possession on the basis of title cannot get a decree for possession under the first paragraph of section 9 of the Specific Relief Act. Althongh I feel bound to allow this appeal I do not think that the defendants are entitled to costs in any Court. I accordingly allow the appeal and setting aside the decrees of both the Courts below, dismiss the plaintiff's suit. I direct that the parties shall abide their own costs in all Courts.

Appeal allowed.

(1) 35 C. 61; 11 C. W. N. 1011; 6 C. L. J. 320.

(2) A. W. N. (1888) 41; 10 A. 130.

(3) 7 A. L. J. 1078; 7 Ind. Cas. 495.

GADDU *v.* RIJHA.

PUNJAB CHIEF COURT.
SECOND CIVIL APPEAL No. 1169 OF 1910.
April 12, 1911.
Present:—Sir Arthur Reid, KT., Chief Judge.
GADDU—PLAINTIFF—APPELLANT
versus
RIJHA AND OTHERS—DEFENDANTS—RESPONDENTS.

Punjab Land Revenue Act (*XVII of* 1887), *s.* 111—*Partition*—Adhsalidar, *right to partition*—*Not a joint owner or tenant where original proprietor known*—Adhsali, *definition of.*

Where the original proprietor of a holding is known, an *adhsalidar* in the Kangra District is neither a joint owner nor a joint tenant within the meaning of section 111 of the Punjab Land Revenue Act. Consequently, he is not entitled to seek a partition of the holding, even if he was erroneously recorded as proprietor in some revenue records.

Bhagwat Sahai v. *Bipin Behari Mitter*, 37 C. 918 (P.C.); 14 C.W.N. 962; 12 C.L.J. 240; 8 M.L.T. 228; 1 M. W. N. 691; 7 A. L. J. 1137; 12 Bom. L. R. 997; 20 M. L. J. 907; 7 Ind. Cas. 549; referred to.

Adhsali implies partnership in payment of revenue only.

Appeal from the order of the Divisional Judge, Hoshiarpur, dated the 24th May 1910, confirming the order of the District Judge, Kangra, dated the 18th November 1909, dismissing plaintiffs' claim.

Rai Sahib *Sukh Dial*, for the Petitioner.

Bakhshi *Tek Chand*, for the Respondents.

JUDGMENT.—The appallant an *adhsalidar* having failed in the Revenue Courts to obtain partition of the land in suit has sued for a declaration that he is full proprietor and is entitled to retain possession as proprietor. In pragraph 58 of Lyall's Kangra Settlement Report *adhsali* is defined as implying partnership in payment of revenue and *sanjhi* as implying partnership in payment of revenue and cultivation.

In 1851 and 1868 *adhsalidar* was recorded as proprietor with the *girth* cultivator and he has admittedly paid half the revenue and taken $\frac{1}{4}$th profits ever since he became *adshalidar*, several years after the *girth* obtained possession.

The result of the *adhsalidar* obtaining the dercee he seeks will be that the respondent's position will be altered for the worse.

The latter now pays half the revenue and obtains $\frac{3}{4}$ths profits. He will pay half the revenue and obtain $\frac{1}{2}$ profits of the whole land as he will be deprived of half the land. The only authority cited by the learned Advocate for the appellant is *Bhagwat Shai* v. *Bipin Behari Mitter* (1) and section 111 of the Land Revenue Act.

In the Calcutta case their Lordships of the Privy Council held that, although a *mokarari* lease was in certain contingencies liable to forfeiture, the lessee's title was permanent and the rights incidental to it must be those attached to it as it existed, including the right to partition without reference to what might be lost in the future under changed circumstances. A *mokarari* lease conveys a title obviously different from that of an *adhsalidar* who has nothing to do with the cultivation and merely obtains part of the profits as consideration for paying part of the revenue.

Paragraph 58 of the Settlement Report runs "supposing it can be shown which of the two parties in a holding is the original proprietor *waris*, then I observe that present native feeling attaches little weight to the claims of the others, *i. e.*, the *adhasli* or *sanjhi*. It presumes that the proprietor admitted him of his own free will to the partnership and can dissolve it when he likes." In the present case it has been amply proved that the *girth* was the original proprietor.

Section 111 of the Revenue Act merely provides that any joint owner of land or joint tenant of an occupancy-tenancy may apply for partition.

This does not, in my opinion, help the appellant who has failed to prove that he is a joint owner or a joint tenant; as remaked by the District Judge he was erroneously recorded as proprietor and that error has at last been corrected.

In the absence of any more authoritative definition of the appellant's status, I accept that cited above from the Settlement Report which is usually accepted as a very able and accurate compilation of the Kangra customs and tenures; the appellant has, in my opinion, signally failed to prove that he has proprietary rights in the land in suit.

The appeal fails and is dismissed with costs.

Appeal dismissed.

(1) 7 C. 918 (P. C.); 14 C. W. N. 962; 12 C. L. J. 240; 8 M. L. T. 228; 1 M. W. N. 691; 7 A. L. J. 1137; 12 Bom. L. R. 907; 20 M. L. J. 907; 7 Ind. Cas. 549.

BIBI SHAROFAN *v.* MAHOMED HABIBUDDIN.

CALCUTTA HIGH COURT.
CIVIL RULE No. 636 OF 1911.
March 21, 1911.
Present—Mr. Justice Mookerjee and
Mr. Justice Caspersz.
BIBI SHAROFAN—JUDGMENT-DEBTOR—PETITIONER
versus
MAHOMED HABIBUDDIN—AUCTION-PURCHASER—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 90, 92, O. XLIII, r. 1 (j)—Sale—Application to set aside sale—Compromise between decree-holder and judgment-debtor behind back of auction-purchaser, to have sale set aside, if valid—Appeal—Right of auction-purchaser to appeal.

An execution-sale cannot be set aside without notice to the auction-purchaser and if the original Court pass an order setting the sale aside, the auction-purchaser is entitled to appeal.

An execution-sale was concluded on September 20, 1909, but the judgment-debtor applied to set it aside on the grounds of fraud and irregularity. During the pendency of this proceeding, the decree-holder intimated to the Court that he was willing to accept the decretal amount and to allow the sale to be set aside. The amount was thereupon paid but beyond 30 days from the sale; the Court, however, set it aside. The auction-purchaser appealed to the District Court and the order setting aside the sale was reversed:

Held, that the appeal was competent.

Held, also, that the auction-purchaser was not bound by the compromise between the decree-holder and the judgment-debtor, and that the sale could not be set aside on such compromise.

Rule against the order of the District Judge of Patna, dated January 13th, 1911, reversing that of the Sub-Judge of that District, dated April 12th, 1910.

Dr. *Rash Behary Ghosh*, Moulvis Syed *Shamsul Huda* and Syed *Enayet Karim*, for the Petitioner.

Babus *Mohendra Nath Roy*, *Baldeo Narain Singh* and Moulvi *Mustafa Khan*, for the Opposite Party.

JUDGMENT.

MOOKERJEE. J.—We are invited in this rule to consider the legality of an order by which the Court of Appeal below, in reversal of an order of the Court of first instance, has directed the confirmation of an execution-sale. There is no controversy as to the circumstances under which the order has been made. One Ehaya Hossain obtained a mortgage-decree against the petitioner on the 10th June 1908. The decree was made absolute on the 11th February 1909. Execution was taken out on the 13th July 1909, and the properties were purchased at the execution-sale which followed on the 20th September 1909, by one Mahomed Habib-ud-Din. On the 9th October 1909, the judgment-debtor applied for leave to deposit the decretal amount, and two days later the Court granted the application. The judgment-debtor, however, on the 15th October 1909, made an application under rule 90 of Order XXI of the Civil Procedure Code of 1908 for reversal of the sale on the ground of fraud and material irregularity in its proclamation and conduct, which had resulted in substantial injury to the petitioner. During the pendency of this proceeding, the decree-holder intimated to the Court his willingness to accept the decretal amount and to allow the sale to be set aside, if the judgment-debt was satisfied. Thereupon, the petitioner alleges, he paid the sum to the decree-holder who certified payment to the Court. On the 12th April 1910, the Subordinate Judge set aside the sale, not on the ground that as the decree-holder had consented to its reversal, it could not stand good, but on the ground that the sale had been irregular and the judgment-debtor had suffered substantial injury by reason of the non-publication of the requisite notices and sale proclamation. The auction-puchaser alone appealed against this order to the District Judge. The learned Judge held upon the evidence that neither material irregularity nor fraud had been established, and that the alleged substantial injury had not been proved. In this view, he set aside the order of the Court of first instance and directed the sale to be confirmed. The judgment-debtors then applied to this Court and obtained the rule now under consideration on the ground that the appeal was incompetent, because as the decree-holder had consented to have the sale set aside and by acceptance of a sum in full satisfaction of the judgment-debt had precluded himself from challenging its validity; the auction-puchaser had no *locus standi* in the matter. In support of this proposition, reliance has been placed upon the case of *Purna Chandra* v. *Durga Prasad* (1). It has further been argued that before an execution-sale has been confirmed, the auction-purchaser has no interest in the property, at any rate, no such interest therein as would entitle him to invite the Court to confirm it, even though the decree-holder was not in a position to ask

(1) (1880) 3 Shone 104.

for its confirmation. The question raised is of some novelty and apparently of first impression, but upon well-recognised principles we are unable to hold that the contention of the judgment-debtor should prevail.

In the *first* place, it cannot, in our opinion, be disputed that the auction-purchaser is entitled to be heard before the execution-sale at which he has purchased is set aside. This is manifest from Order XXI, rule 92, sub-rule 2, the proviso to which lays down that no order upon an application to set aside a sale shall be made unless notice of the application has been given to all persons affected thereby. See also *Kripal Singh* v. *Pairoo Raut* (2). In the *second* place, the auction-purchaser is not concluded by the decision of the original Court; it is open to him to take the matter to the Court of Appeal, if he has been prejudiced by the order and obtain its reversal on the ground that it is erroneous. This conclusion follows from the fundamental principles which regulate the right of appeal. As was pointed out by this Court in the case of *Srinath Das* v. *Probhat Chandra Das* (3), as a general proposition of law no one can appeal from a judgment or decree unless he was a party to the action or was treated as such, or is the legal representative of a party, or has privity of estate, title or interest apparent on the face of the record. Another requisite of a valid appeal is, that the appellant has an interest in the subject-matter of the proceeding. A third requisite of a valid appeal is, that the appellant should have been prejudicially affected by the judgment or order complained of. Now, in the case of an appeal by an auction-purchaser against an order of the original Court by which the execution-sale has been set aside, it cannot be disputed that the auction-purchaser was a party to the prceedings in the Court of first instance. The very circumstance that he is entitled to notice before any order is made to his prejudice shows conclusively that he is treated as a party to the proceedings for reversal of the sale. He has also a substantial interest at stake, because he has paid the consideration for the purchases of the property, and, as observed by their Lordships of the Judicial Committee in *Brij Mohun Thakur* v. *Umanath Chowdhry* (4), if no application is successfully made to set aside the sale there is only one duty left to the Court, namely, to pass an order confirming the sale as regards the parties to the suit and the purchaser. Again, as pointed out in the case of *Adhar Chunder* v. *Aghore Nath* (5) and in other cases reviewed in *Bhawani Koer* v. *Muthura Prasad* (6), although an auction-purchaser does not acquire a full title till the confirmation of the sale, he has what has been described as an inchoate or an equitable right which is perfected or becomes absolute upon confirmation.

This view is strengthened by the alteration in the law made by the Code of 1908, under which (section 65) the property is deemed to have vested in the purchaser from the time when the property is sold and not from the time when the sale becomes absolute upon confirmation under rule 92, sub-rule 1. It may further be observed, as pointed by this Court in the case of *Hira Lal Ghose* v. *Chandra Kanto Ghose* (7), which upon this point was accepted as good law in *Joytara* v. *Pran Krishna* (8) that whether an appeal is competent or not, depends, not upon the status of the party who prefers the appeal, but upon the nature of the order which is assailed. In the case just mentioned, it was held that if an order is one within the scope of section 244 of the Code of 1882, it can be challenged by way of appeal by the auction-purchaser precisely in the same manner as its validity can be contested by the decree-holder or by the judgment-debtor. On this principle, it was ruled in the cases of *Gopal Singh* v. *Dular Kuar* (9) and *Kanthi Ram* v. *Bankey Lall* (10), that the auction-purchaser can appeal against an order made in his prejudice in the course of proceedings for reversal of the sale. It was observed that as it is the duty of the Court, where an objection has been disallowed, to confirm the sale as regards the parties to the suit and the purchaser, it is equally the duty of the Court to hear the purchaser if he appears to answer the objection of the judgment-debtor or decree-holder to the sale, and if he has to be heard in the first Court there is no intelligible reason

(2) 11 C. L. J. 86; 5 Ind. Cas. 305.
(3) 11 C. L. J. 580; 6 Ind. Cas. 244.
(4) 20 C. 8 (P. C.); 19 I. A. 154.
(5) 2 C. W. N. 589.
(6) 7 C. L. J. 1 at p. 28.
(7) 26 C. 539.
(8) 13 C. L. J. 57; 7 Ind. Cas. 769.
(9) 2 A. 352.
(10) 2 A. 396.

why he should not be heard in the second Court whether he appears as appellant or respondent. That this view is based not upon any technical rules of procedure, but upon broad principles of justice, equity and good conscience, is, in our opinion, incontestable.

The question was in fact raised and discussed as one of principle in a case before the Supreme Court of the United States [*Blossom* v. *Milwaukee and Chicago Railroad Company* (11)] and it was ruled that a purcheser at a judicial sale who has complied with the terms thereof and paid the purchase-money has the right to appeal from an order setting aside the sale. Mr. Justice Miller who delivered the unanimous opinion of the Court quoted with approval the following passage from the judgment of Chancellor Walworth in *Delaplaine* v. *Lawrence* (12):—" In sales made by masters under decree and order of this Court, the purchasers who have bid off the property and paid their deposits in good faith, are considered as having inchoate rights which entitle them to a hearing upon the question whether the sale shall be set aside. And if the Court errs by setting aside the sale improperly, they have the right to carry the question by appeal to a higher tribunal." To put the matter in another way, a purchaser or bidder subjects himself to the jurisdicion of the Court so much so that if he fails to com plete the sale he may be penalised in the manner mentioned in rule 86 of Order XXI; it is, therefore, only just to hold that he acquires a corresponding right to appear and claim at the hands of the Court relief to which he may be entitled under the rules of equity proceedings. This view has been maintained in numerous decisions among which may be mentioned *Kneeland* v. *American L. and T. Company* (13); *Magann* v. *Legal* (14); *Flourney* v. *Smith* (15); *County* v. *Bunch* (16); *Penn* v. *Creighton* (17); *Todd* v. *Gallego* (18) and *Word* v. *Seattle* (19), all of which confirm the right of the purchaser at a judicial sale to appeal from an order for reversal thereof on the principle just explained. On the other hand, the case of *In re Robinson* (20) shows that an unsuccessful bidder at a sale cannot appeal, because he has acquired no interest, inchoate or otherwise, while the case of *Thomas* v. *Elliot* (21) shows that the right of appeal which would otherwise be enjoyed by the auction-purchaser may be restricted or taken away completely by statutory provision to that effect.

From a review, then, of the principles just explained, it is plain that two positions are firmly established, namely, *first*, that an execution-sale cannot be set aside without notice to the auction-purchaser and without opportunity afforded to him to support the validity of the sale; and *secondly*, that if the original Court has passed an order adverse to the interest of the auction-purchaser, he is entitled to appeal and test the legality of the order in the superior tribunal.

The question next arises whether the rights of the auction-purchaser are affected by the omission of the decree-holder to contest the application of the judgment-debtor for reversal of the sale or by his acceptance of terms from the judgment-debtor which estop him from supporting the sale. In our opinion the right of the auction-purchaser is independent of the right enjoyed by the decree-holder to support the legality of the sale. The auction-purchaser cannot be treated as the representative in interest of the decree-holder and his position cannot be affected by any arrangement which the decree-holder may be prepared to accept. As a general rule a defendant who is injured by a judgment against a co-defendant, may appeal therefrom although the defendant against whom the judgment is rendered, does not do so. Illustrations of this doctrine may be found in various cases in the reports. Thus in *Munay* v. *Guse* (22) it was ruled that where an adverse judgment has been given against the owner of the property and several holders of liens thereon, who were all defendants to an action, the lien-holders were not prevented from appealing against the erroneous judgment, if aggrieved thereby, merely by reason of the failure of the owner to prefer an appeal. A similar view was maintained in *French* v.

(11) (1864) I Wallace 655; 17 Law Ed. 673.
(12) 10 Paige 602.
(13) 136 U. S. 89; 34 Law Ed. 379.
(14) 92 Fed. 252; 34 C. C. A. 323.
(15) 3 Howard (MISS) 62.
(16) 49 Wash. 599; 96 Pac. 164.
(17) 51 Neb. 659; 71 N. W. 279.
(18) 84 Va. 586; 5 S. E. 676; (19) 62 Pac. 135.
(20) 142 Calf. 152; 75 Pac. 777
(21) 215 Mo. 598; 114 S. W. 987.
(22) 10 Wash. 25; 38 Pac. 753,

Peters (23); *McDanial* v. *Correll* (24) and *Arthur* v. *Reed* (25). It is plain that after an execution-sale has taken place, the auction-purchaser is quite as much interested in the proceedings as the decree-holder himself, though, no doubt, their points of view may be different the former has deposited the purchase-money, and his bid has been accepted by the Court, with the result that if the sale cannot be set aside in one or other of the different modes prescribed by the Code his purchase must be confirmed; the decree-holder, on the other hand, is interested to see that the sale continues in force so that the proceeds may be available for the satisfaction of the judgment-debt. It is conceivable that the decree-holder may be satisfied if his claim is paid in full, and he may not be willing to enter into a contest with the judgment-debtor about the legality of the sale; but that is no reason why the auction-purchaser should have his position affected without his consent. He has a substantial interest at stake, and he is entitled to prove the validity of the purchase irrespective of the subsequent conduct of the decree-holder. If any other view were maintained, the provisions of rule 89 of Order XXI would be futile; that rule clearly contemplates that an execution-sale may be set aside on payment of the judgment-debt to the decree-holder and of statutory damages to the purchaser, if the application is made within the prescribed time. If it is open to the judgment-debtor to enter into an engagement with the decree-holder for reversal of the sale, at any rate without the assent of the auction-purchaser and without the payment to him of the sum prescribed by rule 89, no judgment-debtor need avail himself of the provisions of that rule. In our opinion, the view taken by the Court of first instance in the present case, namely, that the auction-purchaser was not bound by the alleged arrangement between the decree-holder and the judgment-debtor and that the sale could be set aside, if at all, only on proof of the grounds mentioned in rule 90, is sound, and if the correctness of this position is once conceded, the conclusion becomes inevitable that the auction-purchaser was entitled to test the propriety of the order of the Original Court by appeal to the District Judge.

The learned Vakil for the petitioners placed much reliance upon the case of *Purna Chandra* v. *Durga Prasad* (1), in which it appears to have been ruled that in a suit brought under section 14 of the Patni Regulation for reversal of a sale against the *zemindar* and the purchaser, an appeal against the decree cannot be maintained by the purchaser alone. That case, in our opinion, is clearly distinguishable. The *zemindar* as well as the purchaser had jointly preferred an appeal to this Court against the decree for reversal of the sale. The *zemindar* applied to the Court for dismissal of the appeal so far as he was concerned, because in his opinion the decree of the Court below could not be successfully challenged, the appeal was thereupon dismissed. The purchaser then claimed to prosecute the appeal so far as he was concerned. The Court held that he could not be heard, because the question at issue, namely, whether there was or was not any arrear for which the *zemindar* could take proceedings under the Patni Regulation, was one between those two parties alone, and the purchaser could not give the Court an information about it, upon a careful examination of the judgment, we are not satisfied that it lays down a comprehensive rule of law that in cases of sales under the Patni Regulation the purchaser can, in no event, appeal against the decree of reversal unless the *zemindar* also joins in the appeal. If the learned Judges intended to lay down any such rule the question when it arises again may require re-consideration. In any event, the learned Judges clearly intimated that there was in this respect no analogy between a *Patni* sale and a sale in execution of a decree under the Civil Procedure Code; in fact, they added that in cases of execution-sales, when the question before the Court is one of regularity of the proceedings, the purchaser, who is himself a party to those proceedings, may very well appear before the Court and maintain their regularity. In our opinion the case of *Purna Chandra* v. *Durga Prasad* (1) does not really advance the contention of the petitioners.

We may add that at one stage of the proceedings we were inclined to make an order for the reversal of the sale under rule 89 of Order XXI of the Code. We are unable to

(23) (1901) 59 N. E. 449.
(24) 12 Ill. 225; 68 Am. Dec. 587.
(25) 26 Tex. 574; 64 S. W. 831.

do so, however, because under rule 92, sub-rule 2, the deposit must be made within thirty days from the date of sale and we have no power, either under section 5 of the Limitation Act or under section 148 of the Civil Procedure Code of 1908, to enlarge the time. We are, therefore, constrained to hold that the appeal to the District Judge was competent and that no grounds have been established for our interference with his order in the exercise of our revisional jurisdiction.

The result is that the rule is discharged: but there will be no order for costs in this Court.

CASPERSZ, J.—The petitioner is the judgment-debtor whose application, under Order XXI, rule 90, of the Code of Civil Procedure, was allowed by the Subordinate Judge of Patna, the sale of the petitioner's properties being set aside. During the pendency of that case the decree-holder accepted his dues from the petitioner and certified satisfaction to the Court. But the auction-purchaser took the matter in appeal before the District Judge who confirmed the sale for the reasons given in his judgment. The petitioner next obtained a rule from this Court and the point for determination is whether the auction-purchaser's appeal to the District Judge was competent.

Under Order XLIII, rule 1 (*j*), of the Code, an order under rule 92 of Order XXI, setting aside a sale, is appelable at the instance of any one whose interests are affected by the sale (See rule 90 of Order XXI). It appears, therefore, that the auction-purchaser was entitled to prefer his appeal to the District Judge. The auction-purchaser, it is true, had no vested right to the properties in question by reason of any order passed by the Court confirming the sale. But he had an equitable title to the property, and a right, in the last resort, under rule 93 of Order XXI, namely, the right to get back his purchase-money with or without interest. The carriage of the execution proceedings was in the hands of the decree-holder who elected to compromise with the judgment-debtor *contra cursus curiae*. Such a compromise, however, cannot be allowed to defeat the interests of the auction-purchaser and the intention of the Code which allows a deposit to set aside the sale only if the money is paid in a particular way and within 30 days. See Order XXI, rules 89 and 92 (2).

I, therefore, agree for the reasons generally stated in the judgment of my learned brother, that this rule must be discharged.

Rule discharged.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1049 OF 1907.

April 10, 1911.

Present:—Mr. Justice Johnstone and Mr. Justice Chevis.

HAR DIAL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

KALI RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom — Hindu Law - - Marriage — Legitimacy—Jhabra Rajputs *not* Kshattriyas—Karewa *marriage between* Jhabra Rajput *and a* Tarkhani *woman is valid—Burden of proof—Marriage between* Kshattriya *and a* Tarkhani *woman.*

Jhabra Rajputs of the Hoshiarpur District are not really *Rajputs*, they do not belong to the *Kshattriya* caste. They are not essentially above *Sudras*. A marriage between a *Jhabra Rajput* and a *Tarkhani* woman is not a marriage between a higher main caste and a lower.

Such a marriage is valid in the Punjab and the issue of such marriage is legitimate.

Khairu v. *Fakir Chand*, 57 P. R. 1903; 150 P. L. R. 1908; 114 P. W. R. 1908; 2 Ind. Cas. 944; *Haria* v. *Kanhya*, 72 P. R. 1908; 64 P. L. R. 1908; 47 P. W. R. 1908, followed.

The burden of proving that such a marriage is invalid by a special custom lies on the person contesting the marriage.

Haria v. *Kanhya*, 72 P. R. 1908; 64 P. L. R. 1908; 47 P. W. R. 1908, followed.

A., a *Jhabra Rajput*, contracted a *karewa* marriage with *B.*, a *Tarkhani* woman. They lived as husband and wife for nearly 40 years. The issue of the marriage was a son, *P.*, who was treated by his father and the *baradari* as the son of *A*. *P.* was married in a *Rajput* family. One of the reversioners of *A.* had admitted *P.* as *A's* son and *P.* was allowed to do *A's kirya-karm*:

Held, that the marriage of *A.* and *B.* was valid and consequently *P.* was the legitimate son of *A.*

Lachman Kaur v. *Mardan Singh*, 8 A. 143; *Mangal Singh* v. *Chandi*, 51 P. R. 1900; P. L. R. 1900 p. 412; *Inderum Valungypooly* v. *Ramaswamy Paudia*, 13 M. I. A. 141; 12 W. R. 42; 3 B. L. R. 1, referred to.

Obiter dicta.—In the absence of a special local custom, a girl cannot now be taken into a different caste by marriage under the Hindu Law. It is more than doubtful whether in the Punjab, a marriage between a *Kshattriya* and a *Tarkhani* woman is really opposed to law.

Second appeal from the order of the Additional Divisional Judge, Hoshiarpur Division, dated the 29th May 1907, reversing that of the District Judge, Hoshiarpur

District, dated the 6th December 1906, dismissing the claim of Har Dial and passing a decree for possession of certain land in favour of the other plaintiffs on payment of Rs. 3,345.

Mr. *Sundar Lal*, for the Appellants.

Rai Sahib *Sukh Dial*, for the Respondents.

JUDGMENT.—This is at first sight a complicated and intricate case in which the Courts below have spent much time and energy in disposing of the large number of issues raised by the first Court. It would serve no useful purpose for us to state in detail all the pleadings and to discuss in detail all the aforesaid issues, for, in our opinion, the plaintiffs, who are reversionary heirs of Jangi, deceased (whose property is in dispute) in the fifth degree, are excluded from succession by his son Partapa (or Partaba) and so have no *locus standi* to sue for possession. This matter is included in issues Nos. 4 and 5 which run thus,—

4. Is Partaba legitimate son of Jangi?

5. If so, can plaintiffs not sue in his presence ?

The first Court found the fourth issue in favour of plaintiffs. That Court does not discuss the question whether Jangi was actually married to *Musammat* Gulabi, *i.e.*, went through the ceremony of *chadar-andazi*, or whether he and she lived in permanent union, or whether during his life-time Jangi treated Partaba as a son, or whether he was so treated by the *baradari*. After merely mentioning some of the positive evidence on the record as to treatment of Partaba and his mother as son and wife, the Court goes on to discuss the question of the validity of a marriage between a *Rajput* and a *Tarkhani* woman and finds it in favour of the plaintiffs. Then it takes up the matter of the conduct of Partaba after Jangi's death and arrives at the conclusion that the former was not treated then as the latter's lawful son. In the end, that Court, after going through all the issues, decided that the sales by Jangi and *Musammat* Hiro, widow of Dunun, were void except as regards the sums of Rs. 1,681 and Rs. 3,345 respectively, and that the claim of Har Dial, plaintiff, who had acquiesced in the transfers—see finding on issue No. 13—must fail on this account; upon these findings a decree followed for $\frac{1}{3}$rd of the land in suit, on payment of certain sums of money, in favour of the other two plaintiffs.

On appeal to the Divisional Court by both parties, the suit was dismissed with costs, plaintiff's appeal being rejected. This result was arrived at on a consideration solely of the issue whether the aforesaid sales were for consideration and "necessity." This point being found in favour of the vendees, it was unnecessary to consider any other question; but the Divisional Judge, incidentally dealing with the matter of Partaba's position, expressd the opinion guardedly that he was a legitimate son.

Before us, on appeal by the plaintiffs, much stress was laid by respondents upon the legitimacy of Partaba and the consequent exclusion of plaintiffs from succession, and we, therefore, elected to hear arguments on this point first. The matter being a difficult one, we reserved judgment, and we now proceed to discuss it.

It is not disputed that Partaba is the son of Jangi and *Musammat* Gulabi, or that the lady lived with Jangi as his wife for a period nearer 40 than 30 years, in fact, until death. It is idle to expect much precise evidence of the actual *karewa*. Defendants called five witnesses, of whom Partaba obviously can have no knowledge, while Har Dial, plaintiff, as witness denies *karewa*. The other three are Maya, who says nothing on the point, Gopi, who says he *heard* there had been *karewa*, and Hira, who merely remarks that *Musammat* Gulabi was *karewe ke aurat*. But one of plaintiffs' witnesses, Bhochanga, who is decidedly hostile to defendants has to admit that he was actually present at the *karewa*, though he goes on to say that *Musammat* Gulabi was a mere mistress (*ashna*), because her first husband was still alive at the time of the *karewa*, and even at the time of his standing in the witness-box. We think that this evidence is, in all the circumstances, sufficient to establish an actual *karewa*, for we cannot see why Bhochanga should have gone out of his way to tell a lie on behalf of Partaba. As to *Musammat* Gulabi's first husband being still alive or being alive at the date of the *karewa*, we must doubt the assertion. It has been made by no other witness, and such a point was never taken by plaintiffs, who, if it were really true, could not have failed

to see how fatal it would be to any pretensions on behalf of Partaba. Even in appeal here the plaintiffs have not taken the point, nor have they argued it. That we are justified in taking this evidence, coupled with evidence of subsequent conduct to be noticed shortly, as sufficient to prove the *factum* of marriage, is clear from a perusal of *Haidar Ali* v. *Sondha* (1); *Hamira* v. *Sundar* (2); *Ralla Ram* v. *Asa Ram* (3); (remand order) *Shib Ditta* v. *Bela* (4); *Mangal Singh* v. *Chandi* (5), (where there was no actual *chadar-andazi* at all), and other rulings.

Before considering the question of the validity of such a marriage between a *Rajput* and a *Tarkhani* widow, we will explain why we think Jangi always looked upon *Musammat* Gulabi as his wife and Partaba as his lawful son, and also why we are of opinion that probably the *baradari* did so too. The indications in favour of defendan's are these,—

(*a*) The *factum* of *karewa*.
(*b*) The 35 to 40 years' cohabitation of the pair.
(*c*) Partaba is married to a *Rajput*.

As to the last point there is evidence of it and there is no rebuttal, and we see no difficulty in accepting the assertion. It is also rather in favour of defendants than otherwise that Partaba was first betrothed to the daughter of one Narain Singh, *Rajput*, who broke the engagement and was in 1890 sued for damages. It is not shown that the breach was due to Partaba's not being considered a *Rajput*, presumably; on the contrary, at betrothal Narain Singh must have considered Partaba one of the *baradari* or he would not have promised his daughter to him.

To these indications we should add the following:—

(*d*) It is asserted and not denied that Partaba did Jangi's *kirya karm*.
(*e*) In a previous suit by Har Dial, plaintiff, a pedigree table put in by him shows Partaba as son of Jangi.
(*f*) After death of Jangi a suit was brought against Partaba for a debt due by Jangi and a decree was obtained.
(*g*) In the Revenue Records Partaba is shown as son of Jangi in respect of 5 *ghumaos* of land of Jangi's.
(*h*) In Exhibit D8, dated 6th June 1889, Jangi described Partaba as his son.
(*i*) In two bonds of 1899 and 1903, respectively, Har Dial, plaintiff, attested, though Partaba is described as son of Jangi.
(*j*) In the deed of gift of 18th May 1895 Jangi calls Partaba his son.

These indications are of varying value, and, no doubt, several of them taken individually do not prove much; but in our opinion, taken together they do sufficiently show that Jangi looked upon Partaba as his lawful son, and that Har Dial, plaintiff, also did so. It may also be taken that the *baradari*, one of whom gave his daughter to Partaba, held the same view at that time at least.

It is, of course, argued on the other side that the conduct of Partaba after Jangi's death is against the theory of his legitimacy, and this argument has evidently been accepted by the first Court. We, however, see little force in it. Mutation took place after Jangi's death in 1899. Partaba claimed, out of the land in Jangi's name, only 12 *ghumaos*, included in the gift of 18th May 1895, whereas much more land was in Jangi's name. It is said that this shows that he did not consider himself the legitimate son of Jangi. Further, when the whole was mutated in favour of *Musummat* Hiro, and Partaba became aware of the sale to Hukman, he accepted a perpetual lease of 5 *ghumaos* and waived his right to the 12 *ghumaos*. But all this is easily explained. Though the whole land was, at Jangi's death, still in his name, all but the aforesaid 12 *ghumaos* had been sold by him on 18th May 1895, and thus Partaba, while stoutly asserting at mutation that he was both donee and heir, did not ask for more than the 12 *ghumaos* really available. [Mr. Sukh Dial has explained us quite satisfactorily how it came about that the vendees of 1895 had not up to Jangi's death got mutation.] And then again, when Partaba had to decide what steps he should take as to the 12 *ghumaos*, he naturally accepted the compromise of a perpetual lease of 5 *ghumaos* on easy terms

(1) 102 P. R. 1880.
(2) 13 P. R. 1898.
(3) 48 P. R. 1890.
(4) 50 P. R. 1900; P. L. R. 1900 p. 155.
(5) 51 P. R. 1900; P. L. R. 1900 p. 412.

in preference to a law suit for the larger area of 12 *ghumaos* which land was under mortgage to one Prabh Dial, who would have to be paid off. In short, Partaba's conduct by no means shows that he knew he was not a legitimate son of Jangi. On the contrary, he seems to have got as much as could be expected from the wreck of the estate and he never departed from his assertion that he was lawful heir of Jangi.

We now come to the question of the legitimacy of Partaba under Hindu Law, and we begin by premising that the Courts should, and generally do, lean in cases like the present to a positive answer to this question. *Cf. Lachman Kaur* v. *Mardan Singh* (6) quoted at p. 74, Tagore Law Lectures, 1878 (2nd Edition), and *Mangal Singh* v. *Chandi* (5) and *Inderum Valungypooly* v. *Ramaswamy Pandia* (7) quoted in *Haria* v. *Kanhya* (8). Here there is every reason to do so, for we have the *karewa* proved, nearly 40 years' cohabitation proved, appropriate treatment by the father and others of the *baradari* proved, admissions by one of the plaintiffs themselves proved, and Partaba's being allowed to do Jangi's *kirya-karm*.

Many authorities have been quoted to us on the state of the Hindu Law on the subject of marriages between Hindus of different main castes or different sub-castes. The first thing we have to decide is whether, in this case of a marriage between a *Jhabra Rajput* and a *Tarkhani* woman, the parties belong to the same main caste or not. No doubt high class *Rajputs* are *Kshattriyas* and a *Tarkhan* is a *Sudra*; but Jangi was a *Jhabra Rajput* and we are inclined to think he was not a *Kshattriya*. The matter must not be dealt with in a pedantic way. We must not say Jangi was a *Rajput*, all *Rajputs* are *Kshattriyas*, therefore, Jangi is so also. Reference to page 47 of the Hoshiarpur Gazetteer, 1904, shows that there are five classes of *Rajputs*, each class being much subdivided; and we find the *Jhabras* almost lowest in the 5th class; and it is said that even the 4th class (the *Rathis*) are "hardly" to be regarded as true *Rajputs* as they practise "*karewa*" and do not marry into the higher classes; and there was evidenly a similar remark in Burney's Settlement Report—see reference to it at foot of page 336, in *Haria* v. *Kanhya* (8), a judgment we shall have to refer to again. Further perusal of page 45, Montgomery's Settlement Report of Hoshiarpur shows that the marriage customs of the higher and lower kinds of *Rajputs* are by no means the same.

It is well known, too, that many tribes in India call themselves *Rajputs*, which are not really so, and which are, like these *Rathis* and *Jhabras*, not admitted to intermarriage with real *Rajputs*. Such tribes are not essentially above the *Jats*, who are certainly *Sudras*.

This being so, all arguments based upon the inadmissibility of marriages between a higher main caste and a lower are really beside the mark; but a few remarks on such marriages may perhaps not be out of place. According to Mayne, 7th Edition, paragraphs 88 and 89, such marriages, though allowed by ancient Hindu Law, are "long since obsolete." The *Mitakshara*, he says, recognised such marriage, but its wording seems to imply that they were dying out. Much the same is said by Gurudas Banerji in Tagore Law Lectures, 1878, (2nd edition), pages 68, 72, 74, the net result being that, notwithstanding the text of Manu, a girl cannot *now* be taken into a different caste by marriage, in the absence of a special local custom. But the law has been differenlty stated by authority here in the Punjab. *Khairu* v. *Fakir Chand* (9) is a clear and reasoned ruling. It relies upon the ancient Hindu Law and upon *dicta* in *Haria* v. *Kanhya* (8) and its net result is that a marriage in the Punjab between a *Minhas Rajput* (a *Kshattriya*) and a *Mahajan* woman (a *Vaisya*) is not invalid. It is said in *Haria* v. *Kanhya* (8) that the "old Aryan customs survive here more than in other parts of India;" and in *Khairu* v. *Fakir Chand* (9) that "mixed marriages seem to have become obsolete rather by custom than by any positive prohibition of personal law." An attempt has been made by the learned Counsel for the appellants to show that these two rulings are in conflict, but we can see no conflict of any importance. The earlier ruling was concerned with a marriage between two sub-castes, though some observations about mixed marriages between

(6) 8 A. 143.
(7) 13 M. I A. 141; 12 W. R. 41; 3 B. L. R. 1.
(8) 72 P. R 1908; 64 P. L. R. 1908; 47 P. W. R. 1908.

(9) 57 P. R. 1909; 150 P. L. R. 1908; 114 P. W. R. 1908; 2 Ind. Cas. 944.

different main castes were set down. The later case was one of marriage by a man into a main caste next below him.

It is unnecessary to pursue the subject further. It is clear that in the present case the marriage, the *factum* of which may be taken as proved, was between two persons really of the same main caste; that this being so, its validity is obvious; that, even if the husband is recognised as a *Kshattriya*, it is more than doubtful whether here in the Punjab the marriage is really opposed to law. In these circumstances, it would be for appellants—see *Haria* v. *Kanhya* (8)—to prove a special custom under which such a marriage would be invalid, and we can find on the record no good evidence to this effect.

The result of these findings is that plaintiffs have no *locus standi* to sue. Partaba being a legitimate son of Jangi, excludes them, and their suit for possession of Jangi's estate fails. They do not ask for a declaration as regards reversionary rights after Partaba's death, and we cannot consider that question in any case, for there is no proof that Partaba colluded with defendants to injure appellants.

The appeal is, therefore, dismissed with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

CRIMINAL REVISION NO. 285 OF 1911.

April 9, 1911.

Present:—Mr. Justice Rattigan.

GIRDHARI LAL—CONVICT—PETITIONER

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 35, 190, 196, 197, 200, 233, 239, 527 (a) —Distinct offences —Concurrent sentences—Separate trial—Complaint against public official duly signed by Public Prosecutor—Erroneous impression of Magistrate, effect of—Cognizance —Failure to examine complainant, effect of—Irregularity —Sanction under section 197—Sanction to prosecute under section 161, or any other section of Penal Code—Valid—Charge framed under s. 165, Indian Penal Code —Subsequent addition of charge under s. 161—Prejudice —Misjoinder of charges or offences—Illegal gratification —Receipt of lump sum collected from different persons —Penal Code (Act XLV of 1860), ss. 161, 165—Punishment—Revision—Finding of fact.

A direction that punishments inflicted in respect of distinct offences shall run concurrently can be made only when the accused is convicted *at one trial* of two or more distinct offences.

Where a complaint under section 161, Indian Penal Code, against a Government official is duly signed by the Public Prosecutor and proceedings thereon are taken, the mere fact that the Magistrate subsequently, by oversihght, thought that he was taking cognizance of the offence on a police report would not render him incompetent to take cognizance of the offence.

A failure to comply with the provisions of section 200, Criminal Procedure Code, does not necessarily and in every case invalidate all subsequent proceedings.

Where a complaint, preferred against a Government servant by a responsible public official, was reduced to writing and signed by him and was accompanied with the formal sanction by the Local Government authorising the prosecution, and the accused was actually convicted of the offence charged:

Held, that the Magistrate's failure to observe the strict requirements of section 200, Criminal Procedure Code, had in no way prejudiced the accused or caused a failure or miscarriage of justice, and that the irregularity was sufficiently covered by the provision of section 527 (*a*) of the Code.

Empress v. *Murphy*, 9 A. 66; *Empress* v. *Monu*, 11 M. 443; *Gurmukh Singh* v. *Musammat Mirza Nur*, 63 P. R. 1901, followed.

The Local Government granted sanction for the prosecution of one of its servants of an offence under section 161, Indian Penal Code, "or any other section of the Code that may be found to be applicable to the offence in respect of the offence briefly described in the schedule annexed." In the schedule the alleged facts of the offence were briefly set forth:

Held, that the sanction was not vague or indefinite. The Local Government had not delegated its function under section 197, Criminal Procedure Code, to any other person or body. It sanctioned the prosecution of one of its servants upon a given set of facts; and while the Government was itself of opinion that the said facts constituted an offence under section 161, Indian Penal Code, it left it to the Court (which alone could decide the matter) to determine whether upon these facts the offence fell under section 161 or any other section of the Penal Code.

Empress v. *Samaviar*, 16 M. 468; *Barindra Kumar Ghose* v. *Emperor*, 37 C. 467; 14 C. W. N. 1114; 7 Ind. Cas. 359; 11 Cr. L. J. 453; *Empress* v. *Bal Gangadhar*, 22 B. 112, distinguished.

The considerations which arise in a case to which section 197 is applicable are essentially different from those considerations of policy which underlie the grant of sanction under section 196, Criminal Procedure Code.

In the trial of a charge of bribery, the Magistrate at first framed a charge under section 165, Indian Penal Code, but at a subsequent and much later stage added a charge under section 161. On the addition of the charge, the accused was given an opportunity of re-calling the witnesses and he actually did re-call some of them:

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Held, that the accused was in no way prejudiced by the addition of the charge and that the proceedings of the Magistrate were in no sense void or without jurisdiction.

Certain sums of money were collected from landholders of various villages and were paid in a lump sum by the persons who had collected them to the accused, a *zilladar* in the Irrigation Department, with the object of inducing him to show favour in his official capacity to their village as a whole. The accused was charged at the trial with having received a lump sum:

Held, that the charge as framed was legal and correct. It was not necessary to charge the accused with an offence under section 161, Indian Penal Code, in respect of every item contributed by the various landholders, and consequently there was no misjoindor of offences or charges.

Girwardhari Lal v. *King-Emperor*, 13 C. W. N. 1062; 4 Ind. Cas. 13; 10 Cr. L. J. 463, followed.

Emperor v. *Nand Lal*, A. W. N. (1904) 223, distinguished.

The orders of Criminal Courts should not be interfered with in revision upon facts save in rare cases and for very exceptional reasons.

Petition for revision under section 439 of the Criminal Procedure Code of the order of the Sessions Judge, Shahpur Division, dated 23rd February 1911, modifying that of the Magistrate, 1st Class, Lallypur, dated the 4th October 1910, convicting the petitioner.

Mr. *Grey*, for the Petitioner.

Mr. *Broadway*, for the Respondent.

JUDGMENT.—The facts of this case and of the connected cases (Criminal Revision Nos. 286 and 287 of 1911), are set forth so fully and clearly in the judgment of the learned Sessions Judge that it is unnecessary for me to recapitulate them. The petitioner, a *zilladar* in the Irrigation Department, was convicted by a Magistrate of the 1st class of four distinct offences under section 161, Indian Penal Code, and in respect of each offence, all being tried separately, was sentenced to two years' rigorous imprisonment and a fine of of Rs. 1,000. The Magistrate directed, however, that the sentences of rigorous imprisonment imposed in each case should run concurrently, but in so directing obviously overlooked the provisions of section 35 of the Criminal Procedure Code. It is clear from those provisions that a direction that punishments inflicted in respect of distinct offences shall run concurrently can be made only when the accused is convicted *at one trial* of two or more distinct offences. The learned Sessions Judge, whose judgment is otherwise a model of careful reasoning and well-considered conclusions, has in his turn overlooked the error on the part of the Magistrate, probably because it was not brought to his notice in the course of argument.

From the orders passed against him in the four cases in which he was convicted, the petitioner preferred appeals to the Sessions Judge and upon these appeals the convictions were impugned both upon certain legal grounds which are detailed in the judgment of that learned Judge. The result of these appeals was that the Sessions Judge upheld the convictions in three of the cases, but acquitted the petitioner in one case on the ground that it was not sufficiently proved in that case that the money paid to Chhajju Ram, the Petitioner's *Munshi*, was so paid with the knowledge of the petitioner; upon the legal objections that were urged before him, the learned Sessions Judge was of opinion that the contentions of petitioner's Counsel were untenable, and must be overruled. The petitioner has now applied to this Court for revision of the judgment and order of the Sessions Judge, and the same legal objections that were overruled by Sessions Judge have now been once more argued before me. After hearing Mr. Grey at some length in support of these objections, I see no reason to differ from the conclusions of the Sessions Judge, and as the latter has dealt with each of these objections exhautively, I find I have but little to add with regard to them.

The *first* objection is that when the Magistrate (after adjourning the former proceedings before him *sine die* when he found that the sanction of the Local Government under section 197, Criminal Procedure Code, had not been obtained), rasumed cognizance of the offences on the 13th May 1910, after the sanction of the Local Government had been obtained he had neither a valid Police report nor a complaint before him, and was therefore, incompetent, under the provisions of section 190 of the Criminal Procedure Code, to take cognizance of the said offences. The learned Sessions Judge holds that the Pelice roport which was before the Magistrate at the earlier stage of the proceedings was not a report on which action could be taken by the Magistrate under section 190, subsection (1), clause (*b*), of the Code, inasmuch as at that time the Magistrate had no power to take cognizance of the offences owing to the absence of sanction by the Local

Government. Upon this point I do not feel called upon to express any opinion, as I find that on the 13th May 1910, there was a written complaint preferred by the Public Prosecutor, filed before the Magistrate, and that it was upon this complaint that the Magistrate directed process to issue to the petitioner and his then co-accused. The complaints filed by the Public Prosecutor are upon the record and upon each of them there is an endorsement by the Magistrate directing proceedings to be taken. In view of this fact I do not attach any importance to the statement, obviously made in error, in the order of the Magistrate, dated the 1st July 1910, to the effect that he was justified in taking cognizance of the offences because he had the former Police report before him. In this order he makes no mention of the complaint and it may well be that he had at that time forgotten the existence of the complaint which had been filed on the 13th May. But this lapse of memory on the part of the Magistrate cannot alter the true state of the facts. The Magistrate actually took cognizance of the offences upon *complaint*. This is clear from the record, and the mere fact that by some oversight, he subsequently forgot that formal complaints were upon the record and that it was upon these complaints that he had taken action, is, in my opinion, of no material importance. The learned Sessions Judge is in error in saying that these complaints were signed by Ahmad Jan, the Police Inspector, but as they were duly signed by the Public Prosecutor, this error is of no moment. I hold, therefore, that the Magistrate was competent to take cognizance of the offences, so far as section 190 of the Criminal Procedure Code is concerned.

The next objection is that the Magistrate did not examine the complainant upon oath, and that this failure to comply with the provisions of section 200 of the said Code is fatal and render null and void all his subsequent proceedings. There is some force in this objection and I have no hesitation in saying that every Magistrate who takes cognizance of an offence upon complaint should, as a matter of ordinary practice, forthwith examine the complainant on oath and reduce the substance of his examination to writing and make the complainant sign the same. This is a very salutory provision of law and Magistrates should be careful strictly to observe it in every case. But I cannot agree that a failure to comply with the provisions of section 200 must necessarily and in every case invalidate all subsequent proceedings. The object of the provision is to prevent the issue of process in cases when the examination of the complainant would show that the complaint was clearly false, frivolous or vexatious and that further proceedings would tend merely to harass unnecessarily an accused person and waste the time of the Court.

In the present case the complaint was preferred by a responsible Public official, was reduced to writing and signed by the said official and was accompanied with a formal sanction by the Local Government for the prosecution of one of its servants In these circumstances, and in view of the fact that the accused person has been actually convicted of the offences charged against him, I am of opinion that the Magistrate's failure to observe the strict requirements of section 200 of the Code, has not in any way prejudiced the accused or caused a failure or miscarriage of justice, and that the irregularity is sufficiently covered by the provisions of section 527 (*a*) of the Code. The decision of the Allahabad High Court [*Empress* v. *Murphy* (1)] and of the Madras High Court [*Empress* v. *Monu* (2)], and of this Court [*Gurmukh Singh* v. *Musammat Mirza Nur* (3)], are in point and support my view and I do not think that an error of this kind can reasonably be regarded from the point of view of prejudice to an accused person, as of the same nature or moment as a misjoinder of charge.

Mr. Grey's third objection relates to the form in which the sanction by the Local Government to the prosecution of the petitioner was conveyed. This sanction (so far as it affected the petitioner) was in each case (*mutatis mutandis*) to the following effect :—

"With reference to the provisions of section 197 of the Code of Criminal Procedure, 1898, the Lieutenant-Governor of the Punjab hereby sanctions the prosecution of Pandit Girdhari Lall son of Pandit Lakhmi Chand, late *zilladar* of Section Akulwala, Jhang Division, Chenab Canal, under section 161 of the Indian Penal Code or any other sec-

(1) 9 A. 666.
(2) 11 M. 443.
(3) 63 P. R. 1901.

tion of the Code that may be found to be applicable in respect of the offence briefly described in the Schedule, hereto annexed, numbered 1 and 2.

(Sd.) E. Maclagan,
Chief Secretary.

"Schedule No. 1 Relating to *Chak* No. 382 J. B.

"On or about the 22nd January 1904, accused Girdhari Lal, who then held the post of *zilladar* in the Jhang Branch in the Lyallpur District, unlawfully obtained from *zemindars* and others of *Chak* No. 382 J. B. the sum of Rs. 250 or thereabouts. This sum was taken as a gratification other than a legal remuneration in respect of his official functions and Girdhari Lal, accused, in taking it committed an offence nnder section 161, Indian Penal Code."

Mr. Grey contends that this sanction is vague and indefinite, and that the Local Government, by granting sanction to the prosecution of the petitioner of an offence under section 161, Indian Penal Code "or any other section of the Code that may be found to be applicable in respect of the offence briefly described in the Schedule," practically delegated its functions under section 197, Criminal Procedure Code, to some other person or body, which it had no power to do. The learned Sessions Judge has dealt fully with this contention and I need say no more than that I entirely agree with his conclusions and the grounds upon which they are based. I can myself find nothing vague or indefinite in the sanction. The Local Government, in the Schedule sets forth briefly the alleged facts of the offence, and grants sanction for the prosecution of the petitioner in respect thereby. The sanction and its appendix, the Schedule, state that the offence committed by the petitioner is that punishable under section 161, Indian Penal Code, but the sanction goes on to provide that if any other section of the Indian Penal Code is found applicable in respect of the said facts, the petitioner may be prosecuted in respect thereof. I agree with the Sessions Judge that this merely means that the Local Government sanctions the prosecution of the petitioner upon a given set of facts and that the Local Government while itself of opinion that the said facts constitute an offence under section 161, Indian Penal Code, leaves it to the Court (which alone can decide the matter) to determine whether upon these facts the offence falls under section 161 or any other section of the Indian Peual Code

I can see nothing wrong in the procedure nor can I agree that the petitioner was anywise prejudiced thereby especially as he has been actually convicted of an offence under section 161, Indian Penal Code. The two cases relied upon by Mr. Grey are obviously distinguishable. In *Empress* v. *Samaviar* (4) the Board of Revenue (to whom the power of granting sanction under section 197, Criminal Procedure Code, had been duly delegated) authorised the Collector to prosecute a Government servant in respect of such offence as *he* thought fit. It was held that, if I may say so very rightly, that the authority empowered to grant sanction for prosecution under section 197, Criminal Procedure Code, could not delegate its powers to a third person. The learned Judges in the course of their jugdment observed "The sanction required under section 197 of the Criminal Procedure Code, must be granted with reference to some specific offence with which the accused is charged in his capacity as a public servant and the intention of the Legislature clearly was that the authority empowered to grant the sanction should take the responsibility of deciding that there were reasonable grounds for prosecuting such public servant for such offence. In the Resolution of the 24th August 1892, *the Board does not sanction the prosecution of the accused for any offence designated by itself*, but merely delegates to the Collector the power of selecting out of several such charges as *he* thinks likely to stand investigation . . . The Board has no legal power so to delegate its discretion. . . . A duty is thrown upon the authority empowered to grant sanction of designating the offence for which leave to prosecute is given and this duty cannot be delegated."

In the present case the Local Government actually designated the offence for which sanction to prosecute was given and I cannot read into the words of the sanction granted by it, a liberty to any person to prosecute the petitioner for any offences which such person may think likely to stand investigation. All that the Local Government has done is to make it clear that it sanctions the prosecution of the petitioner in present of certain specific acts committed

(4) 16 M. 468.

by him that it considers; that these acts are punishable under section 161, Indian Penal Code, but that it leaves it open to the Court to convict him upon these facts of any other offence if, in the opinion of the Court, some other section of the Indian Penal Code is more relevant thereto than section 161. In my opinion there is no similarity between this case and the one with which the Madras High Court had to deal.

The other authority upon which Mr. Grey relies, *Barindra Kumar Ghose* v. *Emperor* (5), is even less in point. The High Court of Calcutta had to deal with a case under section 196 of the Criminal Procedure Code, which provides that "no Court shall take cognizance of any offence punishable under Chapter VI of the Indian Penal Code (except section 127) or punishable under section 108A or section 153A.; or section 294A, or 505 of the same Code, unless upon complaint made by order of, or under authority from the Governor-General in Council, the Local Government or some other officer empowered by Governor-General in Council in this behalf." The offences referred to in this section are of a very exceptional nature and are all of them offences against the State either in its internal or (section 108A) its external relations, and it will be observed that the phraseology of the section is very different from that of section 197. Moreover while it is competent to a Local Government to empower an officer to grant sanction for the purposes of section 197, it is only the Governor-General in Council who has authority to empower an officer to order or authorise complaint under section 196. There is thus in every material respect a substantial distinction between the two sections and a decision upon the meaning and scope of the former section cannot necessarily be accepted as an authority upon the meaning and scope of the latter. In the case cited, the Chief Justice lays considerable stress upon the fact that section 196 relates to offences of a peculiar character. He observes,—"The Local Government cannot delegate to any other body or person the controlling power and discretion of determining whether cognizance should be taken by the Court of an offence mentioned in section 196, Criminal Procedure Code, and its judgment must be specifically directed to the particular section and no other under which the prosecution is to be carried on and the order or authority should be preceded by a deliberate determination in this respect. An order authorizing a complaint under a certain specified section or under any other section found applicable, if it means found by any one other than Government, involves a delegation which cannot be sustained. Seeing that this Chapter (*i.e.* Chapter VI, Indian Penal Code) deals with offences against the State, the policy of this safeguard is manifest; the maintenance of this control is of the highest importance and it is beyond the competence of the Local Government to delegate to any other body or person this controlling power and the discretion it implies. The question whether action should be taken under Chapter VI is more than a matter of law; considerations of policy arise, and these can only be determined by the authorities specially designated in the section." I am far from suggesting that the grant of sanction under section 197 is a mere formality or a matter of but trifling importance; far from it. But it is obvious that the considerations which arise in a case to which section 197 is applicable are essentially different from these considerations of policy, to which the Chief Justice refers and for this reason I cannot regard the case cited as an authority in point. As I am not here concerned with the interpretation of section 196 of the Criminal Procedure Code, it is not for me to say whether the decision of the High Court of Calcutta is right or wrong, but it is somewhat difficult to reconcile it with the ruling of the Bombay High Court in *Empress* v. *Bal Gangadhar* (6). In the latter case, the Government of Bombay ordered a complaint against Tilak "under section 124A of the Indian Penal Code and any other section of the said Code which may be found to be applicable to the said case" and the order was upheld by the Court as legal and valid.

For the reasons given I hold that the sanction granted for the prosecution of the petitioner was good and sufficient for the purposes of section 197, Criminal Procedure Code. It expressly authorised a prosecution under section 161, Indian Penal Code, and the petitioner was charged and convicted under that section.

(5) 37 C. 467; 14 C. W. N. 1114; 7 Ind. Cas. 359; 11 Cr. L. J. 453.

(6) 22 B. 112.

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Mr. Grey laid some stress upon the fact that the Magistrate, on resuming the trial after sanction had been obtained, at first framed a charge under section 165, Indian Penal Code, and that it was only at a subsequent and much later stage that the charge under section 161, Indian Penal Code, was added. The learned Counsel argued that all proceedings prior to the addition of the latter charge were void, inasmuch as the Magistrate had taken cognizance of an offence (under section 165, Indian Penal Code) in respect of which the Local Government had not granted sanction for the petitioner's prosecution. But this argument implies that it was not open to the Local Government to leave it to the Court to decided whether the facts alleged against petitioner constituted an offence under section 161 or section 165 or any other section provided, of course, that cognizance of any such other offence did not need some peculiar preliminary formality (*i. e.*, complaint under section 196, Criminal Procedure Code) other than the sanction under section 197. With this argument I am unable to agree, and I hold that the Magistrate's proceedings were in no sense void or without jurisdiction. I observe that when the charge under section 161 was added, the accused was given an opportunity of re-calling the witnesses and that he actually did re-call Mir Abdul Wahid, Deputy Collector, and cross-examine him at very great length. The accused was then in no way prejudiced by the addition of the charge.

The next contention on behalf of the petitioner is of a two-fold character. It is urged that the offence of which the petitioner has been found guilty is that punishable under section 161, Indian Penal Code, and that the theory for the prosecution is that the petitioner accepted gratification other than legal remuneration as a motive or reward for doing or forbearing to do any official act from each one of the various persons who contributed towards the fund which Chajju Mal had started on petitioner's behalf. This being so, the petitioner should (according to the argument) have been charged with an offence under section 161 in respect of every item of money contributed by these various persons and that the actual charge against him of having received a certain lump sum of money from the *abad-kars* of *chak* so and so, is open to objection on two grounds (1) that it ignores the fact that the petitioner's alleged offence was the doing of something in his official capacity for the benefit of each individual *zemindar* who subscribed to the fund, and that he was not alleged to have done or promised to do that thing for the whole *chak*; and (2) that the Court has thereby joined a number of perfectly distinct offences into on general charge, as regards the subscribers of each *chak*. In this connection reliance is placed on the case of *Emperor* v. *Nand Lal* (7), the head-note to which runs as follows: "Where a bribe was collected from certain inhabitants of a village by subscription and handed over to the recipient in a lump sum it was *held* that the recipient could not be charged under section 161 of the Indian Penal Code merely with the receipt of the whole sum collected, but that he must be charged in respect of not more than three separate items constituting the total collection." The learned acting Chief Justice (Knox) in the course of his judgment remarked: "The learned Sessions Judge disposed of this difficulty in a summary fashion. He considered that in demanding a collective sum of Rs. 100 from the villagers of Chandiva and out of that sum Rs. 31 being collected and paid in a lump sum and the remaining eight rupees shortly afterwards, it was all practically one transaction. In revision, the same plea is taken and, in my opinion effect must be given to it. I was at first disposed to hold with the learned Judge that as the money had been collected and then handed over to one Pyare Lal who took and put it into the hands of Nand Lal, the taking of this might be held to be a distinct offence but on looking more carefully into the case I find there were two persons on their trial, one the present applicant Nand Lal and the second one Mela Ram, a police constable, that these two men were present when certain *kisans* were told that they must get together Rs. 100 to escape being *challaned*. The words used in the charge sheet would give the accused and those who appear on his behalf to understand that they had to meet the distinct offence of obtaining from Kundan Rs. 5, from Bhola Rs. 5, from Razia Rs. 5, from Lallu Rs. 5, from Mohan Rs. 5, from Kishan Re. 1 and so forth, to have joined those separate offences in one charge and to have proceeded to try them in one and the same trial was to conduct a trial

(7) A. W. N. (1904) 223.

prohibited by law." With these remarks as they stand, I am in entire agreement. To unite in one charge the various and entirely distinct offences to which the acting Chief Justice alludes would unquestionably be objectionable and render the trial illegal. Mr. Grey has filed before me a certified copy of a charge drawn up by the Magistrate in the case which came before the learned acting Chief Justice but I cannot believe that this was the charge to which that learned Judge refers. It was as follows:—"I. A. W. McNair, Joint Magistrate, hereby charge you Nand Lal and Mela Ram as follows:—'That you on or about the 20th or 21st day of December 1903 did being Government servants obtain from certain *kisans* of Chandiva, illegal gratification in the shape of Rs. 39 in order to show favour in the exercise of your official functions and thereby committed an offence punishable under section 161 of the Indian Penal Code.' "

I see no reason to doubt the authenticity of this certified copy but I cannot believe that the acting Chief Justice was referring to the charge above set forth when he says that the words *used* in the charge sheet would give the accused and those who appear on his behalf to understand that they had to meet the distinct offence of obtaining from Kundan Rs. 5, from Bhola Rs. 5, from Razai Rs. 5, from Lallu Rs. 5, from Mohan Rs. 5, from Kishen Re. 1 and so forth. "Probably the charge was altered at a subsequent stage of the proceedings but if it was not and if the acting Chief Judge's remarks actually refer to the charge as set forth in the certified copy before me I must, with the greatest respect, differ from the learned Judge's interpretation of it, as I cannot understand how the accused or his advisers could reasonably infer from a general charge of this kind that the former was accused of obtaining specific sums of different value from various specified individuals. It is, I think, more reasonable to assume, as the judgment suggests, that the actual charge upon which the accused was convicted was not the charge set forth in the certified copy and if this was the case it is obvious that the decision of the acting Chief Justice is not in point in the case before me. In this case, as the Sessions Judge points out sums of money were collected by *lambardars* and others from the land-holders of the various *chaks* and were paid in each case by them in a lump sum with the object of inducing the petitioner to show favour in his official capacity to those *chaks* as a whole and I agree with the Sessions Judge that, in the circumstances, the charges, as framed by the Magistrate, were legal and correct. In this connection I would refer to the case of *Girwardhari Lal* v. *King-Emperor* (8) which appears to me to be in point and to support my conclusions; upon this view, it is clear that there was no misjoinder of offences or charges and that the motive of the petitioner was to obtain sums of money from each *chak* by promising to show favour to the inhabitants of those *chaks* generally.

I hold, therefore, that there is no force in any of the legal objections which have been urged before me on behalf of the petitioner. Mr. Grey was anxious to discuss the merits of the three cases in which the petitioner has been convicted, and to argue that it has not been proved that the petitioner had any guilty knowledge of what was being done on his behalf by Chajju Ram. But I saw no reason in this case to depart from the well-established rule of practice observed by this Court that the orders of Criminal Courts are not to be interfered with upon the facts save in rare cases and for very exceptional reasons, I may, however, add that after hearing what Mr. Grey had to say I see no reason whatever to doubt that the petitioner, if he did not actually authorise the actions of his *munshi* Chajju Ram, was throughout fully aware of what was being done by the latter and approved of the same.

The only question that remains is that of sentence. As I have pointed out in an earlier part of this judgment, the Magistrate was in error in directing that the sentences passed by him in the different trials should run concurrently. On the other hand it is clear, that the Magistrate and the Sessions Judge were both of opinion that two years' rigorous imprisonment in all would be a sufficient punishment to the petitioner. In this view I agree. He is a young man, and cannot lose sight of the fact that it was owing to family misfortunes for which he was apparently in no way responsible that he was tempted into the commission of these offences, has permanently lost his employment in Government service and the disgrace of conviction is in itself a grave punish-

(8) 13 C. W. N. 1062; 4 Ind. Cas. 13; 10 Cr. L. J. 463.

ment to a man of his position. Taking all these facts into consideration I reduce the term of rigorous imprisonment in each of the three cases to six months the result being that the petitioner will undergo a total term of eighteen months' rigorous imprisonment as the sentences will be consecutive. The fines imposed will stand.

(s. c. 13 C. L. J. 415.)

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1031 OF 1907.

June 6, 1910.

Present:—Mr. Justice Mookerjee and Mr. Justice Carnduff.

NITYANANDA PAL—DEFENDANT—APPELLANT

versus

NANDA KUMAR CHOWDHURI—PLAINTIFF—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), *s.* 50—*Presumption of fixity of rent—Suit not under Bengal Tenancy Act—Presumption from circumstances.*

In cases to which section 50 of the Bengal Tenancy Act has no application, a Court may draw any appropriate inference from the facts proved by the evidence on the record.

Dinendra Narain v. *Tituram*, 30 C. 801; *Grant* v. *Robinson*, 11 C. W. N. 242; *Nundo Lal* v. *Aturmoni*, 12 C. W. N. 432 and *Golab Misser* v. *Kalanand Singh*, 6 Ind. Cas. 217; 14 C. W. N. 884; 12 C. L. J. 177, referred to.

Appeal from the decree of the Sub-Judge of Hooghly, dated the 8th April 1907, reversing that of the Munsif of Serampore, dated the 26th, May 1906.

Babu *Jadunath Kanjilal*, for the Appellant.

Babu *Nalini Ranjan Chatterjee*, for the Respondent.

JUDGMENT.—This is an appeal on behalf of the second defendant in a suit commenced by the plaintiffs-respondents for possession of a holding transferred to him by the first defendant. The substantial question in controversy between the parties throughout has been, whether the tenancy was transferable and whether any valid right has been acquired by the appellant under his purchase. The allegation of the plaintiffs was not that the land was held by the husband of the first defendant as a service-tenure and was transferable after his death by his widow. The answer of the defendant was that it as not a service-tenure at all, that it was *raiyati*-holding held by the first defendant and her predecessor at a uniform rate of rent from the time of the Permanent Settlement, and that it was consequently capable of transfer under the provisions of the Bengal Tenancy Act.

The Court of first instance negatived the contention of the appellant as to the nature of the tenancy. The Court further held that the holding was created before the Permanent Settlement and was held by the defendant and her predecessor at a uniform rate of rent. In support of this conclusion, the Court relied upon the presumption mentioned in section 50 of the Bengal Tenancy Act. The Court also relied in the alternative upon the circumstances of the case and concluded that as the tenancy had been created at least in the time of the great-grandfather of the husband of the first defendant and had been held since then at a uniform rate of rent, the inference was legitimate that it was a *raiyati*-holding held at a fixed rate of rent and consequently alienable. In this view, the Court of first instance dismissed the suit. Upon appeal, the Subordinate Judge has held that the presumption mentioned in section 50 of the Bengal Tenancy Act has no application inasmuch as the suit cannot be regarded as a suit or proceeding under the Bengal Tenancy Act. In support of this view he has placed reliance upon the cases of *Rasamoy* v. *Srinath* (1); *Sarat Chandra* v. *Shama Churn* (2). In this view, the Subordinate Judge has held that the holding has not been proved by the defendant to be transferable holding. He has consequently reversed the decree of the original Court and decreed the suit.

The second defendant has now appealed to this Court, and on his behalf it has not been contended that the view taken by the Subordinate Judge as to the scope and effect of section 50 of the Bengal Tenancy Act is erroneous, but it has been argued that his judgment is defective inasmuch as he has omitted to consider whether the Court of first instance was justified in inferring from the circumstances of the case that, apart from the provision of section 50 of the Bengal Tenancy Act, the holding had been proved to be transferable. In answer to this argument, it has been

(1) 7 C. W. N. 132.

(2) 10 C. W. N. 930.

contended on behalf of the plaintiffs-respondents, that inasmuch as the provisions of section 50 are admittedly inapplicable, it is not open to the Court to draw any inference from the circumstances of the case, because the effect of such a procedure would be to make the provisions of section 50 applicable to a class of cases to which it is conceded they have no direct application. In our opinion, this view cannot be supported either upon principle or upon the authorities. The object of the Legislature in providing for the presumption as to fixity of rent mentioned in section 50 of the Bengal Tenancy Act was to provide in suits or proceedings under the Act, that is, in suits or proceedings between landlords and tenants as such, an easy method of determination of the rights of the parties. It does not follow, however, by any means that in cases to which the section has no application, it is not open to the Court to draw any appropriate inference from the facts proved by the evidence on the record. In support of this view, reference may be made to the cases of *Dinendra Narain Roy* v. *Tituram Mukerjee* (3); *Grant* v. *Robinson* (4); *Nundolal Gossami* v. *Aturomoni Dassi* (5); and *Gulab Misser* v. *Kalanad Singh* (6).

The result, therefore, is that this appeal must be allowed and the decree of the Subordinate Judge set aside. The case will be remitted to him in order that the appeal may be re-heard and the question of the validity of the inference drawn by the Court of first instance from the facts, apart from the provisions of section 50 of the Bengal Tenancy Act, considered. The learned Vakil for the respondent has suggested that the entire appeal ought to be re-heard and the question of the true nature of the tenancy, that is, whether it was a service-tenure or not, may be left open for discussion. In our opinion, this suggestion is reasonable. We, therefore, direct that the Subordinate Judge do re-hear the appeal and decide all the questions which arise therein. Costs of this appeal will abide the result.

Case remanded.

(3) 30 C. 801.
(4) 11 C. W. N. 242; 5 C. L. J. 178.
(5) 12 C. W. N. 432; 35 C. 673.
(7) 12 C. L. J. 107; 14 C. W. N. 884, 6 Ind. Cas. 217.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 105 OF 1909.

March 13, 1911.

Present:—Mr. Justice N. Chatterjea.

MUKTA SUNDARI DASI AND OTHERS—DEFENDANTS—APPELLATS

versus

BADAL CHANDRA BHOWMIK AND OTHERS—PLAINTIFFS—RESPONDENTS.

Bengal Tenancy Act (VIII of 1885), *ss.* 50, *cl.* (2), 85, 86, *cl.* (b)—*Presumption of permanency—Suit not under Bengal Tenancy Act—Estoppel—Defendant producing false* pattah, *whether entitled to benefit of presumption—Re-entry by landlord—Tenant surrendering—Ejectment of under-*raiyat.

Although the provisions of section 50, clause (2), of the Bengal Tenancy Act apply only to suits or proceedings under the Act, it does not follow that a Court is precluded from drawing an inference from the fact of long payment of rent, at an uniform rate, that the *jote* has been held at a fixed rent since the Permanent Settlement.

Although the defendant set up a false *pattah*, dated some time before the Permanent Settlement, yet he is not precluded from asking the Court to draw an inference as to the fixity of rent if he has proved other facts which would give rise to such an inference.

Caspersz v. *Kedar Nath Sarbadhihari*, 5 C. W. N. 858 at p. 861, followed

Where a *raiyat* surrenders his holding the landlord can re-enter by ejecting the under-*raiyat* without a notice to quit, if not protected by section 85 or section 86, clause (*b*), of the Bengal Tenancy Act.

Nilkanta Chaki v. *Ghatto Sheikh*, 4 C. W. N. 667; and *Badan Chandra Das* v. *Rejeswari Debya*, 2 C. L. J. 570, followed.

Appeal from the decree of the Sub-Judge of Pabna and Bogra, dated September 22, 1908 affirming that of the Munsif of Pabna, dated September 30th, 1907.

Babus *Kishori Lal Sarkar* and *Haris Chandra Roy*, for the Appellants.

Babu *Harendra Narain Mitra*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for ejectment. The palintiff-respondent, who was the *patni* and *darpatni*, *Talukdar* of Taraf Setrani, alleged that there was a non-transferable occupancy-holding in Satrina standing in the name of one Krista Kishore Ghosh consisting of the lands of schedule *ka* measuring 8 *bighas* and odd by recent measurement which was held by his grandson Dina Nath Ghosh, and that the lands of schedule *khas* measuring 11 *bighas* and odd by recent measurement were the *khas* Khamar lands of the plaintiff of which he was in possession through his *burgadars* defendants Nos. 13 and 16, that in a rent-suit brought against Dina Nath the

latter stated that the *jote* comprised the lands of both the schedules *ka* and *kha*, and was a *kaimi maurosi* one and had been sold by him to defendants Nos. 1, 2 and 6, and that the purchasers were in possession thereof. The plaintiff further alleged that as Dina Nath had ceased to pay rent and parted with his interest in the holding which was not a transferable, the purchasers acquired no right by their purchase, and as the defendants Nos. 13 to 16 had given up the land of schedule *kha*, he was entitled to re-enter on the lands of both schedules *ka* and *kha*, but that he was obstructed in his taking possession thereof by defendants Nos. 1, 2 and 6 on the ground of their purchase and by defendants Nos. 3 to 5 and 7 to 12 on the ground that they were *dar-jotedars* under Dina Nath Ghosh. Plaintiff accordingly prayed for *khas* possession of the lands on declaration that the *jote* was a non-transferable occupancy-holding and that the defendants Nos. 1, 2 and 6 had acquired no title by their alleged purchase, and that the *Korfa* Settlements set up by defendants Nos. 3 to 5 and 7 to 12 were invalid as they were made without his consent.

The defence of the purchasers, defendants Nos. 1 and 2, *inter alia* was that the lands of both the schedules *ka* and *kha* were included in the *jote*, that the suit was bad for misjoinder and that the *jote* was a transferable, *kaimi jote*. The defendants Nos. 3 to 5 and 7 to 12, in addition to the above pleas, pleaded that they were *kaimi dar-jotedars* and that the suit was not maintainable without a notice to quit. The Court of first instance decreed the suit and that decree has been confirmed on appeal.

Defendadts Nos. 1 to 5 and 10 have appealed to this Court.

The first contention raised on behalf of the appellants relates to the question whether the *jote* is a tenure or a holding. It is urged that the onus is on the plaintiff to prove that the *jote* is a holding and not a tenure. But the area being less than one hundred *bighas* there is no presumption that it is a tenure. It is true the *jote* has been sub-let for some time, but since when does not appear and having regard to the fact that the purpose for which the *jote* was originally acquired is not known and the other circumstances mentioned by the learned Subordinate Judge. I am unable to hold that he was wrong in coming to the conclusion that it is a holding. The second point urged is, that, upon the facts found in the case, *viz.*, that the *jote* was held at a fixed rent for at least 55 years the Courts below ought to have held that a presumption arises apart from the provisions of section 50 clause (2) of the Bengal Tenancy Act, that the *jote* was held at a fixed rent. The Courts below have held, relying upon the authority of the case of *Sarat Chandra Ghose* v. *Shyam Chand Singha* (1), that the presumption referred to in section 50, clause (2), of the Bengal Tenancy Act does not arise in the present suit which is not a suit under the Bengal Tenancy Act. I think the appellants' contention ought to prevail. It is true the provisions of section 50, clause (2), of the Bengal Tenancy Act apply only to suits or proceedings under the Bengal Tenancy Act between the landlords and tenants as such as held in the case cited above, and in the case of *Rasamoy* v. *Sri Nath* (2), but it does not follow that it is not open to the Court to draw an inference as to the *jote* having been held at a fixed rent from the Permanent Settlement from the fact of long payment of rent at an uniform rate. There is nothing to prevent the Court from drawing an inference of fact from the facts proved in the case that the original contract was to hold at a fixed rent. The question was raised in serveral cases, and I need refer only to the latest case on the point the judgment in *Nityananda Pal* v. *Nanda Kumar Chowdhuri* (3), where the learned Judge, Mookerjee and Carnduff, JJ., observed as follows:—"The object of the Legislature in providing for the presumption as to fixity of rent mentioned in section 50 of the Bengal Tenancy Act was to provide in suits or proceedings under the Act, that is, in suits or proceedings between landlords and tenants as such an easy method of determination of the rights of the parties. It does not follow, however, by any means that in cases to which the section has no application it is not open to the Court to draw any appropriate inference from the facts proved by the evidence on the record. In support of this view reference may be made to the cases of *Dinendra Narain Roy* v. *Tituran Mukerjee* (4); *Grant* v. *Robin-*

(1) 10 C. W. N. 930.
(2) 7 C. W. N 132.
(3) 13 C. L. J. 415; 10 Ind. Cas. 163.
(4) 30 C. 801.

son (5); *Nunda Lal Gossami* v. *Atarmoni Dassi* (6) and *Golab Misser* v. *Kalanand Singh* (7)."

It was, however, contended on behalf of the respondent that the defendant, having set up a *pattah* which has been found to be false, there is no room for any presumption; and *secondly* that the defendants having relied upon the presumption laid down in section 50 of the Bengal Tenancy Act in the Court below cannot now contend that such a presumption arises apart from the provisions of the Bengal Tenancy Act, and *thirdly* that the defendants did not set up in the written statement that uniform payment of rent raised the presumption.

It is true the defendants set up a *pattah*, dated sometime before the Permanent Settlement, but it has been found to be false. Under the circumstances, I do not think the defendants are precluded from asking the Court to draw an inference as to the fixity of rent if they have proved other facts which would give rise to such an inference. [See *Caspersz* v. *Kedar Nath Sarbadhihari* (8)].

In their written statement the defendants stated that Kristo Kishore Ghose held the *jote* at a fixed *jama* from long before the Permanent Settlement from the time of the former *zemindar* of Natore, and that from time immemorial for upwards of 20 years the late Kristo Kishore Ghose and his heirs paid rent at a fixed-rate. They did not rely upon section 50 (2) of the Bengal Tenancy Act in their written statement and at the hearing relied upon authorities to show that the presumption arises apart from the provisions of that section. It is not necessary that defendants should state in their written statement that uniform payment of rent raises the presumption. I accordingly hold that the lower Appellate Court below ought to have come to a finding as to whether any inference could be drawn from the facts proved in the case apart from the provisions of section 50 of the Bengal Tenancy Act, that the *jote* was held at a fixed-rate and was transferable.

The third contention raised on behalf of the appellant is with respect to the under-*ryots*. It is contended that even if the purchaser defendants did not acquire any right by the transfer the rights of the under-*raiyats* cannot be affected.

Under section 85 of the Bengal Tenancy Act a sub-lease granted by a *raiyat* without the landlord's consent is valid only for a limited period as against the landlord but is valid as against the *raiyat* himself [See *Gopal Mandal* v. *Eshan Chunder Benerjee* (9)].

It has been held that where the landlord purchases a holding at a sale in execution of a decree for arrears of rent, he is not bound to annul the under-*ryoti* as an incumbrance under section 167, Bengal Tenancy Act, in order to enable him to obtain *khas* possession. See *Peary Mohun Mookerjee* v. *Badul Chandra Bagdi* (10). In that case it was held that the provisions of section 22 of the Bengal Tenancy Act do not stand in the way of the landlord's recovering *khas* possessions, because that section merely saved the rights of third persons which were valid as against the landlord. The question, however, whether an under-*ryot* in such a case is entitled to a notice under section 49, Bengal Tenancy Act was not raised in that case, the defendant having set up a permanent right.

In the case of a purchase by the landlord of the rights of a *ryot* by a conveyance it has been held that the landlord cannot eject the under-*ryot* without putting an end to the tenancy according to law as the *ryot* himself, if his interest subsisted, could not eject the under-*ryot* without a notice under section 49 (*b*) of the Act, the landlord who steps into his shoes similarly cannot do so without putting an end to the tenancy. The landlord who acquires the rights of the occupancy-holder under a private sale cannot claim any higher right than the occupancy-holder himself had. See *Amirullah* v. *Nazir Mahomed* (11) heard by Geidt and Mookerjee, JJ., and the same case heard by Ghose and Pergiter, JJ., in *Amirullah* v. *Nazir Mohammad* (12); *Lal Mahomed Sarkar* v. *Jogir Sheikh* (13).

Where, however, a *ryot* surrenders his

(5) 11 C. W. N. 242; 5 C. L. J. 178.
(6) 12 C. W. N. 432; 35 C. 763.
(7) 6 Ind. Cas. 217; 14 C. W. N. 884; 12 C. L. J. 107.
(8) 5 C. W. N. 858 at p. 861.
(9) 29 C. 148.
(10) 28 C 205.
(11) 31C. 932.
(12) 34 C. 104; 3 C. L. J. 155.
(13) 13 C. W. N. 913; 2 Ind. Cas. 654.

holding it has been held that the landlord can re-enter by ejecting the under-*ryot* without a notice to quit if not protected by section 85 or section 86 clause (*b*) of the Bengal Tenancy Act, see *Nilkanta Chaki* v. *Ghatao Sheikh* (14) and *Badan Chandra Das* v. *Rajeswari Debya* (15). Section 22 of the Bengal Tenancy Act provides that when the immediate landlord of an occupancy-holding is a proprietor or permanent tenure-holder, and the entire interests of the landlord and the *ryot* in the holding become united in the same person by transfer, succession, or otherwise the occupancy-right shall cease to exist but nothing in this sub-section shall prejudicially affect the rights of any third person. The word "otherwise" in the above section was construed as meaning, in a similar way, to transfer on succession in the case in *Badan Chander Das* v. *Rajeswari Debya* (15) cited above.

It seems to me that the position of a landlord in a case of abandonment is stronger than in the case of a surrender by a *ryot*. In the case of an abandonment the landlord does not acquire any title through the *ryot* as in the case of a purchase. In the case of a surrender the *ryot* gives up the land to the landlord. In the case of a non-transferable occupancy-holding where the *ryot* sells the holding and quits possession of the lands, the lands become part of the *khas* lands of the landlord, and I think the holding does not continue to exist in such a case apart from the right of occupancy itself.

The provisions of section 87 of the Bengal Tenancy Act lend support to the above view. The provisions of that section show that the landlord can enter on the holding in the case of an abandonment even if there are sub-lessees, the only exception being made in favour of a sub-lease executed by a registered instrument the term of which is still unexpired, and in such a case the landlord has to offer the holding to the sub-lessee only for the unexpired term of the lease. Under section 22 (1) the holding continues to subsist divested of the right of occupancy and if the word "otherwise" covers a case of abandonment, and the holding itself, apart from the right of occupancy, subsists in the case of an abandonment. All sub-leases which are valid against the *rayot* himself would have been saved under section 87 of the Act instead of only a sub-lease of which the term had not expired and that only for the unexpired term. Section 87 of the Act (the provisions of which are not exhaustive) does not appear to be applicable to the case of an abandonment such as we have in the present case. The section, however, shows the position of an under-*ryot* in the case of an abandonment.

There does not appear to be any sub-lease by a registered instrument in the present case which can stand good against the landlord having regard to the provisions of section 85 of the Bengal Tenancy Act.

In this connection I ought to notice another argument on behalf of the appellant. It is contended that on a *ryot* abandoning the land the under-*ryot* gets a lift so to say and becomes a *ryot*. If the sub-lease is not binding on the landlord and the holding does not subsist after abandonment I do not see how the under-*ryot* becomes converted to a *ryot* in such a case.

I hold, therefore, that the under-*ryots* have no valid rights as against the plaintiff. They cannot resist the claim for *khas* possession of the plaintiff as the purchaser defendant did not acquire any right under their purchases.

The fourth contention raised on behalf of the appellant also relates to the *darjotedars*. It is urged that plaintiff received rents from the *darjotedars*, and even if the *darjotes* are not valid the landlord has recognized the *darjotes* by receiving rent from them. But the question does not appear to have been urged before the lower Appellate Court, and having regard to the findings arrived at by the Court of the first instance at page 21, of the paper-book, I do not think the contention is a valid one.

The fifth point raised is that, plaintiff having failed to prove that the lands of schedule *kha* were his *khas khamar* lands, cannot fall back upon the defendant's written statement and if he wishes to do so he must take the statement in the written statement as a whole. I do not think, however, that there is anything to prevent the Court from accepting a portion of the statement of the defendants and rejecting another portion. The defenants did not set up any rights to the lands of schedule *kha* other than those of a tenant.

(14) 4 C. W. N. 667.
(15) 2 C. L. J. 570.

The last ground taken is that the suit is bad for misjoinder of parties and causes of action. It is contended that as the lands of the schedule *kha* were claimed as *khas khamar* and those of schedule *ka* as being formerely held by Dina Nath the causes of action were different. The purchasers were different and the lands were purchased at different times and the sub-lessees held different plots. The question of misjoinder of parties appears not to have been pressed in the lower Appellate Court. As regards misjoinder of causes of action, the Courts below have found that the lands of both the schedules *ka* and *kha* are included in the *jote* of Kristo Kishore, and the defendants were sued as trespassers in respect of both the plots. Besides, the defendants do not appear to have been prejudiced, and the defect, if any, is cured by the provisions of section 578 of Act XIV of 1882.

The case, however, will go back to the lower Appellate Court for a re-hearing with reference to the second contention raised on behalf of the appellant, in accordance with the observations made in the judgment. Costs will abide the result.

Case remanded.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPEAL No. 89 OF 1910.

March 9, 1911.

Present:—Mr. Pratt, J. C. and Mr. Crouch, A. J. C.

GANESH KRISHNA—APPELLANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 236—Alternative charges—Charges in the alternative, difference between—Alternative charges for offences under the Penal Code and Special Laws not permissible—Nature of offences for which alternative charges are permissible—Application of s. 236, Criminal Procedure Code.

The accused, a postal peon, was entrusted with certain bearing letters which it was his duty to deliver and recover the amount of the postage due. He returned bringing neither letters nor money and gave no explanation. At his trial he was charged in the alternative under section 409, Indian Penal Code or section 52 of the Post Office Act, in that he either dishonestly converted to his own use the amount recovered on account of the bearing letters entrusted to him or that he threw the letters away:

Held, that the charge in the alternative was bad in law. Section 367 (3) of the Criminal Procedure Code and sections 40 and 72 of the Penal Code refer only to offences under the Penal Code. Consequently, an alternative charge cannot be framed in respect of an offence under the Penal Code and an offence under a Special Law, nor can a Court inflict any sentence on a person found guilty in the alternative of an offence under the Penal Code and another under a Special Act.

Per *Pratt, J. C.*, (*Crouch, A. J. C.* dissenting)—An alternative charge under section 236, Criminal Procedure Code, cannot be framed in respect of distinct offences, nor even in respect of cognate offences when the difference is one of degree, *i.e.*, as to the intention imputed to the accused or as to some circumstance of aggravation.

Section 236, Criminal Procedure Code, applies to those cases only in which the prosecution cannot establish exclusively any one offence, but is able, on the facts which can be proved, to exclude the innocence of the accused and to show that he must have committed one of two or more offences.

Offences charged in the alternative arise out of the same *delictum* and are, therefore, necessarily cognate offences.

The doubt referred to in section 236, Criminal Procedure Code, can only arise when the legal character of the acts of the accused might be considered ambiguous, and the section authorizes a charge in the alternative when it is doubtful which of several offences the facts which can be proved will constitute, and not in a case where there may be doubt as to the facts which constitute one of the elements of the offence, that is, the *corpus delicti*.

The criminal intention imputed to the accused must be specifically determined and not allowed to remain a subject of doubt in an alternative charge.

Section 236, Criminal Procedure Code, contemplates a state of facts constituting a single offence, but it is doubtful whether the act or acts involved may amount to one or other of several cognate offences.

Per *Crouch, A. J. C.*—Section 236, Criminal Procedure Code, provides for those doubts which may arise as to inferences which may be drawn by the Court from the prosecution evidence, if believed.

The essential difference between (1) cumulative charges (2) alternative charges and (3) charges in the alternative is, that under the *first* the Court is asked to convict of two or more offences, under the *second* of any one specified offence, and under the *third* of one or other of two offences without specifying which.

The alternative offences need not necessarily be offences dealt with under the same Chapter of the Penal Code or "cognate" in any other technical sense, but they must, from the nature of the case, be such that the commission of each can reasonably be inferred from the same facts.

This is an appeal against the sentence and conviction passed by H. M. W. Hayward, Esq., A. J. C., Karachi.

Mr. *Rupchand Bhilaram*, for the Accused.

Mr. *Raymond*, for the Crown.

JUDGMENT.

PRATT. J. C.—The accusd has been convicted in a trial by Jury held in the Sessions Court jurisdiction of offences

(1) of an offence under section 409, Indian

Penal Code, for criminal breach of trust of Rs. 2 worth stamps entrusted to him in his capacity as postal peon;

(2) in the alternative under section 409, Indian Penal Code, or section 52 of the Post Office Act in that he either dishonestly converted to his own use Rs. 2-13 proceeds of bearing letters entrusted to him or that he threw away the bearing letters.

It is urged that the second head of charge in the alternative is bad inasmuch as section 236, Criminal Procedure Code, only justifies an alternative charge when the doubt is one of law and not when the doubt is one of fact. In the present case it is said that the prosecution were in doubt as to the facts for they were not certain whether the accused recovered on the bearing letters and dishonestly converted the proceeds to his own use or whether he merely threw them away.

Section 236 is only section under which an alternative charge can be framed. The section enacts that "if a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute" the accused may be charged with all the offences cumulatively or in the alternative with having committed some one of the offences.

The section provides for cumulative as well as for alternative charges and in section 403 of the Code it is contrasted with section 235 (1) which also provides for cumulative charges. The offences falling under section 235 (1) are referred to in section 403 as distinct offences while that expression is not used in regard to the offences falling under section 236.

Under section 235 (1) the offences are committed in a series of acts. They are distinct offences. A conviction or acquittal in respect of one offence is no bar to a trial for another of the offences. There is no limitation as to the previous acquittal or conviction being upon the same facts. A trial is said to be upon the same facts if the evidence in the first case would have supported a conviction for the offence charged in the second case. See *Queen Empress* v. *Bird* (1) Broom 2nd Edition, p. 266, *Kapton* v. *Smith* (2) *Queen Empress* v. *Fakeerappa* (3).

(1) 2 Den. C. C. 94.
(2) 16 W. R. Cr. 3; 7 B. L. R. Ap. 25.
(3) 1 Bom. L. R. 15.

Under section 236 the offences arise out of a single act or out of a series of acts. The offences are not distinct. A conviction or acquittal in respect of one offence is a bar to a re-trial for another of the offences upon the same facts. The illustration to section 403 make this distinction clear.

Illustration (*b*) is a case of robbery and murder. The accused is acquitted of the murder but he may be re-tried and convicted of the robbery. It is immaterial whether the evidence in the murder case would have supported an additional charge for robbery. The offences are distinct offences arising out of the same series of acts and the case falls under section 235 (1).

Illustration (*d*) is a case of culpable homicide. The accused is convicted of culpable homicide not amounting to murder. He may not be tried again for murder. The offences arise out of the same single act or serise of acts. They are not distinct, for they differ only in degree. The case falls under section 236.

The illustration (*a*) is a case of theft. The accused is accquitted of the offence of theft by a servant. He may not be re-tried for the offence of simple theft. The offences arise out of the same act or series of acts. They are not distinct offences for they differ only in degree, *i. e.*, as to a circumstance of aggravation. The case falls under section 236.

Now, it is important to note the illustration as to robbery and murder. Such a case does not fail under section 236. The accused may not urge that on the facts the prosecution must have had a doubt as to whether he was the murderer and robber and might have charged him in the alternative under section 302, Indian Penal Code, or section 392, Indian Penal Code, and that, therefore, acquittal of murder was a bar to the trial for robbery.

Section 236, therefore, does not apply to distinct offences. It applies as shown by illusrations (*a*) and (*d*) to offences of the same kind but which differ only in degree. The difference in degree depends upon some added circumstance of aggravation, *e. g.*, that the theif was the servant of the complainant or to a difference in the intention imputed to the accused as in the case of murder or culpable homicide not amounting the murder.

But both these cases are cases not for

alternative charges but of cumulative charges under section 236. About this, I think, there can be no doubt. The circumstance of aggravation cannot be left in doubt. It must be established on the facts proved, otherwise the accused is entitled to an acquittal of the major offence. The prosecution would charge successively under sections 381 and 379 and rely on a conviction under section 379 if they failed to prove that the accused was the servant of the prosecutor. So also where the difference between the offences arises out of the intention imputed to the accused, *i. e.*, the intention which is presumed from the facts proved. This law cannot be left in doubt, for it is the duty of a Jury to decide which view of the facts is true. Illustration (*a*) to section 299, Criminal Procedure Code, makes it quite certain that an alternative charge for murder or culpable homicide not amounting to murder is not permissible. Indeed, if the intention imputed to the accused could be left in doubt in an alternative charge the most extraordinary and anomalous results would ensue. An accused who had over-driven and killed a foot passenger might be convicted in the alternative of murder or of causing death by a rash and negligent act; or again, in a case of death from a ruptured spleen, the accused might be convicted in the alternative of murder or of simple hurt. A finding which left in doubt whether the convicted person was convicted of murder or not would be bad in law, for the Jury would have failed in their duty to ascertain the true view of the facts.

The result, therefore, is that an alternative charge cannot be framed in respect of distinct offences nor even in respect of cognate offences when the difference is one of degree, *i. e.*, as to the intention imputed to the accused or as to some circumstance of aggravation.

In what cases then is it permissible to frame an alternative charge?

The answer is, I think, suggested by the illustrations to section 236 and most clearly by the original illustration (*a*). It applies only in those rare cases in which the prosecution cannot establish exclusively any one offence but are able on the facts which can be proved to exclude the innocence of the accused and to show that he must have committed one of two or more offences. The prosecution establish a *corpus delicti* on the facts which can be proved and the facts which cannot be proved are subsidiary facts important only to this extent that they decide under which penal provision the *delictum* falls. In the case of illustration (*a*) the dishonest possession of stolen property in the *corpus delicti*. Whether the accused stole it himself or received it from the thief are subsidiary facts which only affect the question whethere his *delictum* falls under section 379 or 411, Indian Penal Code. To take another instance, an accused might charged in the alternative with murder or abetment of murder—*corpus delicti* are the facts showing the murder and the accused's connivance. Whether he did the murder by his own hand or the hand of another is a subsidiary fact which may be left in doubt; or again, there may be, as suggested by illustration (*a*), an alternative charge of theft or criminal breach of trust, the accused is proved to have sold a library book and appropriated the proceeds. It cannot be proved whether the book was issued to him by the librarian or not. Here the *corpus delicti* is the dishonest disposal of the book, whether he took it with or without the consent of the librarian are subsidiary facts important only to decide whether the *delictum* is under section 380 or section 406, Indian Penal Code.

Offences charged in the alternative arise out of the same *delictum* and are, therefore, necessarily cognate offences.

The decided cases fully bear out these conclusions, and I shall now refer to a few typical cases. Under section 235 (1) were decided the cases of *Queen Empress* v. *Fakeerappa* (3), and *Croft* v. *Queen Empress* (4). In *Queen Empress* v. *Fakeerappa* (3) the accused had been acquitted of the offence of belonging to a gang of persons associated for the purpose of habitually committing dacoity. In the course of the trial evidence was given that he and his gang had committed a particular dacoity. He was then tried again for that dacoity and it was held that his acquittal under section 400, Indian Penal Code, was no bar to his trial under section 395, Indian Penal Code. It was held that the transaction was disvisible and that the case fell under section 235 (1), and that it was immaterial whether the second trial was upon the same facts or not. In *Croft* v.

(5) 23 C. 174.

Queen-Empress (4) the accused manufactured an excisable article and put a false trade-mark on it to conceal the fact that it was excisable and sold it without a license. He was convicted of an offence under the Excise Law and this was held no bar to his trial for an offence in respect of the false trade-mark. The case was under section 235 (3) and offences distinct. With every respect to the learned Judges who decided the case of the *Crown* v. *Manghnidar* (5), it seems to me that an acquittal of murder is no bar to a trial for an offence under section 201, Indian Penal Code. The offences are distinct offences committed in the same series of acts and fall under section 235 (1) and paragraph (2) of section 403.

Under section 236 was decided the case of *Queen-Empress* v. *Erramareddi* (6). It was held that an acquittal of the offence of mischief barred a re-trial on the same facts for the offence of theft. The Judges did not discuss the question as to whether the charges of theft and mischief would have been cumulative or alternative but they observed "clause (2) of section 403 does not apply to this case because the imputed offences of mischief and theft were not distinct offences, nor was there a series of acts, but one act or transaction only, the cutting of the tree and the removal of the branches cut."

As to an alternative charge under section 236, the only decided case in the Indian Law Reports is that of *Wafadar Khan* v. *Queen-Empress* (7). In that case a charge of riot had been framed by the Sessions Judge stating two different common objects in the alternative. Here, if the common object was in doubt, the residuum of facts proved would only establish against each of the accused that they had each personally committed particular acts of violence. Excluding the matters in doubt, there was no *corpus delicti* to which the offence of rioting could be referred. The fact in doubt was not a subsidiary fact but an essential element of the *corpus delicti*. The case was one which, as I have already shown, required cumulative charges under section 236, and the Jury should have decided, which common object was proved. The Calcutta High Court decided, and I think decided rightly, that the alternative charge was bad. Beverley, J., in his judment stated the law as follows :—

"Section 236 of the Code only authorises a charge in the alternative when it is doubtful which of several offences the facts which can be proved will constitute not, as in this case, when there may be a doubt as to the facts which constitute one of the elements of the offence."

With this statement of the law I concur if by the word "offence" in the last clause the learned Judge means what I have called the *corpus delicti*. It obviously cannot refer to the elements of either offence charged, for, to take the case of illustration (*a*), one of the elements of theft is that the accused moved the goods without the consent of the person in possession, and yet the alternative shows that that element is not proved.

There is a dictum in *Croft* v *Queen Empress* (4), in which I entirely concur. The Judges there observed at p. 177,—"It appears to us that section 236 of the Code of Criminal Procedure contemplates a state of facts constituting a single offence but it is doubtful whether the act or acts involved may amount to one or other of several cognate offences."

The doubt referred to in section 236 is generally described as a doubt of law. This phrase is not strictly accurate, for it is a doubt as to subsidiary facts which would determine what law was applicable. The doubt is well-described in the phrase used by West, J., with reference to the concluding section of the Code of 1872, in the case of *Reg.* v. *Ramaji Rav* (8) the legal character of the accused might well be considered ambiguous.

Now, applying the law to the present case, there can be no doubt I think but that the alternative charge is bad. The facts proved are (1) that the accused was given certain bearing letters, (2) that it was his duty to deliver and recover money on them (3), that he failed to perform this duty (4), his conduct in not returning. But these facts do not constitute any *corpus delicti*. There is no offence until we artive at the matter in doubt *i e*, as to the dishonest intention or negligence imputed to the accused. And I have already shown that the criminal intention imputed to the accused must be specifically determined and not allowed to remain a subject of doubt in an alternative charge.

(5) 4 S. L. R. 175; 8 Ind. Cas. 936.
(6) 8 M. 296.
(7) 21 C. 955.
(8) 12 B. H. C. R. 1 at p 7.

The verdict on the alternative charge is bad in law as the Jury have not done their duty under section 299 (*a*) and decided which view of the facts is correct.

There is another point which I shall not discuss in detail as it has not been raised in argument. But it is material, as it raises a further doubt as to the legality of the charge. Both the provisions of the law as to judgment and punishment in the cases of an alternative charge are limited to offences under the Indian Penal Code. Section 367 (3) of the Criminal Procedure Code contains an express limitation to that effect; and section 72, Indian Penal Code, is by section 40 limited to offences under the Penal Code. The word "offence" in section 236 includes offences under Special Laws and there is no doubt that offences under special laws may be charged cumulatively. But the limitations in section 72, Indian Penal Code, and section 367 (3), Criminal Procedure Code, seem to indicate that an alternative charge cannot be framed in respect of an offence under the Penal Code and an offence under a Special Law. This is in accord with my view that section 236 only refers to cognate offences.

I would, therefore, confirm the conviction and sentence under the first head of charge for an offence under section 409 in respect of stamps, but reverse the conviction and sentence on the alternative charge in respect of the bearing letters.

CROUCH, A. J. C.—As I am unable to express agreement with the reasons given by the learned Judicial Commissioner, it is necessary to state briefly my grounds for concurring in the order reversing the conviction on the second charge.

Mr. Rupchand has, in urging his objections that the charge is alternative under section 409, Indian Penal Code and section 52 of the Post Office Act VI of 1898 is not justified by the terms of section 236, Criminal Procedure Code, relied on the following dictum of Beverley, J., in *Wafadar-Khan* v. *Queen-Empress* (7):—"Section 236 of the Code only authorises a charge in the alternative when it is doubtful which of several offences the facts which can be proved will constitute not, as this case, when there may be a doubt as to the facts which constitute one of the elements of the offence."

As any doubt as to what offence has been committed must arise from a doubt whether a certain fact constituting an essential element of an offence has been proved, the dictum, as it stands, cannot be accepted as a correct interpretation of the terms of section 236, and I am of opinion that we should not permit it to embarrass us in the construction and application of these terms.

The meaning of the section will, I think, be more easily comprehended, if we analyse the several expressions contained in it, and consider it from the point of view of its practical application.

An "offence" is any act or omission punishable by any law for the time being in force (section 4 (o), Criminal Procedure Code); and one of the chief objects of the charge is to inform the accused precisely what acts, punishable, by law, he is alledged to have committed.

The charge must be distinguished from the "prosecution case." The latter may be, roughly, divided up under three separate heads:—

(1) Acts of, or things done by the accused which it is expected to prove by direct evidence.

(2) Events preceding, accompanying, or following such acts which it is expected to prove by direct evidence.

(3) Inferences from such acts and events.

The illustrations to sections 236 seem to make it clear that by "act or series of acts" are meant "things done by the accused which the prosecution expect to prove by direct evidence" the while expression "facts" used in the wide sense of section 4 of the Evidence Act, and the facts which "constitute an offence" are the act or acts, the particular kind and degree of intention and particular result which together make up the essential elements of a specific offence. An "act" very often is, but is not necessarily, one of the facts constituting an essential element of the offence charged, it may be merely evidence from which, with other facts proved, a fact constituting an element in the offence may be inferred. In considering the section it is important to bear in mind that facts may be proved by way of inference or presumption as well as by direct evidence.

In opening his case, the prosecutor is bound to state not only what specific acts he alleges the accused to have committed, and for which he asks Court to inflict punishment, but also what acts or things done by

the accused, he expects to prove by direct evidence, and to show how from these acts, and other facts which he expects to prove, it may be inferred that the specific acts punishable by law were really committed.

The prosecution is entitled to suggest alternative possible inferences, and to urge the adoption of a particular one, but all acts and events which it intends to prove by direct evidence, and which form part of the prosecution case, must be definitely and positively alleged.

In most cases, the prosecution has to anticipate doubts of two classes: *firstly*, whether the evidence, or certain portions of it, will be believed; *secondly*, what inferences will be drawn from the evidence, if believed. It is with these doubts in view that the particular form of charge is decided on.

It is clear from the opening words of section 236 that the doubts for which it seeks to provide are of the second class. The doubt which of several offences the facts proved will constitute must arise from the very nature of the acts of which it is intended to offer evidence. The doubt is as to the inference which will be drawn by the Court.

Where such doubt arises, the accused may be charged with having committed all or any of such offences; or he may be charged in the alternative with having committed some one of the said offences. In this case we are concerned only with charges in the alternative. It is necessary to distinguish them from what may be termed "alternative charges" where the accused is charged under two separate charges with having committed either offence A or offence B. It is not usual to insert the word "or" between the two charges, but it is explained to the Jury that a verdict of guilty is asked for, on only one of them. The essential difference between cumulative charges, alternative charges and charges in the alternative is, that under the first the Court is asked to convict of two or more offences, under the second of any one specified offence, under the third of one or other of two offences without specifying which.

Ther is no limit whatever expressly imposed by the section to its application except that the doubt which arises must have a special origin. In practice, however, the use of a charge in the alternative is restricted to narrow limits.

In the first place, the section is nothing more than a permissive rule of procedure. Whether it is expedient to frame a charge in the alternative or whether it will unfairly embarrass the accused in the conduct of his defence are two of the most important questions which should be answered satisfactorily before the procedure is followed.

In the second place, the cases in which a charge in the alternative can be effectively used must necessarily be rare. The prosecution is never relieved of its burden of proving the guilt of the accused and the prosecution case must be such that it is a fair inference from the facts of which direct evidence is offered that the accused committed one of two offences, otherwise the trial on a charge in the alternative must inevitably prove futile.

There is no authority for asserting that the alternative offences must be offences dealt with under the same Chapter in the Penal Code, or "cognate" in any other technical sense but they must from the nature of the case be such, that the commission of each can reasonably be inferred from the same facts. For this reason, the cases in which distinct offences can form the subject of a charge in the alternative are not likely to be of frequent occurrence. Illustration (*b*) to section 403 seems to indicate that the Legislature considered that no case could arise in which robbery and murder could be included together in a charge in the alternative but I am not prepared to deduce from this illustration any general rule.

The most ordinary case of doubt arising as to the inference which the Court will draw is when the inference is as to the nature and degree of the accused's intention. But in almost all such cases there will be separate alternative charges so that in the event of the accused being convicted of the most serious offence he can be punished for it. There would be no practical advantage to the prosecution to have a charge, in the alternative of two offences differing only in degree; indeed, the very object of having the double charge would be defeated. If there is doubt whether the conviction will be of murder or of culpable homicide not amounting to murder there should be two

separate charges and the Jury will be directed to find the accused guilty under one, or the other, or acquit on both. (Section 299, Criminal Procedure Code.)

As a charge in the alternative forms an exception to the general rule that a charge should definitely state the precise acts, punishable by law, which the accused is alleged to have committed, its adoption must always cause some degree of embarrassment to the conduct of the defence and the Legislature seems to have contemplated that this consideration would restrict its use to offences punishable under the Penal Code. At any rate, we find that there is no section in either the Penal Code or in the Criminal Procedure Code which authorises the infliction of any sentence on a person found guilty in the alternative of an offence under the Penal Code, and one under a Special Act. Section 367 (3), Criminal Procedure Code and sections 72 and 40, Indian Penal Code, refer only to effences under the Penal Code.

In the present case, the "acts" alleged were that; (1) Accused being entrusted with a number of "bearing letters" and under a duty to collect and bring back a certain sum of money, went on his rounds.

(2) He returned bringing neither letters nor money, and gave no explanation.

In my opinion, a doubt arose from the very nature of these acts whether accused had made away with the letters, or had collected and misappropriated the money due on them, and the acts were such as to raise a fair probability that the Court would infer from them that one of the two offences had been committed. The case, therefore, was one in which a charge in the alternative was justified by the express terms of section 236.

But it was inexpedient to frame such a charge, for on the completion of the trial the Court had, so far as I am able to discover, no power to pass sentence.

In my opinion the charge was technically correct, but the conviction and sentence were bad.

I would, therefore, reverse the conviction and sentence on the second charge.

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 13 OF 1909.

June 24, 1909.

Present:—Mr. Sunder Lal, J. C.

RAM PARTAP—DEFENDANT—APPELLANT

versus

BACHCHU MISRA—PLAINTIFF AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), ss. 86 and 87—Decree for foreclosure obtained against all the defendants—Order absolute obtained only against some of the defendants, validity of—Payment of the decretal amount by the defendant against whom no order absolute passed, effect of—Foreclosure decree discharged by the payment made by one defendant against all—Decree joint and indivisible against all the judgment-debtors—Redemption by a puisne mortgagee, effect of.

In 1892 one *B.* mortgaged a portion of his share by way of conditional sale in favour of the respondent. Subsequently, in 1896, after the death of *B.*, his sons mortgaged with possession the entire share to one *K.*, now represented by the appellant. The respondent instituted a suit for foreclosure on his mortgage of 1892 and impleaded *K.*, and the sons of *B.*, as defendants to his suit and obtained a decree for foreclosure. In applying for an order absolute, however, he did not make *K.* a party to the proceedings and obtained the order only against the sons of *B.* Subsequently, on the objection of *K.*, it was decided that the order obtained against the sons of *B.*, did not bind him and that he should be allowed to deposit the decretal amount and thereby to redeem the property. *K.* deposited the money which the respondent withdrew and thus his mortgage was satisfied. The respondent now, on the basis of the order absolute against the sons of *B.* alone, sought to redeem *K.*'s mortgage of 1896. The question for decision was, whether the order absolute obtained by the respondent could still be considered as subsisting although his decretal amount had been deposited in full and his mortgage-decree satisfied:

Held, that the decree for foreclosure obtained by the respondent was a joint and indivisible decree against all the defendants and there could be only one order absolute affecting all the defendants. The effect of the deposit of money by *K.* who was not a party to the order absolute, was that the respondent's mortgage had been satisfied in its entirety and he could not, therefore, urge that the equity of redemption, which was acquired by him as a complement to the mortgagee-rights under an incomplete foreclosure proceeding, still vested in him. The effect of the payment of the decretal money by *K.* was that the respondent's rights as mortgagee passed to the redeeming puisne mortgagee whatever they were at the date of such payment.

Hussanbhai v. *Umaji*, 28 B. 153; *Kedar Nath* v. *Syed Hafiz Ali*, 10 O. C. 356, referred to.

Pandit *Gokaran Nath Misra*, for the Appellant.

Mr. *Zahur Ahmad*, for Mr. *Mumtaz Husain*, for the Respondents.

JUDGMENT.—This is a rather peculiar

suit for redemption of a mortgage. The circumstances shortly are as follows: –

On the 26th September, 1892, one Bhawani Din who was the owner of a 2-anna 8-pies share in the village of Khatmipur mortgaged his one-anna share thereof by way of conditional sale in favour of Bachchu Misra for tho sum of Rs. 500. Bhawani Din died shortly after, and on 18th November, 1896, his sons mortgaged with possession their entire 2-anna 8-pie share to one Kashi Ram for the sum of Rs. 300. The appellant in this appeal is a legal representative of Kashi Ram. Bachchu Misra instituted a suit for foreclosure on his mortgage of 26th September, 1892. He impleaded the sons of Bhawani Din and Kashi Ram as defendants to the said suit, and on 3rd October, 1901, he obtained a decree for foreclosure under section 86 of Act IV of 1882. Bachchu Misra applied for the said decree being made absolute on 4th August, 1902, against the heirs of Bhawani Din only. The said heirs applied for enlargement of the time to pay the mortgage money and obtained it from the Court. Another application for foreclosure was made against them on the expiration of the enlarged period of time for payment of the mortgage-money, but it was dismissed in default of prosecution. Ultimately, the decree-holder applied for an order absolute under section 87 of Act IV of 1882 against the heirs of Bhawani Din and obtained the said order against them on 25th April 1903. Kashi Ram was no party to any of these proceedings.

On the strength of the said order Bachchu Misra applied for possession of the mortgaged property. Thereupon, Kashi Ram on the 19th March, 1906, filed an objection in Court in which he urged that the entire foreclosure proceedings were bad in law, inasmuch as he was not made party to them and the order absolute made on the 25th April 1903, was of no force and validity as against him. The Court gave effect to the objection and allowed him to redeem on payment of the mortgage-money due to the decree-holder on 24th April 1906. This order was upheld in appeal by this Court on the 5th January 1907. Kashi Ram deposited the amount due to the mortgage Bachchu Misra and thus redeemed the mortgage of 26th September 1892. Bachchu Misra has drawn the money deposited to his credit and his mortgage has thus been satisfied. Kashi Ram had been temporarily dispossessed by Bachchu Misra on the strength of the foreclosure order of 25th April 1903. But on the said order being held invalid he was put back into possession of the said property and is now in possession thereof.

The present suit has been instituted by the plaintiff Bachchu Misra on the allegation that by the foreclosure proceedings of 25th April 1903, as between himself and the heirs of Bhawani Din the decree for foreclosure has become absolute against them and their rights as mortgagors have now passed to him. He, therefore, as a representative of the mortgagors, now sues to redeem Kashi Ram's mortgage of 18th November 1896. As a prior mortgagee under the mortgage of 26th September 1892, Bachchu Misra has no right in law to redeem the puisne mortgage of 1896 in favour of Kashi Ram. He can only sue for redemption if the rights of the mortgagors have by any process of law been transferred to him and the only question in this appeal is whether by the order absolute of 25th April 1903, the rights of Bhawani Din's sons have passed to the plaintiff. The Court of first instance held on this question in the negative and dismissed the suit. The learned Subordinate Judge on appeal has held in favour of the plaintiff, and holding that the plaintiff is entitled to maintain this suit for redemption, has remanded the case under Order XLI, rule 23, of the Code of Civil Procedure, for trial on the merits.

The present appeal has been instituted by Ram Partap who is the legal representative of Kashi Ram, the puisne mortgagee. The decree of 3rd October 1901, was a joint and indivisible decree against all the defendants. It gave them a right to redeem the mortgage of 26th September 1892, within the period of time specified in the decree and on default of payment it granted the plaintiff in that case a joint and indivisible decree for foreclosure. There was one decree in the case and there could be only one order absolute affecting all the defendants under section 87 of Act IV of 1882. The decree *nisi* as a whole can be made absolute under section 86 of the Act. Now, in this case, the decree-holder did not obtain an order absolute

as against Kashi Ram. In the proceedings which followed, Kashi Ram was held entitled to pay him the mortgage-money and discharge the plaintiff's mortgage. The legal effect of those proceedings is, that it has now been finally held that nothing done in the way of foreclosure under the order of 25th April 1903, affected the rights of Kashi Ram. So far as he is concerned, these proceedings are merely waste paper. As between Kashi Ram and Bachchu Misra, the decree of 3rd October 1901, has been discharged by payment to the latter of the mortgage-money and uuder section 74 of Act IV of 1882 all the rights which once vested in Bachchu Misra as mortgagee have now passed on to Kashi Ram and his legal representative. Bachchu Misra cannot now be permitted to urge that he is still a mortgagee under the document of 26th September, 1892. It is only a mortgagee, who, as such can foreclose the equity of redemption, and when his title as mortgagee passed to Kashi Ram he no longer retained the character of a mortgagee in which character alone he could foreclose. If the foreclosure proceedings of 25th April 1903, are good and binding it is the person now entitled to the mortgagee rights under the document of 26th September, 1892, in whom the equity of redemption can vest and that person is now Kashi Ram, the person in whom the mortgagee-rights have now vested. Foreclosure vests the equity of redemption in the mortgagee and not in one who has ceased to be a mortgagee. In my opinion, however, when Kashi Ram applied on the 19th March 1906, to re-open the foreclosure proceedings and the Court granted his prayer on 24th April 1906, the *ex parte* order of 23rd April, 1903, was set aside as a whole. It has been held that if, on an application under section 108 of the Code of Civil Procedure, 1882, an *ex parte* decree is set aside the order is passed in favour of all the defendants [*Bhura Mal* v. *Har Kishan Das* (1), *Mohammed Hamidulla* v. *Tohurennissa Bibi* (2).] On the principle of these cases it must be taken that the order absolute was set aside completely. Under the English Law when foreclosure is re-opened it is re-opened as a whole (Robin's Law of Mortgage, page 1050). The invalid fereclosure proceedings aforesaid, therefore, did not vest the equity of redemption in the plaintiff, both because the proceedings were invalid and because the plaintiff has ceased to be the mortgagee in whom alone by foreclosure the equity of redemption can vest. The Court below has, however, relied in support of its view on the ruling of the Bombay High Court in *Hassanbhai* v. *Umaji* (3) which has been followed by this Court in *Kedar Nath* v. *Syed Hafiz Ali* (4). In the case of *Hussanbhai* v. *Umaji* (3) the mortgagee had obtained a final decree for foreclosure against the mortgagors. The foreclosure proceedings were good as between the parties to the decree. As the mortgage of the foreclosing mortgagee in that case still subsisted, it was held that the foreclosure proceedings vested in him the entire rights of the mortgagors and as such he was entitled to exercise the right of redemption as against a puisne mortgagee. That case is inapplicable to the circumstances of this case for many reasons. In the first place, the puisne mortgagee in this case though a party to the order absolute under section 86 of Act IV of 1882 was no party to the order absolute under section 87 of the Act and the entire proceedings were invalid as against him. In the Bombay case the foreclosure proceedings were still subsisting and in force between all the parties to the original decree. In this case, in the subsequent proceedings between the parties, they have been held to be invalid and the plaintiff cannot now be heard to set up the validity of the said proceedings as against Kashi Ram's heirs in face of the final adjudication of their invalidity between the plaintiff and Kashi Ram. In the next place, unlike the Bombay case, this is a case in which the plaintiff's rights as mortgagee have been transferred to Kashi Ram by virtue of the payment made by the latter. The plaintiff cannot urge that the equity of redemption, which is only a complement to the mortgagee-rights acquired by foreclosure proceedings, still remains in him. The plaintiff is now in this difficulty that, if the foreclosure proceedings are valid and binding upon the heirs of the original mortgagors, by receiving payment of the mortgage-money from Kashi Ram, the rights of the plaintiff as mortgagee passed to the redeeming puisne mortgagee whatever they

(1) 24 A. 883.
(2) 25 C. 155.
(3) 28 B. 153.
(4) 10 O. C. 356.

were on the date of such payment. In a properly framed decree the pusine mortgagee might in his term have foreclosed the prior mortgage as against the mortgagor. The plaintiff acquired no equity of redemption by the invalid foreclosure proceedings. The case in *Kedar Nath* v. *Syed Hafiz Ali* (4) is also distinguishable for the same reason. I hold that the plaintiff has not acquired the rights of the mortgagor by virtue of the invalid order absolute of 25th April, 1903, and that he is not competent to set up the said proceedings as valid when they have been held to be invalid by order *inter partes* I, therefore, decree the appeal, set aside the order of the Court below and dismiss the suit of the plaintiff with costs in all Courts.

Appeal allowed.

SIND JUDICIAL COMMISSIONER'S COURT.

EXECUTION PROCEEDING SUIT No. 9 OF 1909.

April 5, 1911.

Present:—Mr. Pratt, J. C.

KARAM ALLAHI SHAH MAHOMED—JUDGMENT-CREDITOR

versus

MARIAM, WIFE OF KARAM ALLAHI—JUDGMENT DEBTOR.

Civil Procedure Code (Act V of 1908), O. XXI, r. 33 (1) and (2)—Restitution of conjugal rights—Detention of wife in prison—Discretion of Court.

In execution of a decree for restitution of conjugal rights a Court ought, in the exercise of its discretion under Order XXI, rule 33 (1), to decline to enforce the decree by the detention in prison of the wife, especially where the marriage was an unhappy one and the husband has charged the wife with adultery.

Mr. *Tarachand*, for the judgment-creditor.

ORDER.—The parties are evidently unhappily married and the husband himself has charged his wife with adultery. When the husband has made such a charge against his wife, it would be barbarous to compel the wife on pain of imprisonment to return to live with him. In exercise of my discretion under Order XXI, rule 33 (1), I decline to enforce the decree by the detention in prison of the judgment-debtor. The case is not one in which an order under rule 33 (2) would be appropriate.

Application dismissed.

Application dismissed.

MADRAS HIGH COURT.

LETTERS PATENT APPEAL No. 51 OF 1910

March 30, 1311.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Sundara Aiyar.

KODALI MALLAYYA—APPELLANT

versus

TARIGOPALA RAMAYYA—RESPONDENT.

Vendor and purchaser—Unstamped pro-note executed for unpaid consideration—Suit on pro-note—Decree on original transaction.

A sale of certain land was effected in consideration of payment of money. In lieu, however, of actual payment the vendor received from the vendee an unstamped promissory note. In a suit by the vendor based on the promissory note to enforce the personal obligation of the vendee, and not based on the transaction of sale to enforce vendor's lien on the property:

Held, that no decree could be passed, though the sale entitled the plaintiff to the payment of the purchase-money and the law gave him a lien on the property for that amount.

Where a document which cannot be used in evidence is executed to prove a complete pre-existing right, a suit may be maintained on the original right itself unless it be shown that it was entitled to merge the right in the document, but where at the time that an obligation comes into existence, a document is executed as the evidence and record of that obligation, a suit to enforce it can be only on the document itself.

Pothi Reddi v. *Velayuda Sivan*, 10 M. 94; *Yerlagadda Veeraragaviah* v. *Gorantla Ramayya*, 29 M. 111; 15 M. L. J. 484; and *Sheik Akbar* v. *Sheikh Khan*, 7 C. 256, referred to.

Appeal under section 15 of the Letters Patent against the judgment of the Hon'ble Mr. Justice Krishnasawmy Iyer, dated 15th August 1910 in C. R. P. No. 742 of 1908, presented against the decree of the District Munsif of Bezwada in S. C. S. No. 897 of 1908. See 7 Ind. Cas. 320.

Mr. *J. Prakasam*, for the Appellant.

Mr. *P. Nagabhusanam*, for the Respondent.

JUDGMENT.—This is an appeal from the judgment of Krishnasawmi Iyer, J., in *Kodali Mathaya* v. *Tangoppala Ramaya* (1), in which the learned Judge confirmed the judgment of the District Munsif of Bezwada who dismissed the plaintiff's suit to recover the amount due to plaintiff for the balance of purchase-money due to him from the defendant for the sale of certain land. The plaintiff received from the defendant on the date of the sale an unstamped document which has been held by both the Munsif and the learned Judge to be a promissory-note, and as the document could not, consequently,

(1) 7 Ind. Cas. 320; 1 M. W. N, 367; 8 M. L. T, 251

be acted on the learned Judge held that the suit was rightly dismissed. It is contended in this appeal that as the transaction of sale itself gave the plaintiff a complete cause of action he is entitled to a decree for the amount apart from the promissory-note. It is, no doubt, true that the sale entitled the plaintiff to the payment of the balance of purchase-money, and the law gave him also a lien on the property for the amount. The promissory-note by itself would not, according to the allegations in the plaint, extinguish the lien as the sale was not in consideration of a covenant to pay the balance of the purchase-money but in consideration of the payment of the money itself. But this suit is not one to enforce the lien on the property but to enforce the personal obligation of the defendant to pay. In a suit to enferce this obligation the principle laid down in *Pothi Reddi* v. *Velayudha Sivan* (2); *Yerlagadda Veeraraghavayya* v. *Gorantla Ramayya* (3); *Sheikh Akbar* v. *Sheik Khan* (4) is applicable. That principle is that where a document which cannot be used in evidence is executed to evidence a complete pre-existing right a suit may be maintained on the original right itself unless it be shown that it was entitled to merge the right in the document, but where at the time that an obligation comes into existence, document is executed as the evidence and record of that obligation a suit to enforce it can be only on the document itself. In this case the plaint does not show that the case falls within the former category of cases. Whether the plaintiff may not still be entitled to institute a suit for the enforcement of his lien, it is unnecessary to consider.

We agree that this suit was rightly dismissed.

The appeal is dismissed with costs.

Appeal dismissed.

(2) 10 M. 94.
(3) 29 M. 111; 15 M. L. J. 484.
(4) 7 C. 356.

FULL BENCH.

PUNJAB CHIEF COURT.

CRIMINAL REVISION No. 1163 OF 1910.

April 21, 1911.

Present:—Sir Arthur Reid, KT., Chief Judge Mr. Justice Kensington, Mr. Justice Johnstone and Mr. Justice Chevis.

NARAIN DAS AND OTHERS—PETITIONERS

versus

Musammat DURGA DEVI AND ANOTHER—COMPLAINANTS—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), ss. 107, 119, 437—"*Accused person*"—*Whether a person from whom security has been demanded under s.* 107 *is an accused person Further inquiry, whether can be ordered of a person released under s.* 119.

A person from whom security has been demanded under section 107, Criminal Procedure Code, is not an accused person so as to permit a District Magistrate or Sessions Judge, as the case may be, to take action under section 437 of the Code and order further inquiry, should that person have been released or discharged under section 119.

Mohammad Khan v. *Emperor*, 42 P. R. 1905; *Cr.* 131 P. L. R. 1905; 2 Cr. L. J. 637, approved.

Manna v, *Emperor* 24 P. R. 1903; Cr. 20 P. L. R 1904; 1 Cr. L J. 96; *Chetu* v. *Gokha Singh*, 33 P. R. 1905 Cr. 149 P. L. R. 1905; 2 Cr. L. J. 716, overruled.

Velu Taji Ammal v. *Chidambaravela Pillai*, 33 M. 85; 4 Ind. Cas, 1057; 20 M. L. J. 137; 6 M. L. T. 123; 11 Cr. L. J. 162, referred to.

Petition, under section 439 of the Criminal Procedure Code, for revision of the order of the District Magistrate, Amritsar, dated the 8th August 1910, reversing that of the Magistrate, 1st Class, Amritsar, dated the 3rd June 1910, dismissing the complaint against petitioners in default.

Pandit *Rambhaj Datta*, for the Petitioners.

The case coming on for hearing before Johnstone and Chevis, JJ., the Court made on 9th March 1911 the following

ORDER OF REFERENCE TO A FULL BENCH.

The point in this case is whether a person from whom security has been demanded under section 107, Criminal Procedure Code, is an "accused person" so as to permit the District Magistrate or Sessions Judge, as the case may be, to take action under section 437 of the Code, and order further inquiry should that person have been released or discharged under section 19. There is a distinct conflict of authority in this connection [*Manna* v. *Emperor* (1) and *Chetu* v. *Gokha Singh* (2) being opposed to

(1) 24 P. R. 1903 Cr.; 20 P. L. R. 1904: 1 Cr.; L. J. 96.
(2) 33 P. R. 1905 Cr.; 152 P. L. R. 1905; 2 Cr. L. J. 716.

Mohammad Khan v. *Emperor* (3)]. The last named ruling was arrived at appearently without reference to the other two; and the time has come for a pronouncement by a Full Bench. We, therefore, refer the case to a Full Bench.

OPINION OF THE FULL BENCH.

The question referred to this Full Bench was thus stated in the referring order:—

Whether a person from whom security has been demanded under setion 107, Criminal Procedure Code, is an "accused person" so as to permit the District Magistrate or Sessions Judge, as the case may be, to take action under section 437 of the Code, and order further inquiry should that person have been released or discharged under section 119.

The question was anwered in the affirmative in *Manna* v. *Emperor* (1) and *Chetu* v. *Gokha Singh* (2) and in the negative in *Muhammad Khan* v. *Emperor* (3) a conflict of authority which render reference to this Bench necessary. We have considered the point and the rulings quoted, and also *Velu Taji Ammal* v. *Chidambaravelu Pillai* (4) and we have arrived at the conclusion that *Muhammad Khan* v. *Emperor* (3) contains the correct view of the law. The whole question is therein fully discussed and it need not be discussed again. It is also not necessary to discuss ground No. 5 of this revision-petition, in which it is urged that the order of the Magistrate in this case amounted to an acquittal, inasmuch as this question does not arise on the reference.

The order of the District Magistrate of 8th August 1910 ordering further inquiry is hereby set aside.

(3) 42 P. R. 1905 Cr., 131 P. L. R. 1905; 2 Cr. L. J. 637.

(4) 33 M. 85; 4 Ind Cas. 1057, 20 M. L. J. 137; 6 M. L. T. 133; 11 Cr. L. J. 162.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 263 OF 1910.

March 1, 1911.

Present:—Mr. Piggott, A. J. C.

INDAR SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

KESRI Singh—PLAINTIFF—RESPONDENT.

Agreement to supply funds for litigation, effect of—Right to recover property based on such agreement—Sale—Conveyance.

One *I.* was entitled to succeed to certain property on the death of a widow as being the nearest reversioner of the widow's deceased husband. The property was in possession of remoter reversioners. In order to prosecute his claim he entered into an agreement with the plaintiff, by which he agreed to give him half the property in dispute in lieu of the funds supplied to him by the plaintiff for the expenses of the suit. The plaintiff and *I.* jointly sued for possession of the property. Before decision of the case, *I.* died and the question arose whether on the basis of the said agreement plaintiff could recover half of his share in the property. The Courts below allowed the plaintiff's claim:

Held, on appeal, that the agreement in question did not amount to a sale as defined in the Transfer of Property Act or to a "conveyance" as defined in the Indian Stamp Act and that it did not transfer any property to the plaintiff nor did it confer any title on him.

Raghunath v. *Nilkanth*, 20 C. 843; 20 I. A. 112; *Lal Achal Ram* v. *Raja Kazim Husain Khan*, 8 O. C. 155; 9 C. W. N. 477; 27 A. 271; 15 M. L. J. 197; *Bajrangi Singh* v. *Bhagwan Bakhsh Singh*, 11 O. C. 301; *Haji Niyamat Ali* v. *Ilahi Bakhsh*, 8 Ind. Cas. 500, followed.

Mr. *P. N. Rozdon*, for the Appellants.

Pandit *Gakaran Nath Misra*, for the Respondent

JUDGMENT.—The questions raised by this appeal seem to me somewhat more difficult than the Courts below have realised. The essential facts admit of being briefly stated:—

One Indarjit Singh was entitled to succeed to certain immoveable property on the death of *Musammat* Horkoera, who had been in possession of the same as a Hindu widow, he being the nearest reversioner of that lady's deceased husband. The property was, as a matter of fact, in the possession of certain other reversioners, who represented an elder branch of the family but were one step farther removed than Indarjit Singh in descent from the common ancestor. Indarjit Singh himself was an old man and either had no funds with which to prosecute his claim to the property, or did not choose to embark any money of his own in the litigation. He, therefore, on February 18th, 1908, entered into an agreement with the plaintiff-respondent Kesri Singh, the effect of which is the essential point to be determined in this appeal. The agreement in question was undoubtedly on all fours with that which formed the basis of the litigation in the reported case of *Raghunath* v. *Nilkanth* (1), decided by their Lordships of the Privy Council. Kesri

(1) 20 C. 843; 20 I. A. 112.

Singh was to provide the entire expenses of the litigation, whatever they might be ; and in return for the consideration. Indarjit Singh undertook that he, on obtaining possession of the property in question, would make over one-half of the same to Kesri Singh. The document in question was stamped as an *ikrarnama* or agreement with a stamp of the value of Re. 1 and was only registered on the date already given. I have no hesitation in agreeing with the Courts below that the agreement in question was not void either on the ground, that it was opposed to public policy or that it was of the nature of a wagering transaction. It did confer upon Kesri Singh certain rights as against Indarjit Singh which he could enforce by a suit in the event of the latter's endeavouring to repudiate the contract. The question, however, which the Courts below seem to me to have overlooked, and which is distinctly raised by the first paragraph of the memorandum of appeal now before me, is whether this agreement conferred upon Kesri Singh any rights as against the persons in possession of the property. In other words, did any title to the property as such pass to Kesri Singh in virtue of this agreement of February 18th, 1908. I have carefully considered the terms of the agreement and it seems to me beyond doubt that it does not amount to a "sale" as defined in the Transfer of Property Act, or to a "conveyance" as defined in the Indian Stamp Act. It was not stamped as a "conveyance" and was evidently not regarded as such by the parties concerned. In the Privy Council case to which I have already referred, the suit was one to enforce the terms of the agreement against the party executing it, and it was never suggested that the agreement in itself had conferred title on the person in whose favour it was made. On the contrary, the result of the suit shows clearly enough that in the view of their Lordships of the Privy Council no title had passed to the property as such. The distinction drawn in the Transfer of Property Act (IV of 1882) between a "sale" and a "contract for sale" is clear, and it is specially provided that the latter does not in itself create any interest in or charge on the immoveable property concerned. The other reported case to which my attention was drawn [*Lal Achal Ram* v. *Raja Kazim Husain Khan* (2)] does not touch this point because in that case there had been an out and out sale by the owner. A case much more nearly on all fours with the present one is that of *Bajrangi Singh* v. *Bhagwan Bakhash Singh* (3). There is no doubt this distinction to be drawn, that in this reported case the agreement sought to be enforced had been made during the lifetime of the widow in possession of the property, so that it amounted to an attempt to transfer the chance of an heir apparent succeeding to an estate. The learned Judicial Commissioner held that such a contract was void, and could not even have been made the basis of a suit for specific performance. In the case now before me I think the agreement in question could have been made the basis of suit for specific performance after Indarjit Singh had obtained possession of the whole of the property concerned; but in other respects the facts of this reported case were more in favour of the party seeking to enforce the agreement than are those of the case now before me. I have been referred to the decision of this Court *Haji Niyamat Ali* v. *Ilahi Bakhsh* (4). In that case the plaintiff was seeking to enforce an agreement similar to the one now before me against the executants of the same after they had succeeded in obtaining possession of the property to which the agreement referred. The plaintiff obtained from this Court a decree for possession according to the terms of his agreement; and the point whether the suit should not have been rather one to obtain execution of a valid title-deed was not considered or even raised. In any case there is a vital difference between a suit to enforce an agreement as against the persons executing the same, and a suit like the present which proceeds upon a claim of title to immoveable property as against persons in possession of the same. The present suit was brought on March 1st, 1909 by Indarjit Singh and Kesri Singh jointly. The plaint recites that Kesri Singh is entitled to a half share (*nisf ka haqqdar hai*) in virtue of the agreement of February 18th 1908. There is no doubt an admission by Indarjit Singh which could have been pleaded against the latter in the event of a suit, but it cannot be said to operate so as to confer title upon Kesri Singh if the agreement itself failed to do so. As a matter of fact, Inderjit Singh died before the suit

(2) 8 O. C. 155; 9 C. W. N. 477; 27 A. 271; 15 M. L. J. 97.

(3) 11 O. C. 301.

(4) 8 Ind. Cas. 500.

was decided even by the first Court and his place in the litigation was taken by Uman Singh, brother of Kesri Singh, in whose favour Indarjit Singh had executed a deed of gift in respect of one-half share in the disputed property. I have to-day by a separate order upheld the decision of the lower Appellate Court by which Uman Singh recovers possession of one-half share in the property in dispute by virtue of this deed of gift, it can scarcely be said, therefore, that the equities of the case are very clearly or overwhelmingly in favour of Kesri Singh. On the suit as brought I am clearly of opinion that Kesri Singh's claim to a half-share in virtue of the agreement of February 18th, 1908, must fail because the said agreement confers upon him no interest in the property in dispute capable of being enforced by a suit against parties in possession who are not themselves bound by the terms of the agreement. I, therefore, accept this appeal and setting aside the decision of the lower Appellate Court, dismiss the claim of the plaintiff Kesri Singh to one-half share of the property in suit with costs in all Courts.

Appeal accepted.

OUDH JUDICIAL COMMISSIOMER'S COURT.

SECOND CIVIL APPEAL No. 229 OF 1910.

February 16, 1911.

Present:—Mr. Chamier, J. C.

Thakur SHEO NARAIN SINGH AND ANOTHER—DEFENDANTS—APPELLANTS

versus

CHANDRABHAL AND OTHERS—PLAINTIFFS—RESPONDENTS.

Water rights—Riparian owners, rights of - Injunction restraining the riparian owner from erecting a dam across the river - Rights of such owners to the flow of water not absolute and exclusive but relative—Injunction allowable only so far as to stop the flow of the stream or cause material injury to the other owners.

The respondents owned a village on the bank of the river Sai and the appellants some other villages about 12 miles higher up the river The appellants built a dam across the river and the respondents, thereupon, sued to obtain a permanent injunction restraining them from hereafter building a dam across the river which would prevent the water from flowing down to the respondents' village or materially reduced the amount of the water that flows down. The Courts below granted an injunction restraining the appellants altogether from erecting a dam of any kind in future:

Held, that the terms of the injunction granted were too wide. According to the ordinary law each owner has a right to the usufruct of the river or stream which passes through his land. That means not an absolute or exclusive right to the flow of the water but subject to the similar right of all the proprietors of the banks on each side to the reasonable enjoyment of the same; in short, a riparian owner has a right to use and consume the water for irrigating the land abutting a natural stream, provided that he does not thereby cause a material injury to other like owners. The decree of the Courts below was, therefore, modified and an injunction granted restraining the appellants from damming up the river in such a way as to stop the flow of the stream or cause a material injury to the respondents.

Dinkar v. *Narain*, 29 B. 357; 7 Bom. L. R. 265; *Debi Prasad* v. *Joynath*, 24 C. 865; 24 I. A. 60 (P. C.), referred to.

Appeal against the order of the Additional District Judge, Lucknow, dated the 11th March 1910 confirming that of the Munsif, South Lucknow, dated the 30th October 1909.

Mr. *A. P. Sen*, Babu *Basudeo Lal*, Mirza *Samiullah Beg*, Mirza *Mohammad Abid* and Babu *Har Dayal*, for the Appellants.

Mr. *Mumtaz Husain*, Babu *Bisheshar Nath* and Babu *Kalka Prasad*, for the Respondents.

JUDGMENT.—This was a suit by the respondents for demolition of a dam built by the appellants across the river Sai, for a permanent injunction restraining the appellants from hereafter building a dam across the river which will prevent the water from flowing down to the respondents' villages or materially reduce the amount of the water that flows down and for damages.

The Courts below have granted an injunction and awarded Rs. 200 on account of damages.

In second appeal the decisions are attacked upon two grounds, namely, the relief has been given to the respondents, on a ground not taken in the plaint, that the injunction is wrong in form and that there is no evidence to support the award of damages.

The respondents are owner of three villages on the bank of the river Sai. The appellants are the owners of two villages about twelve miles higher up the river. The respondents' case is that they are entitled to dam up the river for the purpose of irrigating the villages; that the appellants have never built a dam in their villages and are not entitled to prevent the water from flowing down to the respondents' village or to do anything which will materially reduce the volume

thereof and that the respondents have a customary right or easement to prevent the appellants from so doing. The appellants denied that the respondents had any right to dam up the river or to prevent the appellants from doing so. The second appellant went so far as to plead that a riparian owner can obstruct the flow of water as much as he pleases so long as he builds the dam on his own land. The Courts below have found that the respondents have failed to establish a customary right or easement entitling them to prevent the appellants from building a dam across the river but that the respondents are entitled under the ordinary law of the land to relief on the ground that the appellants dammed up the river in such a way as to interfere with the respondents' rights, and they assessed the damages at Rs. 200.

It is suggested that the claim of the respondents was based entirely upon the alleged customary right or easement: I do not think so. They distinctly alleged that the appellants were not entitled to stop or do anything which would materially reduce the flow of the water. On the third issue the parties did and could give evidence as to the results of the action of the appellants. It seems to me that the ground upon which relief has been given to the respondents is distinctly taken in the plaint and that it is independent of the allegation of the existence of a customary right or easement. But the terms of the injunction granted by the Munsif and approved by the Additional Judge are too wide. The injunction restrains the appellants altogether from erecting a dam of any kind in future. The evidence does not justify the conclusion that the appellants are not entitld to build a dam of any kind. No custom has been proved modifying the ordinary law applicable to riparian owner. According to the ordinary law each owner has a right to the usufruct of the river or stream which passes through his land. That means not an absolute or exclusive right to the flow of the water in its material state but to the flow of the water and the enjoyment of its subject to the similar right of all the proprietors of the banks on each side to the reasonable enjoyment of the same. A riparian owner has the right to use and consume the water for irrigating the land abutting on a natural stream provided that he does not thereby cause material injury to other like owners: [See *Dinkar* v. *Narain* (1) *Debi Prasad* v. *Joynath Singh* (2), and Dosson on the Law of Riparian Rights *passim*.

Both parties have pitched their cases too high. If the present claim to an injunction were dismissed the result might be a claim by the appellants to dam up the river altogether. I think, therefore, that an injunction should be granted to the respondent restraining the appellants from damming up or otherwise interfering with the flow of the river in such a way as to cause injury to the respondents. There remains the question of damages. The villages of the appellants and respondents are twelve miles apart.

There is some very loose evidence that the crops on the banks of the river in the respondents' villages were rather poor in the year in which the appellants built their dam but there is no evidence that the dam materially interfered with the flow of the water or that the poorness of the crops was due to the action of the appellants. I, therefore, allow this appeal, set aside the decree of the Courts below, and in lieu thereof I grant an injunction restraining the appellants, their agents, servants and workmen from damming up the river in such a way as to stop the flow of the stream or cause material injury to the respondents. As both parties put their cases too high I direct that they shall pay their own costs throughout.

Appeal allowed.

(1) 29 B. 357; 7 Bom. L. R. 265.
(2) 24 C. 865 (P. C.); 24 I. A. 60.

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEAL NO. 79 OF 1910.

March 1, 1911.

Present:-- Mr. Chamier, J. C.

Lala JUGGI LAL AND OTHERS—DECREE-HOLDERS—APPELLANTS

versus

GANGA PRASAD AND OTHERS—JUDGMENT-DEBTORS—RESPONDENTS.

Execution of decree—Limitation for application—"Step-in-aid of execution of a decree", meaning of—Process-fee, effect of depositing—Limitation Act (IX of 1908), Sch. I, Art. 182.

In execution of a decree dated 15th November 1906 the decree-holder's last application was made on the 19th March 1907. In it the decree-holder prayed for the issue of a warrant for the arrest of the judgment-debtor. After several notices, issued to the judgment-debtor, had returned unserved, the Court ordered the issue of a warrant. On the date of the

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last order the decree-holder's agent was present in Court and pr ssed for the issue of a warrant. The present application for execution was made within three years from the date when the order for the issue of warrant was made in the presence of the agent of the decree-holder but more than three years from the date of the last application for execution. The judgment-debtor objected that the execution of decree was barred. The decree-holder contended that his agent's request to the Court to issue a warrant of arrest was an application to the Court to take a step-in-aid of execution and having been made less than three years before the present application there was no bar of limitation:

Held, that the fact that the decree-holder's agent pressed the Court could not be considered as an application to the Court to take a step-in-aid of execution.

Raja Dalip Singh v. *Thakur Durga Bakhsh*, Select Case No. 185, followed.

Pandit *Jagmohan Nath Chak*, for the Appellants.

Pandit *Gokaran Nath Misra*, for the Respondents.

JUDGMENT.—This appeal arises out of an application made on April 28th, 1910, for execution of a decree dated November 15th, 1906. The last previous application was made on March, 19th, 1907. In it the decree-holder prayed for the issue of a warrant for the arrest of the judgment-debtor. The Court in the first instance issued notices to the judgment-debtor to show cause why a warrant should not be issued. April 29th 1907 was fixed for the return of the served notice. When the case was called on on that date it appeared that the second notice had not been served as the judgment-debtor could not be found. The decree-holder's agent then urged the Court to issue a warrant of arrest at once instead of attempting to serve the judgment-debtor with a notice to show cause and the Court agreed. The words in the order-sheet are "The decree-holder's *mukhtar* is present The judgment-debtor is absent. Two notices to the judgment-debtor have been returned unserved as the judgment-debtor has gone away on account of the plague. The decree-holder's agent presses for the issue of a warrant.

"It is, therefore, ordered that a warrant be issued for the arrest of the judgment-debtor returnable on July 7th. The decree-holder will pay the necessary process-fees at once."

The process-fee was paid on the same day.

The authorities are clear that mere payment of process-fees does not amount to an application to a Court to take a step-in-aid of execution. But it is urged that the request of the decree-holder's agent to the Court to issue a warrant of arrest at once was an application to the Court to take a step-in-aid of execution and having been made less than three years before the present application for execution was made saved the present application from the bar of limitation.

Several cases have been cited but none of them covers the present case.

Here there was before the Court a formal written application for the issue of a warrant of arrest No fresh application was made on April 29th on that day. The decree holder's agent merely appeared to support the application. In the language of the Court he pressed it. I am unable to hold that this was an application to the Court to take a step-in-aid of execution. If it was such an application then it must be held that every appearance by a decree-holder, his Pleader or agent in support of a pending application for execution is an application to the Court to take a step-in-aid of execution. Such a construction of Article 182 of the first Schedule to the Limitation Act cannot have been intended by the Legislature. It would lead to great confusion. The view which I take is supported by the decision in *Raja Dalip Singh* v. *Thakur Durga Bakhsh* (1) where Mr. Young declined to hold that ordinary actions supplementary to an application for execution were in themselves applications to the Court to take steps-in-aid of execution.

I dismiss this appeal with costs.

Appeal dismissed.

(1) Select Case No. 185.

PUNJAB CHIEF COURT.

CIVIL REVISION No. 1939 OF 1909.

April 22, 1911.

Present:—Mr. Justice Rattigan.

MATHU MAL—PETITIONER

versus

Musammat AMBO AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 98, 99, 101, 103—Revision—Practice—Preliminary order not contested till final orders passed in the case—Final order itself not contested—Preliminary order, whether can be revised.

The Chief Court will not interfere on the revision side with a preliminary order of a lower Court which is allowed to stand unchallenged at the time it is

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passed, and which is contested only at a late hour and after the inquiry has been made in accordance therewith and a final order (which itself is really not contested) passed by the lower Court.

A party against whom an order is made under Order XXI, rule 98, rule 99 or rule 101 of the Civil Procedure Code, has the right to proceed under Order XXI, rule 103, and, therefore, cannot be allowed to have the order rectified in revision.

Petition, under section 70 (*a*) of Act XVIII of 1884 as amended by Act XXV of 1899, for revision of the order of the District Judge, Delhi, dated the 18th June 1909.

The Hon'ble Mr. *Shadi Lal*, for the Petitioner.

Rai Bhadur *Lal Chand*, for the Respondents.

JUDGMENT.—In 1866, *Musammat* Munia, the widow of Mathu Mal's grandfather on the maternal side, sold the house now in dispute to one Rammi Mal the adoptive father of Kidar Nath.

In 1905, Mathu Mal sued Kidar Nath for possession of the said house. His claim was dismissed in the lower Court but was decreed by the Chief Court on appeal, by decree dated 7th July 1906.

Mathu Mal applied for execution of his decree, and on the 15th October 1906, the bailiff reported that *Musammat* Ambo, the widow of Rammi Mal, was in possession and refused to deliver the house on the ground that it belonged to her, and that one Ram Dit, Pujari, who was in possession of temple which formed part of the property decreed to Mathu Mal, also declined to hand over possession.

On 17th October 1908 Mathu Mal, as decree-holder preferred a complaint under section 328 of the Civil Procedure Code of 1882, and notices were accordingly issued to the objections and on the 30th October 1908, *Musammat* Ambo presented a petition under section 331 of the said Code in which she claimed to be in possession in good faith of the said property on her own account and asserted that she was no party to the suit against Kidar Nath and therefore, not bound by the decree passed, therein. Counsel for the parties concerned were heard, and *Musammat* Ambo's petition was (in accordance with the provisions of the said section) duly registered as a suit, *Musammat* Ambo being declared to be the plaintiff and the decree-holder (Mathu Mal) the defendant. The Court further ordered that the next hearing should take place on the 30th November 1908. On that date the parties and their Pleaders appeared and put forward various pleas on behalf of their respective cases, after which the Court framed seven issues dealing with all the points raised in the pleadings, and fixed the 9th February 1909, for evidence.

The present Code of Civil Procedure came into force on the 1st January 1909.

On the 2nd January 1909, the decree-holder presented an application to the Court to the effect (1) that under section 331 of the Code of 1882, the suit should have been registered as one between himself and plaintiff and the claimant as defendant, and not *vice versa*; (2) that the objections of the claimants did not allege any title as against the decree-holder, and (3) that section 331 of the said Code, contemplates a decision on the true merits of the case. The decree-holder accordingly prayed (1) that the heading of the suit might be corrected, (2) that the suit might be decreed in his favour without further delay, (3) that if the Court was of opinion that further explanations were necessary, *Musammt* Ambo should be called upon to explain her case.

On the 9th February 1909, the District Judge after hearing the parties' Pleaders passed an order to the effect that the previous order making *Musammat* Ambo plaintiff in the suit was clearly wrong and must be cancelled. He then proceeded to take up what he calls the application of the decree-holder, but which was apparently the decree-holder's complaint under section 328 of the Code of 1882 and with reference to this he held, despite the objections of decree-holder's Counsel that the "objection" must be regulated by the provisions of the Civil Procedure Code of 1908, and be decided summarily in accordance with the provisions of Order XXI, rule 99. The learned Judge, therefore, fixed one issue for trial, which was as follows:—"Was the resistance occasioned by *Musammat* Ambo and Ram Dit claiming in good faith to be in possession, *Musammt* Ambo on her own account and Ram Dit as her tenant?"

Before proceeding I may observe that it is somewhat difficult to understand the proceedings of the District Judge of this date. Apparently he cancelled all orders on the application of *Musammat* Ambo, and took action on the complaint (under section 328 of the Code of 1882) of the decree-holder. But I do

not think that this was his intention. What he evidently meant to do was to rectify the mistake in the heading of *Musammat* Ambo's application which had been registered as a suit and to thereafter deal with it as if it was still an application. From the wording of his order, however, it would appear as if he had thrown aside *Musammat* Ambo's application and proceeded simply upon the complaint of the decree-holder. Mr. Lal Chand contends that this was not the learned Judge's real intention and I think he is right. I assume, therefore, that what the District Judge meant was that *Musammat* Ambo's application which had been filed under section 331 of the old Code and registered as a suit between the parties, must, after the coming into operation of the new Civil Procedure Code, be treated as a mere application and decided summarily in accordance with the provisions of Order XXI, rule 99. He, therefore, disregarded all the issues which had been previously framed and fixed the one issue dealing with the claimant's possession of the property.

The learned Judge's successor in office very rightly held that he could not go behind his predecessor's orders of the 9th February 1909, which had not been contested by application to a superior Court, and proceeded to decide the claimant's contention with reference merely to the question of possession and he found that *Musammat* Ambo was in possession in good faith on her own account and Ram Dit as her tenant. He accordingly dismissed the decree-holder's complaint, dated 30th October 1808.

The decree-holder now applies for revision and the application is obviously in respect of the order of the 9th February 1909 as it is based on the ground that, inasmuch as *Musammat* Ambo's application under section 321 of the old Code had been duly registered as a suit between the parties prior to the date when the new Civil Procedure Code came into force, the District Jndge committed a material irregularity and acted without jurisdiction in holding that the provisions of the new Code were applicable thereto and had the effect of re-transferring the suit into an application which could be decided summarily under Order XXI, rule 99. In this connection reliance is placed upon section 6 of the General Clauses Act, 1897, clauses (*b*) and (*c*).

Mr. Lal Chand raises the preliminary objection that as the decree-holder had the right of instituting a suit to establish his claim to the property, (Order XXI, rule 103) no application for revision can lie, even if there has been any material irregularity on the part of the District Judge. The learned Advocate strenuously contends that there has been no such irregularity, but he mintains that in any event this Court should not, in accordance with its well-recognized rules of practice, interfere on the revision side, when the petitioner has another remedy open to him, and that the order of the 9th February 1909, in any event, is no longer open to revision. In my opinion, this objection must prevail. The order of the District Judge which I am now asked to revise is not so much the final order dated the 18th June 1909 as the preliminary order of the 9th February 1909, and the contentions put forward in the grounds of revision and also urged before me are directed almost exclusively against the latter order. Now, no attempt was made by the decree-holder to impugn that order until after the final decision was given in the case, and proceedings went on in the lower Court in accordance with that order and without further demur on the part of the decree-holder, on the 9th February, the 3rd April, the 6th April and subsequent dates, and no application was preferred to this Court for revision of the order of 9th February until the 26th October 1909, despite the fact that the *final* order of the District Judge was passed on the 18th June 1908. I am not now asked to revise the last order, but I *am* asked to go behind it and all the proceedings prior to it, in order to set aside the interlocutory order of the 9th February 1909. It seems to me that it would be grossly unfair to the respondent for me to accede to this prayer. It was at the time open to the petitioner, either to appeal from that order, or if no appeal would lie therefrom to apply to this Court to revise it, and as he elected not to do so, and as he has eventually come forward with a very belated petition, after proceedings have been completed ond final orders long since passed in accordance with the terms of that order, I do not conside that I am justified at this last stage in considering his alleged grievances. Apart from this objection (which *per se* is fatal

to his prayer), it is clear that the petitioner had the right to proceed under Order XXI, rule 103, and as he had that remedy, in order to rectify the *final* order of the District Judge, he cannot reasonably claim any indulgence from this Court. It may be that the petitioner's right to institute a regular suit to establish his right is now barred by limitation. If so, he has only himself to blame. The final order of the District Judge (as above remarked passed on the 18th June 1909 and the present application for revision (which practically impeaches only the prior order of the 9th February 1909) was not filed in this Court till the 20th October 1909. As the hearing before me Mr. Shadi Lal limited his arguments merely to the order of the 9th February 1909 and endeavoured to show that order was erroneous. Without, therefore, going into the merits of the legal points urged before me, in support of the petition, I hold that I am not justified in the circumstances of the case, in interfering at this stage with a preliminary order of the District Judge which was allowed to stand unchallenged at the time it was passed and which is contested only at a late hour and after the inquiry has been made in accordance therewith and a final order (which itself is really not contested) passed by the District Judge.

I, therefore, reject this petition with costs.

Petition rejected.

OUDH JUDICIAL COMMISSIONDR'S COURT.

SECOND CIVIL APPEAL No. 116 OF 1910.

March 1, 1911.

Present:—Mr. Chamier, J. C.

BIKARMAJIT SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SARNAM—DEFENDANT—RESPONDENT.

Landlord and tenant—Tenant, right of, to build on his 'sahan'—*Estoppel against the landlord if building not objected to in time—Minority of landlord at the time of building, effect of*—Wajib-ul-arz, *interpretation of*—"Chaupal", *meaning of.*

The appellants, as *zemindars* of a village, brought a suit calling upon the respondent, a tenant in the village, to remove a *chabutra* and a *chaupal* erected by him on land which was entered in the *khasra* as the "*sahan*" of his house. The Court of first instance decreed the claim but the lower Appellate Court dismissed it on the ground that the appellants were not entitled under the terms of the *Wajib-ul-arz* to have the erections removed, and that they were estopped from making the present claim as they were aware that the defendant was building on the land and took no steps to prevent him from going on with the buildings:

Held, that the appellants were not estopped from making the present claim because when erections were made one of the major plaintiffs was in jail and the other major plaintiff was absent from the village and the rest of the plaintiffs were at that time and were still minors.

Held, further, that inasmuch as the *Wajib-ul-arz* provided that the tenant was not to build a '*makan*' on the *zemindar's* land without his premission, the defendant was not competent to build the *chaupal*, which being a covered building was to be treated as a '*makan*' under the terms of the *Wajib-ul-arz*.

Babu *Basudeo Lal*, for the Appellants.

Mr. *E. Manuel*, for the Respondent.

JUDGMENT.—The question in this appeal is whether the plaintiffs-appellants, who are *zemindars* of a village, are entitled to call upon the defendant-respondent, a tenant in the village, to remove a *chaubutra* and a *chaupal* erected by him on a plot No. 157 which is the *sahan* of his house. The Munsif decreed the claim, but the Subordinate Judge dismissed it holding that the plaintiffs are not entitled under the *Wajib-ul-arz* or otherwise to have the erections removed and that they are estopped from making the present claim because they were aware that the defendant was building on the land and took no steps to prevent him from going on with the buildings. The decision that the plaintiffs are estopped from making the present claim cannot be supported, for the evidence shows that the *chaubutra* and *chaupal* were built three or four years before this suit was brought when one of the major plaintiffs was in jail and the other major plaintiff was absent from the village having absconded in fear of a criminal charge. The rest of the plaintiffs were at that time and still are minors. For the same reason, the suit cannot be held to be barred by limitation under Article 32 of the first Schedule to the Limitation Act supposing that Article to be applicable to the suit as the defendant contends.

The *Wajib-ul-arz* provides that a tenant may not build a *makan* on the *zemindars'* land without their permission. The *chaupal* being a covered building seems to me to be a *makan* within the meaning of the *Wajib-ul-arz* whether it was built for the purpose of being used as a house in the ordinary sense or not. No particulars are given as to the

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chaubutra and I am not prepared to hold that a *chaubutra* is necessarily a *makan*.

I allow the appeal, set aside the decree of the Subordinate Judge and give the plaintiffs a decree for the demolition of the *chaupal*. The defendant is allowed one month's time within which to remove the *chaupal*. The rest of the claim is dismissed. The parties will pay their own costs thorughout.

Appeal allowed.

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEL No. 68 OF 1910.

February 1, 1911.

Present :—Mr. Chamier, J. C.

AJUDHIA SINGH—DECREE-HOLDER—APPELLANT

versus

DRIGPAL SINGH AND ANOTHER—JUDGMENT-DERTORS—RESPONDENTS.

Decree in which no time is fixed for payment, effect of—Application for execution of decree—Declaratory decree—Decree capable of execution even though no time fixed for payment—Civil Procedure Code (Act V of 1908), s. 47, cl. (2).

The plaintiff sued for possession of immoveable property and for mesne profits. A compromise was arrived at in pursuance of which a decree was passed for possession of the property subject to the payment by the plaintiff of a certain sum stated in the compromise. The compromise, however, did not mention the time during which the money was to be paid. Several years after, the plaintiff deposited the money in Court and prayed for delivery of possession of the property in suit. The defendant objected that, as money had not been deposited within three years, the execution of the decree was barred by limitation and delivery of possession could not be allowed. The plaintiff contended that the decree was not capable of execution until the money was paid into Court and the application for execution having been made within three years of that payment was within time. He also contended that the decree was purely declaratory and the application for execution may and should be treated as a suit with reference to section 47, clause (2 , of the Code of Civil Procedure:

Held, that the decree was intended to be executed and not to merely declare the rights of the parties to be enforced in a subsequent suit:

Held, further, that if no time for payment of the money was fixed by the decree, the decree-holder had three years within which to execute the decree and as in the present case the money had not been deposited within three years from the date of the decree, the application was time-barred.

Raja Partab Bahadur Singh v. *Raja Surat Singh*, 8 O.C. 361; *Jogeshur Singh* v. *Bhagwan Baksh*, 9 Ind. Cas. 337, 14 O. C. 10; *Etyati Pooparambhi Beva* v. *Matalakat Krishna Menon*, 28 M. 211; *Maloji* v. *Sagaji*, 13 B. 567; *Narayan Govind* v. *Ananda Ram Koji Ram*, 16 B. 480 and *Maruti* v. *Krishna*, 23 B. 592, referred to.

Chedi v. *Lalu*, 24 A. 300; *Mohammad Suleman Khan* v. *Muhammad Yar Khan*, 17 A. 39, not followed.

Babu *Basudeo Lal*, for the Appellant.

Pandit *Gokaran Nath Mirsa*, for the Respondents.

JUDGMENT.—The appellant in this case sued for possession of immoveable property and for mesne profits. On July 7th, 1904 the parties entered into a compromise in pursuance of which a decree was passed on the same day which ran as follows:—

"It is ordered in terms of the compromise that upon the plaintiff's depositing Rs. 400 payable to Dirgpal Singh, defendant No. 2, plaintiff will get proprietary possession of the 11 *P.* 13 *Krant* 2 *Jau* share ; parties will pay their own costs. The rest of the plaintiff's claim is dismissed."

In March 1910 the appellant paid Rs. 400 into Court and on April 1st, 1910, he applied to the Court for the delivery of possession of the share decreed. Both the Courts below have held that the application is barred by limitation.

The learned Advocate for the appellant contends that the decree was not capable of execution until the money was paid into Court by the appellant and the application for execution having been made within three years of that, payment was within time. Alternatively, he contends that the decree was purely declaratory and the application for execution may and should be treated as a suit with reference to section 47 (2) of the Code of Civil Procedure.

Taking the second contention first I am unable to hold that the decree was intended only to declare the rights of the parties. The case of *Raja Partab Bahadur Sinph* v. *Raja Surat Singh* (1) and other similar cases relating to Settlement Court decrees which have been referred to, appear to me to have no bearing on the present case. Reading the decree with the compromise, I have no doubt that the decree was intended to be executed and not to merely declare the rights of the parties to be enforced in a subsequent suit.

In *Etyati Pooparambhi Beva* v. *Matalakat Krishna Menon* (2) it was held that a decree for redemption should be treated as executable from the date on which it is passed although it allows the decree-holder no time within

(1) 8 O. C. 361.
(2) 28 M. 211.

which to pay the mortgage-money. That decision was approved and followed by this Court in *Jogeshur Singh* v. *Raja Bhagwan Buksh* (3) in which the question was whether execution of a decree for redemption was barred by limitation. In *Maloji* v. *Sogaji* (4) it was held that if no time for payment of the mortgage-money is fixed by a decree for redemption the decree holder has three years within which to execute the decree. This decision was approved in *Narayan Govind* v. *Ananda Ram Koli Ram* (5) and *Maruti* v. *Krishna* (6) in which it was said that such a decree may be executed after the expiry of three years if it has been kept alive by applications for execution made according to law within the prescribed period. All these decisions were passed in relation to decrees for redemption, but there is a close analogy between the decree considered in those cases and the decree in question in the present case. The only decision of which I am aware which in any way conflicts with those decisions is that of *Chedi* v. *Lalu* (7) where it was held that a decree for possession does not become capable of execution until the pre-emptive price is paid into Court. The soundness of this ruling appears to me to be open to question. The holder of a decree for pre-emption can execute decree as soon as he pleases provided that he complies with the conditions imposed upon him. In the case of *Mohammad Suleman Khan* v. *Mohammad Yar Khan* (8), which the High Court followed in the case of *Chedi* v. *Lalu* (7), the decree as passed was incapable of execution. The decree-holder was obliged to have it amended by the Court before he could execute it.

It appears to me that the decree in question in the present case was executable from the date on which it was passed and, therefore, the appellant was bound to apply for execution within three years or taken steps within that period which would have the effect of keeping the decree alive. I agree with the Courts below that the appellant's application for execution was barred by limitation.

The appeal is dismissed with costs.

Appeal dismissed.

(3) 14 O. C. 10; 9 Ind. Cas. 337
(4) 13 B. 507.
(5) 16 B. 480.
(6) 23 B. 592.
(7) 24 A. 300.
(8) 17 A. 39.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 137 OF 1910.

January 19, 1911.

Present:—Mr. Piggott, A. J. C.

Musammat PARBATI—DEFENDANT—APPELLANT

versus

MAHARAJ SINGH—PLAINTIFF AND ANOTHER—DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), ss. 13, 32, cls. (3) and (5)—Admissibility of proceedings of another litigation—Statement made by a woman as to her marriage with another person, admissibility of—Finding of fact, how far it can be challenged in second appeal—Whole cannot be challenged—Practice.

The question for decision was whether the appellant was the legitimate daughter of one *K.* and *R.* The respondent contended that *R.* was not the legally married wife of *K.* and in proof of it produced a compromise and a decree between *R.* and another person by which *R.* obtained only a small amount as maintenance. He also relied upon a statement made by *R.* on a certain occasion admitting that she was the concubine and not the married wife of *K.* The question before the Court was whether the compromise and the decree passed in the other suit as well as the statement of *R.* were admissible in evidence. In second appeal it was also urged that the statement of *R.* had not been proved by the best available evidence:

Held, that the compromise and the decree passed in the other case were relevant facts under section 13 of the Evidence Act:

Held, also, that the statement of *R.* was admissible in evidence under section 32, clauses (3) and (5), of the same Act:

Held, further, that it was not for a Court in second appeal to consider the precise degree of weight to be attached to the different parts of evidence. If a finding of fact had been arrived at after a careful consideration as a whole, no valid objection in law could be made in second appeal with respect to this finding.

Mr. *Nabiullah* and Pandit *Ikbal Narain Masladan*, for the Appellant.

Pandit *Gokaran Nath Misra*, for the Respondent No. 1.

JUDGMENT.—This is a second appeal by *Musammat* Parbati, who was the first defendant in a suit brought by the respondent, Thakur Maharaj Singh, for mortgage-possession of 10 *bighas* 5 *biswas* of land in *mauza* Muzaffarpur Sara. The plaintiff claims under a mortgage by one *Musammat* Rukmin, who was the second defendant in the suit as brought, but who has failed to put in any appearance as respondent in this Court. The land in question was in possession of *Musammat* Radha, mother of appellant, up to the time of her death in December 1907; and it cannot be denied that so far as *Musam-*

mat Radha herself was concerned, her possession was subject to the provisions of a compromise-decree passed in certain litigation between *Musammat* Radha and *Musammat* Rukmin already mentioned. If the terms of that compromise-decree are binding on the appellant *Musammat* Parbati, she has no defence against this suit. Her only valid defence against the plaintiff's claim lies in her plea that she took possession of the land in suit on her mother's death, not as heir of the latter, but as heir of her own father Kalyan Singh. To the establishment of this defence, again, it is essential that the appellant should prove that she was the legitimate daughter of Kalyan Singh, born while the said Kalyan Singh and *Musammat* Radha were living in lawful wedlock. This was denied by the opposite party and has been expressly found against the appellant by the Courts below. All the pleas taken in the memorandum of second appeal to this Court are clearly subject to the point already taken, namely, that the appeal cannot succeed unless *Musammat* Parbati can show cause why this Court should go behind the finding of fact arrived at by the Court of first appeal with regard to the legitimacy of the appellant. This was, in fact, conceded in argument before this Court. The first ground which was pressed upon me as a reason for interfering with the finding of the lower Appellate Court was that the Court of first instance, the learned Munsif of North Unao, had neglected to frame a specific issue on the question of the legitimacy of *Musammat* Parbati. This point has been dealt with by the learned District Judge in appeal; I think *Musammat* Parbati was not prejudiced by the somewhat sketchy form in which issues were framed in the first Court, and that this Court would not be justified in interfering on second appeal on this ground.

The only other point argued before me was that the decision of the lower Appellate Court proceeds in part upon irrelevant and inadmissible evidence. I have no doubt that the fact of the previous litigation between *Musammat* Radha and *Musammat* Rukmin, and the nature of the compromise in which that litigation resulted, were relevant facts in the present case under the provisions of section 13 of the Indian Evidence Act (I of 1872). I also think that the plaintiff was entitled to proof under the provisions of section 32, clause 3, and probably also clause 5, of the same Act, the fact that *Musammat* Radha had on a certain occasion made a statement admitting that she was the concubine and not the married wife of Kalyan Singh. The question whether this statement, even if admissible, was proved by the best available evidence was also argued before me, but under the circumstances I do not think any valid exception can be taken to the procedure adopted in the Munsif's Court. It is not for me to consider in second appeal the precise degree of weight attached by the lower Appellate Court to different parts of the evidence before it, or to say whether I should myself necessarily have regarded that evidence in precisely the same way. There has been a finding of fact arrived at after fair consideration of the evidence as a whole, and I am clearly of opinion that no valid objection in law has been made out in respect of his finding. I accordingly dismiss this appeal with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 536 OF 1910.

February 22, 1911.

Present:—Mr. Justice Griffin.

BADRI BHAR—DEFENDANT—APPELLANT

versus

RAM SARAN PANDE—PLAINTIFF

—RESPONDENT.

Contract Act (IX of 1872), s. 23—Compromise—Withdrawing complaint of a compoundable offence—Consideration, legality of.

A. and *D.* entered into a compromise whereby *A.* agreed to permit *B.* to continue in possession of a certain house in consideration whereof *B.* withdrew a complaint which he had filed in a Criminal Court against *A.* in respect of a compoundable offence:

Held, that the compromise was lawful and was binding upon the parties.

Amir Khan v. *Amir Jan*, 3 C. W. N. 5, referred to.

Second appeal from the decision of the Subordinate Judge of Gorakhpur, dated the 22nd March 1910.

Mr. *Sital Prashad Ghose*, for the Appellant.

Mr. *Iswar Saran*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by a *zemindar* aginst a *ryot* for possession of a house situate in the *abadi* of the village. The suit was instituted on the 11th May 1907. Upon the 7th May of the same year, Badri, one of the defendants, had filed a complaint against the plaintiff charg-

ing him with offences punishable under sections 323 and 426, Indian Penal Code. In the criminal case the parties came to a compromise, the material terms of which were to the effect that the present plaintiff agreed to the defendant Badri remaining in possession of the house, that the plaintiff would not interfere with that possession and that in consequence of that arrangement Badri withdrew his complaint. In the defence to the present suit it was pleaded that the plaintiff had no right to maintain the suit by reason of the compromise above referred to. The Court of first instance gave effect to the plea and dismissed the plaintiff's suit. The lower Appellate Court, on appeal by the plaintiff, held that the compromise was obtained under undue influence and decreed the suit. The defendant comes here in second appeal. There was no issue as to undue influence in the Court of first instance. One of the grounds of appeal to the lower Appellate Court set out that the deed of compromise was executed under undue influence through fear of the criminal case in order to have it struck off. It is contended on behalf of the appellant that whether the plaintiff is precluded by reason of section 115 of the Evidence Act from denying the right of the defendant to remain in possession, yet, in any case, the agreement contained in the compromise is one which should be given effect to. I have been referred to a ruling reported in *Amir Khan* v. *Amir Jan* (1), in which it was held that an agreement by the defendant to execute a *kobala* of certain land in favour of the plaintiff in consideration of the latter's abstaining from prosecuting criminal proceedings against the former in respect to an offence which was compoundable, was an agreement enforceable at law and was not opposed to public policy.

In the present case, the charge preferred by the defendant Badri against the plaintiff in the Criminal Court was clearly compoundable at the will of the complainant under section 345, Criminal Procedure Code. It does not appear to me that, under the circumstances, the agreement can be held to be an unlawful agreement within the meaning of section 23 of the Contract Act. The Court below has, however, held that the agreement was not enforceable by reason of the fact that it was executed under undue influence. As said above, there was no issue upon that point in the Court of first instance. The passage relating to undue influence in the judgment of the Court below can hardly be styled a finding. It is as follows:—

"The agreement is, I think, not binding on the plaintiff as the defendant Badri obtained this agreement by exercising undue influence on him by prosecuting him in the Criminal Court."

If the above is said to constitute a finding it does not appear to me to be a legal inference from established facts. The appellant Badri abandoned his charge in the Criminal Court on the promise of the present plaintiff allowing him to remain in possession of the house in dispute. The consideration which the plaintiff received for the agreement contained in the compromise was the abandonment by the defendant of criminal proceedings. In my opinion the agreement is one which should be given effect to. I allow the appeal, set aside the decree of the Court below and restore that of the Court of first instance with costs.

Appeal allowed.

(1) 3 C. W. N. 5.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 384 OF 1909.

February 7, 1911.

Present:- Mr. Chamier, J. C.

KANCHAN SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

Musammat JAFRI BEGAM—PLAINTIFF AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage of property not in the possession of the mortgagor, effect of—Long term for redemption fixed in the mortgage-deed, validity of—Redemption not allowed by the assignee of mortgagor in a suit for possession by the mortgagee—Mortgagee bound to pay money paid for redemption of prior mortgage—Suit for possession not a suit for specific performance.

In 1886 one *K.* mortgaged a share in a village with possession to one *J.* Subsequently, in 1898, the same share was mortgaged with possession to the plaintiff for a term of 80 years, it being expressly stipulated that the mortgagor shall not redeem until the expiry of the said period. In 1905 *K.* sold the property to the defendants, who then paid off *J.*'s mortgage of 1886 and took possession of the property mortgaged. The plaintiff now brought a suit for possession on the basis of the mortgage of 1898. The defendants contended that the mortgagor, not being at the date of transaction in possession of the mortgaged property, had no right to mortgage it with possession and that

the plaintiff could not claim possession on the strength of the deed. It was also contended that the condition in the mortgage-deed that the mortgagor shall not redeem for 80 years should not be enforced and the defendants should be allowed to redeem the plaintiff's mortgage:

Held, that although the property was not in the possession of the mortgagor in 1898 when he mortgaged it to the plaintiff, yet that circumstance could not prevent the plaintiff from asserting her right under the terms of her mortgage-deed and that, therefore, she was entitled to recover possession of the property mortgaged to her:

Held, further, that the present suit for possession could not be treated as a suit for the specific performance of the contract, and that the defendants could not be allowed to redeem in the present suit inasmuch as the defendants had not offered to redeem the plaintiff's mortgage, nor had they paid the Court-fee which would be payable on a prayer for redemption of the mortgage:

Held, also, that it was premature to consider whether the provision that the mortgage shall not be redeemed for 80 years should be enforced or not, as the plaintiff had not yet obtained possession of the property and no question of redemption could till then arise:

Held, lastly, that the plaintiff, before obtaining possession of the property mortgaged, must pay to the defendants the amount of money paid by them to the mortgagee of 1886.

Kalka Singh v. *Himayat Ali*, 10 O. C. 218, referred to.

Mr. *A. P. Sen* and Babu *Basudeo Lal*, for the Appellants.

Mirza *Samiullah Beg*, for the Respondents.

JUDGMENT.—This was a suit by one Jafri Begam for possession as mortgagee of a $2\frac{1}{2}$ *biswas* share in a village. The facts are as follows:—On May 10th, 1886, Newaz Singh, the owner of the property mortgaged it with possession to Tasadduq Husain, the husband of the present plaintiff, for twenty years to secure a payment of a sum of Rs. 2,000 and agreed that the mortgagee should enter into possession and receive the profits in lieu of interest on Rs. 1,000, and that the remaining Rs. 1,000 should carry interest at the rate of 2 per cent, per mensem. On November 12th 1898, Newaz Singh mortgaged the property to the plaintiff for Rs. 2,000 for a term of eighty years. In this mortgage also it was provided that the mortgagee should hold possession in lieu of the interest on Rs. 1,000 and that the remaining Rs. 1,000 should carry interest at the rate of 2 per cent. per mensem. It was expressly provided that the mortgagor should not redeem until the expiry of the period of eighty years, and further that if redemption did not take place at the end of that period, the transaction should be considered to be a sale. On December 26th, 1905, Newaz Singh sold the property for Rs. 12,000 to defendants Nos. 2 and 3, Kanchan Singh and Jagannath Singh, who then paid off Tasadduq Husain's mortgage of May 1886 and took possession of the property. Subsequently, they mortgaged the property to defendants Nos. 4, 5 and 6. This is a suit by Jafri Begam for possession of the mortgaged property on the basis of her mortgage of November 12th, 1898. The defence was that the mortgage to the plaintiff was without consideration; that it had been obtained from the mortgagor by undue influence exercised by Tasadduq Husain, and that regard being had to the terms of the mortgage the transaction was not enforcible. The Courts below have held that the mortgage was made for the consideration stated in the deed; that the mortgage-deed was not procured by the exercise of undue influence, and that the plaintiff is entitled to possession on the basis of the mortgage.

In second appeal it is contended that the Courts should have declined to pass a decree in favour of the plaintiff when they found that there had been deceit in the transaction. There are expressions in the judgment which suggest that the Courts were not satisfied with the conduct of the plaintiff or her husband, but they must be disregarded in the face of the findings that the mortgage was for consideration and was not obtained by undue influence.

The second point taken in appeal is that the account-books of the plaintiff, not having been properly and regularly kept, should not have been relied upon by the Courts as evidence of the existence of the consideration. We find, however, that the lower Appellate Court was satisfied that Newaz Singh signed these account-books and thereby admitted that the sums stated therein to be due by him was correct. There is evidence to support the finding of the lower Appellate Court that the mortgage was made for the consideration stated in the deed and we must accept the finding.

The third ground of appeal has not been pressed. It has been dealt with sufficiently by the lower Appellate Court.

Great stress was laid upon the 4th ground of appeal, namely, that the mortgagor not being at the date of the transaction in possession of the mortgaged property had no right to mortgage it with possession to the

plaintiff and the plaintiff could not claim possession on the strength of the deed. It is a fact that the mortgagor was not in possession at the date of the mortgage and the statement in the deed that the plaintiff had been placed in possession of the property is not true, but this is a common feature in transactions of this kind. One often finds a person making a mortgage stating that he is in possession and has delivered possession to the mortgagee, whereas in fact the property is in possession of a third person. It has never yet been held that, in such circumstances, the mortgagee is not entitled to assert the right to possession which the deed gives him. In our opinion, the circumstance that Newaz Singh was not in possession at the date of the mortgage in suit does not prevent the plaintiff from claiming the possession to which she is entitled under the deed.

The fifth ground of appeal is as follows:—"Because, looking at all the circumstances and the equities of the case, it is not one in which specific performance of contract ought to be decreed." This suit for possession on the basis of a mortgage is not a suit for the specific performance of the contracts [see the decision of this Court in *Kalka Singh* v *Himayat Ali* (1)]. It was suggested in the course of argument that this ground of appeal was wide enough to cover a question which was raised in the first Court and also on appeal to the lower Appellate Court, namely, whether a provision in a mortgage-deed that the mortgage shall not be redeemed for so long a period as eighty years should be enforced. In a supplementary written statement filed by the defendants in the first Court they pleaded that if the deed in suit was held to have been executed for consideration they should be given an opportunity of redeeming the property. An issue was framed upon this question and was decided against the defendants. In their appeal to the District Judge they urged that a decree should be passad in favour of the plaintiff only in case the defendants failed to deposit in Court the amount found due to the plaintiff. In the memorandum of appeal presented to this Court nothing is said about redemption of the plaintiff's mortgage by the defendants. The appellants have not offered to redeem the plaintiff's mortgage and they have not paid the Court-fee which would be payable on a prayer for redemption of a mortgage. It seems to us that it is premature to consider whether the provision that the mortgage shall not be redeemed for eighty years should be enforced or not. The plaintiff has not yet obtained possession of the property. It may be that if the provision in question should not be enforced in its entirety it would be reasonable to allow the plaintiff to retain possession for a few years. We express no opinion upon this question.

A cross-objection has been filed on behalf of the plaintiff to the effect that she should not have been called upon to pay to the defendants the amount which they paid for redemption of Tasadduq Husain's mortgage of 1886. It is argued on her behalf that they cannot have intended to keep that mortgage alive; but regard being had to the circumstances they can have had no other intention. The sale-deed to the defendants Nos. 2 and 3 mentions the mortgage to the plaintiff though it alleges that it was a *farzi* transaction. It is quite clear that the defendants Nos 2 and 3 knew when they purchased this property that they would have to deal with the plaintiff sooner or later and they must have intended in case of necessity to use the mortgage paid off by them as protection against the plaintiff's claim.

The appeal and the cross-objection are dismissed with costs.

Appeal dismissd.

(1) 10 O. C, 218.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 2071 OF 1909.

April 7, 1911.

Present:—Mr. Justice Coxe.

SHIBA PRASAD SAMANTA AND OTHERS—PLAINTIFFS—APPELLANTS

versus

GOSSAIN DAS DATTA AND ANOTHER—DEFENDANTS—RESPONDENTS.

Bengal Embankment Act (VI B. C. of 1882), ss. 56, 57, 68, 86—Collector—Power to apportion embankment charges—Contract between zemindar and tenure-holder—Civil Court—Jurisdiction to interfere with Collector's order—Specific Relief Act (I of 1877), ss. 54, 56.

Under the Bengal Embankment Act, the Collector is authorised to assess the embankment charges on tenures after due notice; and the tenure-holders are bound to pay those sums to

the *zemindar*. The Collector's order is not subject to any contract made between the tenure-holders and the *zemindar*; that is, the order is not a nullity even if it be contrary to any such contract.

Section 86 of the Embankment Act enacts that orders passed under section 68 shall be final. The Civil Courts, therefore, have no jurisdiction to modify or alter such orders.

Appeal from the decree of the Sub-Judge of Midnapur, dated July 12th, 1909, modifying that of the Munsif of Midnapur, dated December 9th, 1909.

Babu *Joy Gopal Ghosha*, for the Appellants.

Babu *Nanda Lal Banerjee*, for the Respondents.

JUDGMENT.—The plaintiffs in this case are *putnidars* under the defendants-respondents and there is a stipulation in the *putni* that the *zemindar* shall pay the *poolbandi* cesses. Embankment charges were assessed by the Collector under the Bengal Embankment Act, 1882, and have been apportioned on the plaintiffs as *putnidars*. The plaintiffs have brought this suit for a declaration that they are not bound to pay these charges and that the orders of the Collector cannot be enforced and for an injunction against the defendants from realizing these charges from them. The suit was decreed by the Munsif but dismissed, on appeal, by the Subordinate Judge. The plaintiffs appeal to this Court.

Under section 54 of the Bengal Embankment Act, the whole sum assessed as embankment charges is payable to the Collector by the *zemindars* of the Estates benefited. Under section 55, every *zemindar* is entitled to recover from the tenure-holders under him the sums apportioned to those tenures under section 59. This apportionment is made by the Collector after notice has been given under section 56 that an inquiry will be held for the purpose of apportioning amongst the *zemindars* and the tenure-holders the sums so payable, and section 59 enacts that the Collector shall charge or apportion the amount payable in respect of each Estate upon the holders of the tenures therein rateably in the proportion of the benefit received. When the apportionment has been completed the Collector, under section 68, makes an order specifying the Estates and tenures in respect of which the sums charged or apportioned are payable, and, when that has been done, the Collector, under section 69, causes a copy of the said order to be published with a notice that the amounts apportioned on the tenure-holders are payable to the *zemindars*. Taking all these sections together, it is quite clear the Collector is authorised to assess the embankment charges on tenures after due notice and that the tenure-holders are bound to pay those sums to the *zemindars*. There is no means by which Government can recover those charges from the tenure-holders.

The *first* point taken on behalf of the appellants is, that the Collector's orders apportioning the embankment charges on tenure-holders, must be subject to any contract made between the tenure-holders and the *zemindars*; and that, if such an order is contrary to any such contract, it is a nullity. It is said that all these orders of the Collector must be construed as being passed on the assumption that there is no contract to the contrary. There is certainly nothing in the Act to support this view and I should have expected that, if this had been the intention of the legislature, suitable words would have been introduced, to indicate that the Collector's proceedings were subject to contracts between the parties; and that it was not the intention of the legislature to make these orders so subject to contracts between the parties may be inferred from the arguments contained in the judgment of the Collector, dated the 5th July 1904 on the objection of the present plaintiffs to pay the charges. The Collector pointed out in that order that a contract of this nature might conceivably make the superior estate insolvent,—unable to pay the charges itself, and unsaleable for arrears of such charges. In such a case, as the Government could not recover the charges from the tenure-holders, the result would be that they would not be collected at all. On these considerations I am not at all prepared to accept the plaintiffs' contention that, if the Collector's order under section 68 conflicts with a contract between the parties, it must be regarded as a nullity.

Secondly, it is urged that the plaintiffs do not desire that the Collector's order should be set aside but merely that it should not be enforced as against them. This distinction is somewhat too fine for my appreciation. It seems clear that if these embankment charges cannot be realised in accordance with the Collector's order, the Collector's

order is, to all practical intents and purposes, set aside.

Thirdly, it is urged that the matter is concluded by the doctrine of *res judicata*, but I do not think that contention can possibly succeed. The decision of the High Court which laid down that the *zemindars* would be bound to pay the *poolbandi* charges was passed in appeal from Appellate Decree No. 920 of 1880, and could not possibly conclude the defendants in this case from pleading that they are not bound to pay the embankment charges assessed under an Act which had not been passed at the time of the previous decision.

The *fourth* point taken is, that the Civil Courts are entitled to give relief under section 54 of the Specific Relief Act and that the present is a suitable case in which such relief should be given. No doubt the Courts have such powers, but it appears to me that section 86 of the Embankment Act prevents any decree being given to the plaintiffs in the present case. That section enacts that orders passed under section 68—and I have no doubt whatever that the order now under criticism was passed under section 68—shall be final and not liable to be modified or altered otherwise than as expressly provided in this Act. I do not see that any advantage is gained by twisting the simple words of a statute and making them mean the precise opposite of what they appear to mean. I cannot hold that orders passed under section 68 are not final or are liable to be modified or altered at its discretion by a Civil Court under section 54 of the Specific Relief Act. The words seem to me to be perfectly simple and they cannot be evaded in this case without doing violence to the English language.

The view of the learned Subordinate Judge that a decree in favour of the plaintiffs would interfere with the public duties of the Embankment Collector has been criticized and it may not perhaps be sustainable. The effect of the orders of the Embankment Collector is that the *putnidars* shall pay the charges to the *zemindars* and, if these charges are not paid, that default will not interfere with the duties of the Embankment Collector, unless the *zemindari* Estate is thereby rendered insolvent, a contingency which is hardly immediate enough to come within the scope of section 56, clause (*d*), of the Specific Relief Act.

It appears to me that the Civil Courts have no jurisdiction to modify or alter orders duly passed under section 68 of the Embankment Act, and accordingly I think that the decision of the learned Subordinate Judge is right and dismiss the appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.
FIRST CIVIL APPEAL No. 154 OF 1908.
March 22, 1911.
Present:—Sir Ralph Benson, Judge, and Mr. Justice Sundara Aiyar.
P. R. AIYANNA CHARIAR—APPELLANT
versus
LAKSHMI AMMAL AND OTHERS—RESPONDENTS.

Hindu Law—Adoption—Adoption not valid—Claim by reversioner to property of adoptee—Relationship of plaintiff as sapinda *to adoptee's natural family—Recognition of adoption—Estoppel—Whether bars right to claim as reversioner—Mistaken impression of law as to validity of adoption, effect of—Title by prescription.*

Plaintiff sued for a declaration that certain alienations by 1st defendant were not binding on him as reversioner to her deceased husband *R.* It was found and conceded by plaintiff that *R.* was adopted into another family, but that the adoption was not valid. The lower Court found, however, that plaintiff had treated *R.* all along as an adopted son, that, therefore, he was estopped from disputing the validity of the adoption, that *R.* ceased to belong to his natural family, and that plaintiff's claim to the reversion as a member of *R.*'s natural family could not be upheld:

Held, (1) that the result of the estoppel would only be to prevent the plaintiff from disputing *R.*'s title to the property of his adoptive father as adopted son, and that it could not give *R.* the status of an adopted son or put an end to his position as a member of his natural family.

A mistaken impression of law regarding the validity of an adoption is not a ground on which any estoppel can be based.

(2) that *R.*'s adoption being invalid, his title to his adoptive father's estate was acquired by prescription, *viz.*, an absolute heritable estate and that plaintiff was entitled to the reversion.

Rajaya Lakshmi v. *Saryanarayana*,, 3 M. L. J. 100, referred to.

Dalton v. *Fitzgerald*, (1897) 2 Ch. 86; 66 L. J Ch. 604; 76 L. T. 700; 45 W. R. 695, distinguished.

Appeal against the decree of the District Court of Chingleput in Original Suit No. 14 of 1906.

Messrs. *T. R. Ramachandra Aiyar*, *S. Gopalsawmi Iyengar* and *C. Padmanabha Iyengar*, for the Appellant.

AIYANNA CHARIAR *v.* LAKSHMI AMMAL.

Messrs. *K. Sreenivasa Aiyangar* and *R. Rangaswami Iyengar*, for the Respondents.

JUDGMENT.—This is an appeal from the decision of the District Court of Chingleput in a suit for a declaration that certain alienations made by the first defendant, the widow of one Srinivasa Raghavachari, were not binding on the plaintiff who claims to be the nearest reversioner of her husband entitled to succeed on the first defendant's death. The lower Court has found that the plaintiff is not proved to be the nearest reversioner and dismissed the suit on that ground without deciding the other issues. The plaintiff's father was admittedly the natural brother of the father of the first defendant's husband. The case of the defendants is, that Rangachari was given away in adoption to one Raghavachari and ceased to be a member of the plaintiff's family. The plaintiff denied the adoption of Rangachari and alleged that the adoption, even if true, was invalid. He also claimed to be Rangachari's reversionary heir, even if the adoption was true and valid. The factum of the adoption was found in the defendant's favour by the lower Court and in fact was conceded by the plaintiff's Vakil in the course of the case, and the learned Vakil, for the appellant does not seriously contest it before us. The lower Court held that the adoption was invalid, it being a second adoption made by Rangachari's widow, Kanakammal, long after the estate of her husband had vested in her first adopted son, and then in that adopted son's adopted son, and finally in the widow of the latter. It was admitted for the respondent that this finding could not be disputed. The lower Court has found, however, that Rangachari was all along treated as Raghavachari's adopted son and that the plaintiff is estopped from disputing the validity of the adoption, and it has further held that for the purposes of this case it must be taken that Rangachari consequently ceased to belong to his natural family, and the plaintiff could not claim to the reversion of Rangachari as a member of his natural family. The plaintiff's right as reversioner, even in the event of the adoption being valid, is held by the lower Court not to be proved. In appeal it is contended that the finding as to the estoppel is incorrect and that in any event the result of the estoppel would only be to prevent the plaintiff from disputing Rangachari's right to the property of Raghavachari as his adopted son but that it could not give him the status of an adopted son or put an end to his position as a member of his natural family. We are of opinion that both these contentions should be upheld. There is practically no evidence of estoppel at all. The facts on which the learned Vakil for the respondent seeks to maintain the finding of the lower Court are (1) that Rangachari did not take a share in the property of his natural family along with the plaintiff's father, the whole estate being taken by the latter; (2) that Rangachari's position as adopted son was recognised by his relations, and (3) that the plaintiff's father wrote the letters Exhibits XIX (*a*) to XIX (c) to Kanakammal and her first adopted son's widow Srirangammal, soon after the adoption in which he inquired about the welfare of the 'child Rangachari.' These facts, in our opinion, are quite insufficient to establish the plea of estoppel. It is not contended that Rangachari claimed any share of the property of his natural family and was refused by the plaintiff's father Rangachari was evidently under the impression that his adoption was valid and it may be that the plaintiff's father and other relations also shared in that impression, a fact which would account for the letters already referred to. But it is now well-established that a mistaken impression of law regarding the validity of an adoption is not a ground on which any estoppel can be based. Mr. Srinivasa Iyengar does not contend that the estoppel could change the natural status of Rangachari, if the adoption was invalid. But he argues that as Rangachari purported to hold the property in suit as the adopted son of Raghavachari, the reversionary heirs entitled to succeed on the death of the first defendant are the *sapindas* of Raghavachari's family, and not of Rangachari's natural family. And he relied on the authority of *Rajyalakshmi* v. *Suryanarayana* (1) and *Dalton* v. *Fitzgerald* (2). This proposition is quite untenable. Rangachari's title to his adoptive father's family must, of course, be held in this case to have been acquired by prescription. It is quite true that if a person capable of holding one or other

(1) 3 M. L. J. 100.
(2) (1897) 2 Ch. 86; 66 L. J. Ch. 604; 76 L. T. 700; 45 W. R. 685

of different kinds of estate prescribes for a particular kind of estate, he could not acquire a larger estate or an estate different from that for which he prescribes. The *animus possidendi* is the test for determining the estate which prescription would confer on him. See our judgment in A.S. No. 73 of 1908. Therefore, if a woman prescribes for what is known as a "woman's estate" under the Hindu Law, it must be held, at least in some classes of cases, that her heirs, would be the successors to her woman's estate and *Rajyalakshmi* v. *Suryanarayana* (1) similarly holds that if one prescribes for an impartible holder's estate, the property which he acquires by prescription would in certain circumstances pass to the heirs who would be entitled to succeed if the property were in fact impartible. But it is impossible to hold that there would be any difference in the estate which Rangachari acquired by prescription whether he purported to belong to his natural family or to the family into which he was adopted. The title acquired by him would be the same in both cases, namely, an absolute, heritable estate. The dscision in *Dalton* v. *Fitzgerald* (2) has absolutely no application. It merely held that a person obtaining possession of property under a specific instrument and his heirs would not be entitled to dispute the title of other persons claiming an estate in the same property under the same instrument. This is a rule of estoppel applicable to the person taking under an instrument and to heirs. It has no bearing on cases where title is acquired solely by prescription.

In the view we have taken of this question, it is unnecessary to consider whether the plaintiff's claim as reversioner, even if the adoption set up be valid, is sustainable or not. We must reverse the decree of the lower Court and remand the suit for trial on the issues which have not been disposed of. The costs of this appeal will abide the result.

Appeal allowed.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 93 OF 1909.

June 21, 1909.

Present:—Mr. Sunder Lal, J. C.

KEDAR SINGH AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

SUMER SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Redemption, suit for—Mortgagor and mortgagee, relation between—Payment of a portion of mortgage-money, effect of—Discharge of a portion of mortgaged property by a proportionate payment of the mortgage-money—Arrangement to hand over property other than the mortgaged property for payment of the mortgage-money, effect of, when unregistered—Verification or modification of the terms of contract, what amount to—Evidence Act (I of 1872), s. 92, cl. (4).

K., *D.*, and *S.* each owned a third share in the property in dispute. On the 15th June 1880 *K.* and *D.* mortgaged with possession their 2/3rds share in favour of the defendant. On the death of *S.*, he was succeeded by his widow *J.*, who on the 7th July 1885 mortgaged her ⅓rd share to the same defendant excepting the village *B.* On the 5th June 1901 *K.* alone mortgaged with possession his ⅓rd share excepting the village *B.* Half the mortgage-money due under the deed of 1880 was set off as part of the consideration of this mortgage. After the death of the widow, the sons of *D.* sued for redemption of the mortgage of 1885 as her heirs. They contended that by the mortgage of 5th June 1901 *K.*'s share in the mortgage of 1880 had been paid up and the latter mortgage, so far as it related to *K.*'s share, had been discharged. They also alleged that about 6 years ago the mortgagor and the mortgagee entered into an arrangement by which the share of *J.* in village *B.* as also the share of *K.* in the said village had been placed in the possession of the mortgagee, on the understanding that he was to collect the rents and the profits thereof and apply them to the reduction of the principal amount due on his mortgage. The questions for decision were whether *K.*'s liability under the mortgage of 1880 had been discharged and whether the arrangement alleged by the plaintiff could be proved in law under section 92, clause 4, of the Evidence Act, in the absence of a registered document to evidence the same:

Held, that the mere fact that *K.*'s share on account of the mortgage of 1880 was set off against the amount secured under the latter deed of 1901 was not enough to show that any part of the mortgaged property had been released from liability for the remainder of the money due under the deed of 1880. In the absence of an express contract to the contrary, the mortgagee was entitled to retain the whole of the property mortgaged as security for what was due to him:

Held, further, that the arrangement relied upon by the plaintiff did not require registration as it would not in any way affect the mortgagee nor could such an arrangement modify or vary the terms of the mortgage and that, therefore, it could be proved in spite of section 92, clause 4, of the Evidence Act.

KEDAR SINGH *v.* SUMER SINGH.

Gokul Das Gopal Das v. *Puranmal Premsukh Das*, 10 C. 1035; 11 I. A. 126 and *Antu Singh* v. *Ajudhia Sahu*, 9 A. 249, referred to.

Babu *Hari Kishan Dhaon* for Pandit *Gokaran Nath Misra*, for the Appellants.

Babu *Gopal Sahai*, for the Respondent No. 1.

JUDGMENT.—Kandar Singh, Dharajit Singh and Sadho Singh who were own brothers, owned several villages in the Herdoi District. On the death of Sadho Singh he was succeeded by his widow *Musammat* Janaka. It is averred in paragraph No. 1 of the plaint, and not disputed by the defendant in his written statement of defence, that of the three persons aforesaid, each owned a third share in the property. On the 15th June 1880, Kandar Singh and Dharajit Singh made a possessory mortgage of their two-thirds share in the *Mauzas* Damkapur, Mirzapur, Rampur, Nayagam and Birawan in favour of the defendant for the sum of Rs. 300; the mortgagee was to enjoy the profits of the said property in lieu of interest and the mortgage was redeemable on payment of the principal mortgage-money, *viz.*, Rs. 300.

On 7th July 1885, *Musammat* Janaka executed a mortgage of her $\frac{1}{3}$rd share in all the said villages except Birwan in favour of the same mortgagee for the sum of Rs. 150. The mortgagee in this case, too, was in possession of the mortgaged property in lieu of interest.

On 5th June 1901, Kandar Singh alone mortgaged his own one-third share in all the said villages except Birwan for Rs. 400 with possession. Rupees one hundred and fifty out of this sum of Rs. 400 being one moiety amount due under the mortgage of 15th June, 1880, was set off as part of the consideration of this mortgage in the following words :—*mujrai minjumla babat rahinama nawishta min mukir yeaftani murtahin ragistri shuda tadadi tin so muwarikhai wa musadika 15th June* 1880 150."

The plaintiffs in this case, *viz.*, Kandar Singh and Pulandar Singh, son of Dharajit Singh, sue for the redemption of these mortgages. They seek to redeem the mortgage of 7th July 1885, as the heirs of the mortgagor *Musammat* Janaka who is dead. They contend that by the mortgage of 5th June 1901, executed by Kandar Singh, his share in the mortgaged property of the mortgage of 15th June 1880, was released, and the latter mortgage, in so far as it related to Kandar Singh's share, was discharged Among the property so discharged was Kandar Singh's $\frac{1}{3}$rd share in *Mauza* Birwan. They allege that about six years ago the mortgagors and the mortgagee entered into an arrangement by which the share of *Musammat* Janaka in *Mauza* Birwan as also the share of Kandar Singh in the said village, which had been set free by the discharge of the mortgage of 15th June 1880, was placed in the possession of the mortgagee on the understanding that he was to collect the rents and profits thereof, and apply them to the reduction of the principal amount due to him on his mortgages. They do not allege that these shares were added to the list of the mortgaged property (for the entire income of the mortgaged property was to go towards the interest only due on the mortgages), but that it was property placed by the mortgagors in charge of the mortgagee, for collection of rents and profits, on the understanding mentioned above. The mortgagee according to the plaint has cut down some trees on the mortgaged property. The plaintiffs, therefore, seek to set off the value of the trees so cut down, and the income from the shares of *Musammat* Janaka and Kandar Singh in *Mauza* Birwan against the principal amount due on the mortgages. According to their account the amount so sought to be set off exceeded the amount due on the mortgages and there was surplus left in the hands of the mortgagee.

The lower Appellate Court has,—

(1) set off the value of the trees cut down against the mortgage-money;

(2) held that Kandar Singh's liability under the mortgage of 15th June 1880 was not discharged as between the parties to that mortgage, and his interest in *Mauza* Birwan was, therefore, not in possession of the mortgagee under the arrangement set forth in the plaint, that it was in the possession of the mortgagee under the mortgage of 15th June 1880 ;

(3) that the arrangement set forth in the plaint could not be proved in law under section 92, clause (4), of the Evidence Act, 1872, in the absence of a registered document to evidence the same.

The parties have accepted the finding of the learned District Judge on the first point which is no longer in question in the appeal,

KEDAR SINGH *v.* SUMER SINGH.

The appeal before me refers to the second and third points mentioned above.

The mortgage of 15th June 1880 was a joint mortgage made by Kandar Singh and Dharajit Singh. They were both jointly and severally liable thereunder to the mortgagee. The mere payment of Rs. 150 by one of them, without any conditions whatever to the mortgagee, was a payment on account of the mortgage, which, in the absence of an express or implied contract to the contrary, left the entire mortgaged property burdened with the amount of the remainder of the mortgage-money. The question is whether there was an express or implied contract between Kandar Singh and the mortgagee, by which Kandar Singh's interest in the property mortgaged under the mortgage of 15th June 1880, was released from the mortgage. The only evidence relied upon to prove this contract is the language of the document of 5th June 1901. All that that document shows is that Rs. 150 on account of the mortgage of 15th June 1880 was set off against the amount secured under the later deed. There is nothing in the language of the later deed to show that any part of the mortgaged property was released from liability for the remainder of the mortgage-money due under that document. In the absence of an express contract, what is the implication? It was to the interest of the mortgagee to retain the whole of the mortgaged property as security for what was due to him and not to release of any portion of it. The answer to the question is, I think, contained in the judgment of their Lordships of the Privy Council in *Gokul Das Gopal Das* v. *Puranmal Premsukh Das* (1). At page 1046 of the report the following passage occurs:—"If there is no express evidence of it, what intention should be ascribed to him? The ordinary rule is that a man having a right to act in either of two ways, shall be assumed to have acted according to his interest." It was to the interest of the mortgagee, as I have already observed, to retain his charge on all the mortgaged property and, in the absence of express words in the later deed of mortgage releasing in terms any part of the mortgaged property from mortgage, it must be held that the mortgage still subsisted on the remainder of the mortgaged property. The conclusion at which the Court below has arrived was, therefore, correct and the appeal so far as this point is concerned fails.

The next point for consideration is, whether the arrangement relied upon in the plaint, so far as it relates to the interest of *Musammat* Janaka in Birwan, can be proved in the absence of a registered document. The plaintiffs could certainly entrust their share in *Mauza* Birwan to any one for management. They could direct him (*i. e.*, the Manager) to pay the income therefrom to their mortgagee as it accrued from time to time. A contract between the plaintiffs and their manager on the lines mentioned above could be entered into orally. Such contract does not in any way affect the mortgage to pay which such arrangement is made, and would not in any way affect the rights of the mortgagee. Does it stand on a different footing if the manager selected is the mortgagee himself? I think not, unless the mortgagee in entering into such contract in any way agree to modify or vary the terms of the mortgage in any respect. I must, therefore, proceed to examine if the arrangement alleged in any way modifies or varies the terms of the mortgage. Ther is no addition made to the mortgaged property by this arrangement. As has already been observed, the mortgaged property is held in lieu of interest only. The amount payable under the mortgage is not varied. Only a mode for its payment has been devised, to which the mortgagee is alleged to have consented, as it in no way interfered with his rights as mortgagee. The mortgagee must get the entire amount due on the mortgage before he can be compelled to allow redemption of the mortgage. The result of the transaction seems to be that the mortgagee has agreed to undertake to manage the property for and on behalf of the owner thereof, and as his manager and agent and to apply the income to reduce the amount due to him on the mortgage. He has not agreed to modify one single term of his mortgage.

Under section 92, clause (4) of Act I of 1872 the existence of any distinct subsequent oral agreement can be proved, unless such oral agreement modifies or varies the terms of any registered document. As no term of the original con-

(1) 10 C. 1035; 11 I. A. 126.

tract has in any sense been modified by this agreement, evidence is admissible to prove it. What has really happened in this case is similar to what happened in the case of *Antu Singh* v. *Ajudhia Singh* (2). In that case a mortgagor had agreed with his mortgagee to assign over to him the rents due from certain tenants of the mortgagor to provide for the payment of the interest due to the mortgagee. The transaction was what is known as *Jamog* in the eastern districts of the Province of Agra. It was held that oral evidence could be given to prove this transaction. From the evidence recorded in the Court of first instance I find that that Court did not allow questions relating to the arrangements set up, being put to witnesses. Evidence was excluded upon this point. I, therefore, think that the following issue should be remitted under Order XLI, rule 3, of the Code of Civil Procedure, to the lower Appellate Court for determination, namely,

Was the mortgagee put in possession of the share of *Musammat* Janaka in *mouza* Birwan under the arrangement set forth in the plaint; if so, what amount, if any, has been realized by the mortgagee on account of the profits of the said share?

The Court below will record evidence which the parties may adduce on this point as well as any documentary evidence which may be produced and return its findings together with the evidence as soon as possible. Ten days will be allowed for objections from the date of the receipt of the findings is notified to the parties.

(2) 9 A. 249,

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 290 OF 1910.

February 28, 1911,

Present:—Mr. Evans, A. J. C.

KASHI SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

BALRAJ SINGH AND OTHERS—PLAINTIFFS—AND OTHERS—DEFENDANTS—RESPONDENTS.

Pedigree filed in Settlement Court, admissibility of—Proof of such pedigree, elements necessary for—Special means of knowledge of the person filing the pedigree—Evidence Act (I of 1872), s. 32, cl. 5.

A pedigree produced in a Settlement Court is admissible in evidence under section 32, clause 5, of the Evidence Act, upon proof that the person making the statement contained in the pedigree was dead and had a special means of knowledge.

Babu *Har Krishna Dhon*, holding brief of Pandit *Gokaran Nath Misra*, for the Appellants.

Mr. *G. H. Thomas*, for the Respondents.

ORDER.—This is an appeal against an order of the District Judge of Fyzabad upholding a decision of the Subordinate Judge of Fyzabad.

Six persons were plaintiffs and they asked for a decree for possession of certain property which belonged to one Subdhan. The defendants were the transferees from his widow. The plaintiffs' suit was based on the allegation that Subdhan's widow held the property as a Hindu widow without power of alienation and that the plaintiffs as collaterals were entitled to possession thereof. The defendants in their written statement urged that the plaintiffs were not collaterals of the deceased Subdhan, and that under a custom widows of Thakurs could transfer their husbands' property for legal necessity.

The learned Subordinate Judge found that, the custom set up by the defendants was not proved nor was it proved that the property had been transferred for legal necessity. He also found that the plaintiffs Nos. 1, 3 and 4 were collaterals of the deceased and were entitled to possession of a portion of the property to the extent of 8 annas in *mahal* Nageshar and Maneshar and 4 annas in *mahal* Guman in the villages mentioned in the plaint. The decision was upheld on appeal by the learned District Judge and in second appeal by the defendants the decision of the Court below as to custom and legal necessity is not challenged, but it is urged *first*, that there were alive at the death of Subdhan's widow ten reversioners of equal degree with the plaintiffs and the plaintiffs were not entitled in any case to a decree for more than 3/13ths of the property in suit; and *secondly*, that the pedigree set up by the plaintiffs was not admissible in evidence.

As to the first point, I find that, before the Subordinate Judge, the only contention taken was that five collaterals were alive at the death of the widow who were entitled to share with the plaintiffs. As to one

of them, the Subordinate Judge found that it was admitted that he had died before the death of the widow and as to the other four he did not believe the evidence of the witnesses who said that they had survived the widow. The learned District Judge's judgment is somewhat scanty but apparently he has accepted the decision of the Subordinate Judge on this point and I must hold that in second appeal I am unable to interfere with his decision.

As to the second point about the pedigree; I find that the plaintiffs put in a copy of a pedigree which had apparently been produced in the Settlement Court. Assuming that this document can be proved by a certified copy of the original, it appears to me that it is not admissible in evidence against the appellants. If admissible in evidence it would be admissible under section 32, clause (5), of the Evidence Act, being a written statement made by a person who is dead, but it must be proved in such a case that the person making the statement had a special means of knowledge. There are some signatures upon this pedigree but it is conceded that there is no evidence to show who the persons were and what means of knowledge they had as to the facts set forth in the pedigree; nor indeed is it proved that the persons whose signatures appear on the copy had really signed the original. I am, therefore, compelled to hold that this pedigree is useless for the object with which it was produced by the plaintiffs: but it is contended on their behalf that a pedigree was appended to the plaint which was based upon the Settlement pedigree noted above and that the evidence of their witnesses, namely, P. W. No. 1, P. W. No. 2, P. W. No. 3 and P. W. No. 4, who were believed by the Courts below, proves this pedigree and according to that pedigree they are entitled to the share decreed to them. I have examined the decision of the Subordinate Judge and cannot find that he alludes to the evidence of these witnesses at all. He relies entirely upon the Settlement pedigree (Exhibit 34) and he presumes it to be genuine and he works the shares due to the plaintiffs Nos. 1, 3 and 4 according to that pedigree. His decision, therefore, appears to be based upon that pedigree and not upon the evidence at all. All that the learned Judge says is that the pedigree had in his opinion been sufficiently proved and in another part of his judgment he says that the *Shajra* being more than thirty years old is presumed to be genuine. All that I can gather from this is that the Courts below decreed the claim upon this Settlement pedigree only and not upon the pedigree attached to the plaint or by the evidence called by the plaintiffs. As I have decided that the Settlement pedigree is inadmissible in evidence I must remand the case to the Court below in order to have a finding on the following issues: —

(1). Has the pedigree attached to the plaint been proved to be correct?

(2). If so, what shares are the plaintiffs Nos. 1, 3 and 4 entitled to according to it?

No further evidence need be recorded. The finding should be submitted within three months and fifteen days will be allowed for objections.

Case remanded.

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 260 OF 1910.

March 7, 1911.

Present:—Mr. Piggott, A. J. C.

Babu BISHAMBHAR NATH—PLAINTIFF—APPELLANT

versus

Musammat INDAR BASA AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family, manager of—Suit to recover debt belonging to joint family—Necessary parties—Competency of the Manager to bring such a suit.

The plaintiff, as manager and head of a Hindu joint family, sued to recover a debt due by the defendant to the money-lending business belonging to the family. The debt was based upon a pro-note executed by the defendant in favour of the plaintiff's uncle, who at the time was the head of the family. The defendant objected that the plaintiff alone could not maintain the suit:

Held, that, as the head of the family, the plaintiff was competent to maintain the suit and that it was not necessary for the other members of the family to be joined as plaintiffs, although the Court had discretion to add them as defendants to enable it completely and effectively to adjudicate upon all the questions involved in the case.

Kishen Pershad v. *Har Narain Singh*, 15 C. W. N. 321; 8 A. L. J. 256; 9 M. L. T. 343; 13 C. L. J. 345; 21 M. L. J. 378; 9 Ind. Cas. 739 (P. C.), followed.

Pandit *Gokaran Nath Misra*, for the Appellant.

VISWESWARA SARMA *v.* DR. T. M. NAIR.

Mr. *A. P. Sen* and Babu *Narain Lal*, for the Respondent No. 1.

JUDGMENT.—In this case the plaintiff Bishambhar Nath sues for the recovery of debts incurred by one Jawahir in the course of his dealing with a certain money-lending firm. The plaintiff's case is that this money-lending business was carried on by Jagannath, uncle of the plaintiff, a manager and head of a joint Hindu family: the contracts on which the claim is based were entered into by Jawahir with Jagannath personally, and the pro-note which covers the greater part of the amount claimed was executed by Jawahir in favour of Jagan Nath. The latter is now dead; and the plaintiff now claims to have succeeded him as head of the family and manager of the money-lending business. His claim is admitted by the other members of the family, who declined to be added as plaintiffs in the suit. Both the Courts below have held that the suit is not maintainable, as the plaintiff is not entitled to sue unless the other members of the joint family join him as plaintiffs. There has been a very recent decision of their Lordships of the Privy Council in a case [*Kishen Pershad* v. *Har Narain Singh* (1)], in which the whole question of the rights of the managing member or members of a Hindu joint family in respect of business carried on for the benefit of the joint family as a whole has been considered at some length.

On the principles laid down in this ruling there can be no doubt that a suit brought by Jagannath alone for the recovery of the debts set forth in the plaint would, on the facts there alleged, be maintainable. It seems to me a reasonable, and even necessary, extension of the same principle to say that the plaintiff is entitled to maintain this suit, if it be true that he has succeeded to Jagannath's position both as manager of the business and head of the joint family. I hold that, on the facts set forth in the plaint, the suit is maintainable by Bishambhar Nath alone, and that the *pro forma* defendants, Har Preshad and Ram Sarup, were not necessary parties to the suit as plaintiffs, though the Court had discretion to add them as defendants in order to enable it completely and effectively to adjudicate upon all the questions involved. I must, therefore, set aside the decrees of both Courts below: and as they have disposed of the entire case on this preliminary point, I remand the case through the Court of first appeal to the first Court, that of the learned Subordinate Judge of Sitapore, with direction to re-admit the suit and dispose of it according to law, *vide* Order XLI, rule 23, of the Civil Procedure Code. Costs in this and the lower Appellate Court will abide the event.

Case remanded.

(1) 15 C. W. N. 321 (P. C.); 8 A. L. J. 256; 9 M. L. T. 343; 13 C. L. J. 345; 21 M. L. J. 378; 9 Ind. Cas. 539.

MADRAS HIGH COURT.

Full Bench.

REFERRED CASE NO. 8 OF 1910.

March 20, 1911.

Present:—Sir Arnold White, KT., Chief Justice, Mr. Justice Munro and Mr. Justice Sankaran Nair.

S. VISWESWARA SARMA—PLAINTIFF

versus

DR. T. M. NAIR AND ANOTHER—DEFENDANTS.

Civil Procedure Code (Act V of 1908), *Sch. I. O. VII, r.* 10—*Return of plaint for presentation to proper Court—Right of plaintiff to credit of the Court-fee levied in the wrong Court—Cancellation of stamp, effect of—Court Fees Act (VII of* 1870), *ss.* 28, 30—*Presidency Small Cause Courts Act (XV of* 1882), *ss.* 71, 75.

Where Court-fee is paid upon the institution of a suit in a Court which cannot grant the relief sought and consequently, the plaint is returned for presentation to the proper Court, the plaintiff, on filing the plaint in the latter Court, is entitled to take credit for the amount of the Court-fee levied in the Court to which it was first presented, even though the stamp was cancelled before the plaint was returned.

The plaintiff brought a suit in the City Civil Court at Madras affixing a Court-fee of the value of Rs. 75 to the plaint. The City Court Judge after cancelling the stamp returned the plaint for presentation to the Small Cause Court. The plaintiff presented the same plaint to the Small Cause Court to which he affixed a further adhesive stamp of Rs. 9-12-0 to make up the deficiency:

Held, that the plaint presented to the City Court had not lost its force by the cancellation of the stamp and that the plaintiff should not be required to pay a Court-fee of similar value over again in the Small Cause Court.

Prabhakarbhat v. *Vishwambhar Pandit*, 8 B. 313; followed.

In re Bai Amrit, 8 B. 380 at p. 390, distinguished.

Per *White, C. J.*—Under the Court Fees Act the plaint when presented to the Small Cause Court was not unstamped *quoad* the cancelled stamp.

Per *Munro, J.*—A Court when returning a plaint under Order VII, rule 10, Civil Procedure Code, cannot be said to be acting upon it within the meaning of section 30 of the Court Fees Act.

Per *Sankaran Nair, J.*—A document does not cease any the less to be a properly stamped document by

the cancellation of the stamp. It continues to be propely stamped. By cancellation the stamps cannot be used again, but when a document, which is the plaint in one Court, is rightly presented in another Court as a plaint in another Court, the stamp is not being used again.

The cancellation in such cases must be taken to be set aside by reason of the subsequent order returning the plaint.

Case stated under section 69 of the Presidency Small Cause Courts Act, XV of 1882, and rule 428 of the Rules of Presidency Small Cause Court of Madras by the Chief Judge of that Court in Suit No. 3067 of 1910 on the file of that Court.

On 13th December 1910 Krishnaswami Aiyar and Ayling, JJ., made the following

ORDER OF REFERENCE TO A FULL BENCH.

KRISHNASWAMI AIYAR, J.—This is a reference by the learned Chief Judge of the Presidency Small Cause Court. The question stated is one of far-reaching importance. The Judge of the City Civil Court returned a plaint for presentation to the proper Court under Order VII, rule 10, of the Code of Civil Procedure. The plaint has been represented to the Presidency Small Cause Court under the authority of that rule. The question is, whether the plaintiff is entitled to credit for the Court-fee levied in the City Civil Court. Section 9 of the Madras City Civil Court Act, 1892, directs the value to be ascertained for the purposes of Court-fee in the manner provided by the Court Fees Act, section 7, clause (*v*), if the suit is for land or a house or a garden. Section 6 of the Court Fees Act renders the 1st Schedule applicable to a plaint filed in the City Civil Court. Section 25 of the Court Fees Act provides that all fees referred to in section 3 or chargeable under the Act shall be collected by stamps. Section 26 directs that the stamps used to denote any fees chargeable under the Act shall be impressed or adhesive or partly impressed and partly adhesive as the Governor-General in Council may direct. By section 27 the Local Government is empowered to make rules for regulating among other thing the renewal of damaged or spoiled stamps. Section 30 provides that no document requiring a stamp *under this Act* shall be filed or acted upon in any proceeding in any Court or Office until the stamp has been cancelled. The rest of the section deals with the mode of cancellation.

In this case the stamp used for the plaint in the City Civil Court was cancelled in accordance with the provisions of section 30 and the instructions issued by the Government of India (See Appendix VI to Jagannada Iyer's Court Fee Act). Now the plaint comes again into Court with the cancelled stamp and an additional stamp to make up the deficiency in the Court-fee required for the plaint in the Small Cause Court in pursuance of the Government Notification under section 75 of the Presidency Small Cause Courts Act (See page 276 of Bakewell's Presidency Small Cause Courts Act). There is no doubt that the identical plaint returned by the City Civil Court is properly presented to the Presidency Small Cause Court under Order VII, rule 10, of the Code of Civil Procedure. A plaint presented in the Small Cause Court is chargeable with a fee under section 71 of the Presidency Small Cause Courts Act, not exceeding that which is specified in that section. Uuder section 75 of the same Act the Local Government may from time to time by notification in the Official Gazette vary the amount of the fee under section 71. The Government of Madras has fixed the fee under this section by a notification, dated the 23rd January 1883. These two sections of the Act together with the notification only determine the fee but make no provision as regards the mode in which that fee is to be paid. By section 77 it is enacted that sections 3, 5 and 25 of the Court Fees Act shall remain unaffected by anything contained in Chapter X, *i. e.*, for our present purpose, by sections 71 and 75 of the Presidency Small Cause Courts Act. The result of the saving is that by virtue of section 3 the fees chargeable in the Presidency Small Cause Court shall be collected in manner therein after appearing in Court Fees Act and that by section 25 of the Court-fee chargeable in the Presidency Small Cause Court which is referred to in section 3 though it is not leviable under the Court Fees Act, shall be collected by stamps. Section 26 appears to have no application to the nature of the stamps which may be used for Court-fees in the Presidency Small Cause Court, as they are not chargeable under the Court Fees Act. Section 28, which is applicable to the Presidency Small Cause Court because the Court-fees referred to in section

3 are payable in stamps under section 25, declares that no document which ought to bear a stamp under this Act shall be of any validity unless and until it is properly stamped. Can it be said that a plaint which bears a cancelled stamp is properly stamped within the meaning of section 28 of the Court Fees Act? There is no definition of the words "properly stamped" in the Act. If a stamp which has been properly cancelled in accordance with the requirements of section 30 may be used again in payment of a Court-fee chargeable, there is no provision limiting such user to the mere case of a plaint returned. In *Prabhakarbhat* v. *Vishwambhar Pandit* (1), the question referred to the Full Bench was whether a plaint could be returned where in second appeal a suit was held to have been filed in the wrong Court. In the course of the judgment of the Full Bench it was incidentally observed "where a Court-fee, on the institution of a suit, has been paid in a Court which cannot possibly afford the relief sought, it does not seem consistent with sound principle that the plaintiff should be condemned to lose the fee thus paid or that he should not be allowed to ask without paying a second fee for an adjudication from a Court which can really give one." There is no reference in the judgment to the provisions of section 30 of the Court Fees Act as regards cancellation of the stamp or section 28 as to the requirement of a proper stamp. Stress was laid on the provision contained in section 30 of the Court Fees Act in the decision in *Jagjivin Javherdas* v. *Magdum Ali* (2), as precluding the presentation of a plaint returned with a cancelled stamp without new stamps being affixed to it. In the case of *In re Bai Amrit* (3) the same learned Judges who decided the case of *Jagjivan Javherdas Seth* v. *Magdum Ali* (2) declined to accept the decision of the Full Bench in *Prabhakarbhat* v. *Vishambhar Pandit* (1) as binding upon them. One of the Judges Mr. Justice Pinhey points out at page 390 that the decision of the Full Bench was silent on one of the grounds on which the decision in *Jagjivan Javherdas Seth* v. *Magdum Ali*(2) was based, *viz.*, "the futility of returning a plaint after the Court-fee stamps have been cancelled, because cancelled Court-fee stamps can no more be used a second time than cancelled postage stamps can be so used."

The argument in favour of the opposite view can only be that the cancelled stamps must be treated as uncancelled because the Court which returned the plaint for want of jurisdiction had no jurisdiction to cancel the stamp. But that is evidently not the effect of section 30 of the Court Fees Act which requires cancellation of the stamp before the plaint is filed or acted upon. The Court must consider the allegations in the plaint and the relief asked for before determining the question of jurisdiction. On the foregoing considerations, the result must be that the plaint returned to be presented to the proper Court will have to be stamped anew without reference to the cancelled stamps. Section 29 of the Court Fees Act, which makes a special provision in the case of amendment of a document that it shall not necessitate the affixing of a fresh stamp, appears to strengthen the above view. A cancelled stamp does not also appear to fall under the head of damaged or spoiled stamps with reference to the renewal of which the Local Government has power to make rules. The rules made by the Local Government under section 27, clause (*c*), which refer to plaints written on stamps and not filed in any Court, do not extend to the case of a cancelled stamp returned.

But the matter does not appear to rest here. The learned Chief Judge points out that section 21 of the Civil Procedure Code of 1882, section 14 of the Madras City Civil Courts Act, 1892, and sections 19A and 40 of the Presidency Small Cause Courts Act, 1882, make special provision for the deduction of the Court-fee paid in one Court from the fee payable in another to which a plaint returned by the first is represented or a suit is transferred from the first in the circumstances referred to in those sections. Where the transfer of the suit or the representation of the plaint is to the High Court on the Original Side there may be a special need for a specifie provision as regards the deduction of the fee already paid, as the system of charging Court-fees is essentially different under the Rules of Practice applicable to the Original Side. But it is not easy to explain why a special provision for deduc-

(1) 8 B. 313.
(2) 7 B. 487.
(3) 8 B. 380 at p. 390.

tion was made in section 2 of the old Code of Civil Procedure where a suit is stayed in one Court under section 20 and the plaint is returned and presented to another under section 21. It must, however, be noted that sections 20 and 21 have not been reproduced in the Civil Procedure Code of 1908. On a full consideration of the various provisions of the several enactments to which our attention has been drawn, I feel constrained to agree with the learned Chief Judge of the Small Cause Court. But the practice not only in the Small Cause Court but throughout the Presidency has been in such cases as the present to accept the original stamp affixed to the plaint in one Court as good so far as it goes in the second Court to which the plaint is represented. As the question is one of great importance and the view we are at present inclined to take is against the established practice, we refer the question stated to the Full Bench.

AYLING, J.—I am not prepared to dissent from the view of the law expounded by my learned brother; but it cannot be denied that its adoption will not only alter the general practice both in the Presidency and Moffusil Courts, but (what is of more importance) will inflict considerable hardship on many litigants who have, in perfect good faith, taken their case to the wrong Court. I doubt very much whether this was the intention of the Legislature. I, therefore, agree in the proposed reference to a Full Bench.

Mr. *C. K. Mahadeva Aiyar*, for the Plaintiff.

Messrs. *C. Venkatasubramiah*, *V.V. Srinivasa Iyengur* and *Kunjunni Nair*, for the Defendants.

OPINION OF THE FULL BENCH.

WHITE, C. J.—I do not think we ought to interfere with an established practice in this Presidency unless we are fully satisfied that the practice is contrary to law. In this case, on the facts stated in the order of reference, I am not so satisfied.

The plaint presented to the Small Cause Court is the same plaint as that which was presented to the City Civil Court and returned by that Court under Order VII, rule 10, of the first Schedule to the Code of Civil Procedure. The amount actually paid on the plaint is an amount which satisfies the requirements of sections 71 and 75 of the Presidency Small Cause Courts Act, 1882, and the notifications under the latter section. No doubt, stamp on the plaint when it was presented to the City Civil Court was cancelled by the City Civil Court in pursuance of section 30 of the Court Fees Act, because the Court purported to "act upon" it by returning it. But I do not find anything in the Court Fees Act which compels me to hold that the plaint when presented to the Small Cause Court was unstamped *quoad* the cancelled stamp. The analogy of the cancelled postage stamp suggested by *In re Bai Amrit* (3) does not seem to me to be in point. If it were, it might be pointed out that the postal regulations do not require a new stamp when a letter is re-addressed and re-delivered. The provision in section 28 of the Court Fees Act that no document which ought to bear a stamp under that Act shall be of any validity unless it is properly stamped affords us no assistance on the question whether, on the facts stated, the plaint was properly stamped when presented to the Small Cause Court. The provision in the same section that when a document is amended in order to correct a mistake a fresh stamp is not necessary no doubt on the "*expressio uniuste*" principle lends some support to the conclusion that the document in question in the present case was not properly stamped. The same observation may apply to the last paragraph of section 19A and section 40 (3) of the Presidency Small Cause Courts Act. But as pointed out in the order of reference "Where the transfer of the suit or the representation of the plaint is to the High Court on the Original Side there may be a special need for a specific provision as regards the deduction of the fee already paid, as the system of charging Court-fees is essentially different under the Rules of Practice applicable to the Original Side." Sections 20 and 21 of the old Code of Civil Procedure, as the order of reference points out, have not been reproduced in the present Code.

The observation of the Full Bench of the Bombay High Court in *Prabhakarbhat* v. *Vishwambar Pandit* (1), "Where a Court-fee on the institution of a suit has been paid in a Court which cannot possibly afford the relief sought, it does not seem consistent with sound principle that the plaintiff should be condemned to lose the fee thus paid, or that he should not be allowed to ask without

paying a second fee for an adjudication from a Court which can really give one" is no doubt *obiter*, but, in the absence of express statutory provision the other way, I am prepared to apply it to the facts of the present case. In so doing I am upholding what is admittedly the settled practice in this Presidency and what would seem to be, though I have no information as to this, the settled practice in Bombay.

I would answer the question in the affirmative.

MUNRO, J.—I agree that the question whether the Small Cause Court is bound to give credit for the fee levied by the City Civil Court should be answered in the affirmative. I think this result can be deduced from Order VII, rule 10 of the Civil Procedure Code of 1908, which lays down that the plaint shall at any stage of the suit be returned to be presented to the Court in which the suit should have been instituted. If the plaint as returned is not a document which the Court to which it is to be presented is bound to receive as it stands—assuming the same scale of Court-fees is in vogue in both Courts—I am unable to find any sufficient reason for the enactment of the rule. The return of the plaint does not by itself save limitation. So far as limitation is concerned, the plaintiff would be in the same position if he tore up the plaint which had been returned to him, and drew up and presented a fresh one; for, whether the original plaint is presented or a fresh one, the plaintiff, if he wishes to call in aid section 14 of the Limitation Act, must show that he comes within its terms. I do not think that a Court when returning a plaint under this rule can be said to be acting upon it within the meaning of section 30 of the Court Fees Act. It is conceivable that the fact that the Court had no jurisdiction to entertain the plaint might be noticed before any thing was done to the stamps. In such a case the plaint could, and should, be returned without cancelling the stamps. A plaintiff who had acted *bona fide* should not be in a worse position because the Court did not find out its want of jurisdiction before the stamps were cancelled, and, as the rule for the return of plaints makes no distinction between cases where the plaintiff has acted *bona fide* and cases where he has acted otherwise, the same principle is clearly meant to apply in all cases.

SANKARAN NAIR, J.—A plaint was presented to the City Civil Court on the 21st January 1910 written upon a stamp paper of the value of Rs. 75. The stamp was cancelled by an officer of the Court on 22nd January 1910.

The Judge of the City Civil Court was of opinion that the suit should have been instituted in the Small Cause Court and returned it on the 22nd February for presentation to that Court. The same plaint was presented to the Small Cause Court with the stamp of Rs. 75 which had been already cancelled and further adhesive stamps for Rs. 9-12-0 which were required to make up the fee of Rs. 84-12-0 chargeable on the plaint in the Small Cause Court under section 71 of the Presidency Small Cause Courts Act. The learned Chief Judge of the Small Cause Court, Mr. Justice Ayling with some hesitation and Mr. Jutsice Krishnaswami Aiyar are of opinion that the Rs. 75 stamp having been rightly cancelled when the plaint was first presented to the City Civil Court has lost its force and the plaint when presented to the Small Cause Court must be taken to bear only a stamp of Rs. 9-12-0.

Section 71 of the Presidency Small Cause Courts Act provides that an *ad valorem* fee shall be paid on the plaint in every suit and that no plaint shall be received until such fee has been paid. Section 28 of the Court Fees Act also states that no document requiring a stamp under that Act shall be of any validity unless and until it is properly stamped. If, therefore, the plaint when presented to the Small Cause Court bears, in law, only a stamp of Rs. 9-12-0 the plaint cannot be received or acted upon.

The question referred to the Full Bench for decision is whether the stamp cancelled has lost its force in the circumstances above stated and whether the plaint must again be stamped with a stamp of equal value. I am clearly of opinion that the plaintiff need not affix the stamp again to his plaint.

There is no difference between this case and similar cases in the Mofussil Courts where plaints are returned by one Court for presentation to the proper Court. There was a doubt entertained for some time under the old Code of Civil Procedure whether a

plaint should not be returned before it was filed; or whether it might be returned at any stage of the suit. The Bombay and the Madras High Courts took the latter view, which has been embodied in Order VII, rule 10, of the present Code of Civil Procedure, that the plaint shall at any stage of the suit be returned to be presented to the Court in which the suit should have been first instituted. The return of a plaint for presentation to a proper Court is to enable the plaintiff to present that document without paying the stamp over again It was on the ground that "where a Court-fee on the institution of a suit has been paid in a Court which cannot possibly afford the relief sought it does not seem consistent with sound principle that the plaintiff should be condemned to lose the fee thus paid or that he should not be allowed to ask without paying a second fee for an adjudication from a Court which can really give one," that it was held by the Full Bench of the Bombay High Court that a plaint might be returned at any stage of a suit to enable the plaintiff to present the same plaint without paying over again that fee to the proper Court – *Prabhakarbhat* v. *Vishvambhar Pandit*(1), Order VII, rule 10, of the Code of Civil Procedure, 908, now embodies that rule and it would be thus defeating the very object of the Legislature in directing the return of a plaint to levy the fee over again when it is again presented.

The decision of the Bombay High Court was passed in 1884 and the practice in the Bombay Presidency may be presumed to be in accordance with that decision. In this Presidency it has been the practice, to accept the original stamp in the second Court to which the plaint is presented. The Legislature has not interfered with that decision or the practice. It has obviously accepted this view.

Section 14 of the Madras City Civil Courts Act and sections 19A and 40 of the Presidency Small Cause Courts Act provide that credit shall be given to the plaintiff in cases of return of plaints to be presented to the High Court for the Court-fee paid in such Court. This was apparently due to the doubt raised by the system of the Court-fees levied on the Original Side of the High Court being different in principle from the Court Fees Act. Sections 20 and 21 of the Civil Procedure Code of 1882, not reproduced in the present Code, enact a similar provision. But they deal with the re-institution of the suit and this may have created some doubt. These provisions certainly indicate the tendency of legislation and, taken with the omission to deal with the cases under consideration, with the prevailing practice and the Full Bench decision of the Bombay High Court before the Legislature, can lead only to one conclusion.

It is then said that a stamp which has been defaced and cancelled by proper authority has lost its force and cannot be used again. There is, it appears to me, a fallacy in this argument. It loses sight of the fact that a document does not cease any the less to be a properly stamped document by the cancellation of the stamp. It continues to be properly stamped. By cancellation the stamp cannot be used again, but when the same document, which was the plaint in one Court, is rightly presented in another Court as a plaint in another Court, the stamp is not being used again. It is only the same document that is being used in another Court; otherwise, it might with equal force be argued that a plaint with its stamp cancelled, when filed as an exhibit in another case, must be stamped again

I am further of opinion that the cancellation in such cases must be taken to set aside by reason of the subsequent order returning the plaint. Section 30 of the Court Fees Act runs thus :—

"No document requiring a stamp under this Act shall be filed or acted upon in any proceeding in any Court or office until the stamp has been cancelled.

"Such officer, as the Court or the head of the Office may from time to time appoint, shall, on receiving such document, forthwith effect such cancellation by punching out the figure head so as to leave the amount designated on the stamp untouched, and the part removed by punching shall be burnt or otherwise destroyed."

In the course of the argument I was inclined to think that under the 2nd clause of this section, the Court-fee stamp on a plaint has to be cancelled on its presenta-

tion. This does not appear to be so. Under section 48 of the Code of Civil Procedure of 1882, the plaint has to be presented to the Court or to such officer as may be appointed to receive it. Section 57 provided that, if on the presentation of a plaint it appears that the Court has no jurisdiction to try the cause, the plaint shall be returned to be presented to the proper Court. The first clause of section 30 of the Court Fees Act only requires that the stamp shall be cancelled before the document is filed or acted upon. It does not require the cancellation on presentation. The 2nd clause only requires the officer appointed in that behalf, who will be a different person from the Judge himself or who may be a different person from the one appointed to receive plaints, to cancel the stamps when—as I read the clause—he receives it for that purpose, preliminary to its being filed or acted upon. The obvious intention, and what these sections lay down is, that when a plaint is received, and before it is acted upon or filed, the Judge has to decide whether it has been presented to the proper Court, and according to his opinion return it for that purpose or otherwise give it to the proper officer for cancellation before it is acted upon or filed. He may act upon it without filing it by rejecting it for certain reasons, for instance if the plaintiff fails to supply within a given time the requisite stamp paper to meet the deficiency, if any. In these cases he may file a new suit but not present the same plaint. When the Court at a later stage or the Appellate Court directs the return of a plaint, it is only doing what the Court of first instance should have done before the cancellation of the stamp. The important alteration in the present Civil Procedure Code allowing the return of the plaint at any stage only strengthens the argument. As already pointed out, it was enacted to enable the Courts to do at any stage of the suit what should properly be done on presentation of the plaint before it is acted on or filed. It does not affect the interpretation of section 30 of the Court Fees Act. The final order returning the plaint, even if passed only in second appeal, therefore, relates back to a stage of the suit before it is acted upon or filed, as a preliminary to which alone the stamp has to be cancelled under section 30 of the Court Fees Act. The final decision directing the return is an order that the Court should not have acted on or filed the plaint. It follows therefrom that the cancellation of the stamp was unnecessary under section 30 of the Court Fees Act. The plaintiff is in such cases relegated by the order to the position he would occupy if the plaint had been returned before having been acted upon. A Court which has no jurisdiction to entertain a plaint ought to return it immediately. It cannot act upon it, though it may be necessary to make an inquiry to decide the question of jurisdiction. This is not acting upon it but only deciding whether it should act upon it. A party is not to be prejudiced, if possible, by an act of Court afterwards found improper; and cancellation is, therefore, of no greater effect than the other proceedings including decrees which may have been passed before the final order was passed to return the plaint.

I, therefore, answer the question, whether the Small Cause Court is "bound to give credit for the fee levied by the City Civil Court," in the affirmative.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 773 OF 1910.

April 25, 1911.

Present:—Mr. Justice Rattigan.

DUNI CHAND AND OTHERS—DEFENDANTS—APPELLANTS

versus

AZIZ KHAN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 22 (4)—Appeal dismissed for non-payment of proper Court-fee—Cross-objections, whether can be entertained after such dismissal of appeal—General rule—Exceptions—Court-fee—Appellant not able to pay Court-fee on the whole amount claimed—Abandonment of part of claim, whether permissible.

An Appellate Court has no power to reject cross-objections on the merits without hearing the respondent.

The general rule that cross-objections cannot be entertained unless the appeal is decided on the merits is subject to only two exceptions, *viz.*, when the appeal is withdrawn or it is dismissed in default.

Therefore, where an appeal is dismissed, without a

hearing, upon the ground that the appellant has not paid the Court-fee, the Court has no jurisdiction to hear and determine the cross-objections.

An appellant who has claimed a large amount in an insufficiently stamped memorandum of appeal, is at liberty, on being required by the Court to pay Court-fee for the full amount claimed, to abandon part of his claim and to restrict it to such an amount on which he can afford to pay the Court-fee.

Ram Pershad v. *Bhiman*, 27 A. 151, applied.

Second appeal from the order of the Divisional Judge, Attock, at Campbellpore, dated the 12th April, 1910, reversing that of the District Judge, Attock, at Campbellpore, dated the 17th November 1909, decreeing plaintiff's claim.

Rai Sahib Lala *Sukh Dial*, for the Appellants.

Mr. *Abdul Kadir*, for the Respondents.

JUDGMENT.—The judgment of the first Court is far from clear, but it appears that the plaintiffs sued to redeem certain property which had been mortgaged in 1878 for Rs. 400 on payment of that amount. They paid Rs. 30 as Court-fee on this claim.

Defendants claimed that there was in addition to the said mortgage, a further charge of Rs. 550 created in 1881, upon the land, and that the total sum which the plaintiffs had to pay before they could redeem was Rs. 950 as principal and Rs. 1,15,921-11-3 as interest and compound interest. The District Judge granted plaintiffs a decree for redemption conditional on the payment of Rs. 950 principal and Rs. 3,351-9-7, simple interest, for 24 years and $4\frac{1}{2}$ months at the agreed rate of Rs. 2-1-4 per cent. *per mensem*. Plaintiffs were ordered to pay the full amount of Court-fee on the amount so held to be due from them.

From this decree the defendants preferred an appeal to the Divisional Judge and urged that the full amount of interest and compound interest should have been made payable by the plaintiffs, but for some unexplained reason their memorandum of appeal, which was obviously intended to screen them a further payment of over a lakh of rupees, was stamped with a Court-fee stamp of Rs. 10 only. Defendants filed certain cross-objections to the effect that the mortgage-deed of 1881 was not enforcible; that the Court of first instance should not have allowed any interest to the defendants, and that the fact that defendants had been enjoying the use and occupation of the land for many years had been completely overlooked.

The Divisional Judge very rightly held that the memorandum of appeal filed by the defendants-appellants was insufficiently stamped, and that as they prayed that the plaintiffs should be made to pay the full amount of interest and compound interest claimed by them, Court-fee duty must be paid on that amount. He accordingly directed, by order dated 5th April 1910, that the appellants should pay Rs. 2,990 further duty, and at the request of the defendants adjourned the case to the 12th April 1910.

On the said date the appellants presented a petition to the Divisional Judge to the effect that though they were entitled to the full sum claimed by them as interest and compound interest, they could not afford to pay stamp duty on so large a sum. They accordingly prayed that the memorandum of appeal might be returned to them for amendment. The Divisional Judge refused this prayer on the ground that as the appellants had "distinctly claimed the whole amount of compound interest," they could not "at this late stage" ask to have part of this prayer cut out. As the full stamp-duty had not been paid, the learned Judge dismissed the appeal with costs. In this order he also held that the respondent's cross-objections could not be heard and were "dismissed on the merits for reasons given." I confess I am not able to follow the learned Judge's remarks with regard to the cross-objections. If, owing to the dismissal of the appeal, the cross-objections could not be heard, dismissal obviously cannot be said to have been "on the merits," for the Divisional Judge had no power to reject them on the merits without hearing the respondents. But though the learned Judge in this order says that the cross-objections could not be heard, it is clear from his subsequent order (of the same date) that respondents were in fact heard in support of their cross-objections and that it was only after hearing arguments in support of them, that the Divisional Judge eventually dismissed them. I am of opinion that the learned Judge had no jurisdiction to entertain and determine those cross-objections after he had dismissed the appeal. The ordinary rule is that cross-objections cannot be entertained unless the appeal is decided on the merits

Ramjiwan Mal v. *Chand Mal* (1)] and until the enactment of the present Code of Civil Procedure, it was a fairly well-established proposition that cross-objection failed if an appeal was withdrawn or dismissed in default. Clause (4) of Order XLI, rule 22, now provides that where the original appeal is withdrawn or dismissed in default, cross-objections may nevertheless be heard and determined. But this exception to the general rule is expressly limited to the two cases specified and does not affect the applicability of the general rule in other cases. In the present case the appeal was dismissed without a hearing, upon the ground that the appellants had not paid the Court-fee duty, and in the circumstances, as the appeal had been dismissed, the Divisional Judge acted *ultra vires* in proceeding thereafter to hear and determine the cross-objections.

To return, however, to the main question before me, the defendants-appellants have appealed to this Court from the decree of the Divisional Judge dismissing their appeal, and in support of their appeal, Mr. Sukh Dial urges that it was open to them when they found that they could not afford to pay the full Court-fee duty to ask the Court to return the memorandum of appeal, so that they might amend it by abandoning part of their claim and paying such duty as might be leviable upon the amount for which they eventually decided to ask for a decree. There is a dearth of authority upon the question before me, but after full consideration, I think that in justice, and upon principle, an appellant's prayer of this kind should be allowed. He urges that he is really entitled to claim a large sum, but when he finds that he must pay a heavy duty on his memorandum of appeal if his claim as a whole is to be considered, I am unable to find any just and reasonable ground for refusing him liberty to abandon part of his claim and to restrict it to such amount only as he can afford to pay duty upon. A plaintiff who is similary situated has been held entitled to claim this right at the initial stage of a suit, *Ram Pershad* v. *Bhiman* (2). The same principle should surely apply to the case of a *defendant* who appeals from a decree passed against him, and at the very outset of the proceedings asks to be allowed to amend his memorandum of appeal by striking out part of his claim. This prayer was made for no ulterior purpose or with the intention of affecting the jurisdiction of the Court *Arogya Udayan* v. *Appachi Rowthan* (3). and in equity and justice I think it should have been acceded to. I cannot see that the respondents are in any way prejudiced thereby, or that an order allowing such amendment would be detrimental to the revenue. The Divisional Judge refused the prayer apparently on the ground that it had been preferred at "a late stage." I cannot understand this remark. The request was made at the earliest possible opportunity and as soon as the Divisional Judge had pointed out that the memorandum of appeal was insufficiently stamped. I accordingly accept the appeal and direct that the memorandum of appeal presented to the Divisional Judge be returned by him to the appellants for such amendment as they may deem fit in respect of the amount claimed by them. The memorandum of appeal must thereafter be duly filed in the Court of the Divisional Judge with a proper Court-fee within such time as the learned Judge may fix for that purpose. As regards plaintiff's petition for revision in respect of the order of the lower Appellate Court rejecting their cross-objections, I hold that the Divisional Judge acted *ultra vires* in determining those cross-objections after he had dismissed defendants' appeal, and I, therefore, accept the petition in question and set aside the order of the Divisional Judge. If defendants file an amended memorandum of appeal duly stamped within the time specified, I direct that the Divisional Judge shall, at the hearing of the said appeal, hear and determine plaintiffs' cross-objections as well. If no such appeal is filed within the time specified, the said cross-objections will stand dismissed as falling with the dismissal of the appeal, if in the event specified the Divisional Judge decides to dismiss the appeal. Costs both in the lower Appellate Court and in this Court will abide the event.

(1) 10 A. 587.
(2) 27 A. 151,
(3) 25 M. 543.

SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEALS NOS. 6, 7 AND 8 OF 1909.

March 27, 1911.

Present:—Mr. Pratt, J. C., and Mr. Crouch, A. J. C.

TOPANDAS *valad* KANWARMAL—PLAINTIFF—APPELLANT

versus

THE MANAGER, ENCUMBERED ESTAES—DEFENDANT—RESPONDENT.

Limitation Act (XV of 1877), ss. 5, 12—Application for copy not accompanied by deposit of fee—Exclusion of time—Extension of time- Sufficient cause.

Exclusion of time under section 12 of the Limitation Act can be claimed only from the date of deposit of copying fee and not from the date of application not accompanied by such deposit. Therefore, where a party neglects to make the requisite deposit and time is lost owing to such neglect or carelessness, he cannot take advantage of the provisions of section 12.

Parbati v. *Bhola*, 12 A. 79, referred to.

Where the judgment of the Court was pronounced on 15th October but the decree was signed on the 9th November and an application for copy of the decree was made five weeks after the decree was signed:

Held, that, as delay was not due to the non-signing of the decree but to the non-deposit of copying fee, it was immaterial when the decree was signed, and that the cause of delay in applying for copy was not sufficient and substantial to justify an extension under section 5.

Ganpat v. *Ananaji*, 23 B. 144; *Lakhoomal* v. *Joomromal*, 1 S. L. R 71; *Karsondas* v. *Bai Gangabai*, 30 B. 329; 7 Bom. L. R. 965, referred to.

Mr. *Mathradas*, for the Appellant.

Mr. *Lalchand Chuarmal*, for the Respondent.

JUDGMENT.—A preliminary objection is raised that the appeals are not in time. The judgment of the lower Court is dated the 15th October 1908. The appeals were filed on the 6th February 1909. The appeals were, therefore, filed after the lapse of 113 days and the appellant has to show that 23 days were requisite for obtaining copy. Mr. Mathradas admits that this time was not requisite for obtaining copy of the judgment but contends that it was requisite for obtaining copy of the decree. The application for copy was filed on the 16th October but no deposit was made until the 21st October. It is admitted that the District Court does not undertake to prepare copies until a deposit is paid. The interval from the 16th October to the 21st October was, therefore, not time requisite for obtaining a copy and no allowance can be made to the appellant for this time. On the 3rd November the copy of the judgment was delivered to the appellant and he paid a balance due for that copy but left nothing in deposit for the payment of the copying fee of the decree. The appellant may be allowed for the time from the 21st October to 3rd November *i. e.*, 13 days. But is he entitled to any further allowance of time? From the 3rd November there was no money in deposit towards the copying fee of the decree. The appellant paid this on the 17th December and obtained copy of the decree on the 18th. The interval of time from 3rd November to the 17th December cannot be allowed to the appellant, for this delay was due to his neglect to pay a deposit and, as said in *Parbati* v. *Bhola* (1), section 12 does not refer to time lost owing to the neglect or carelessness of the party. After the 17th December the appellant is entitled to two days for the 17th and 18th but even these two days when added to the 13 days already allowed would leave the appeal eight days beyond time.

The appellant attempts to get further time by reason of the fact that the decree was not signed until the 9th November. But, as held in *Ganpat* v. *Ananaji* (2) and *Lakhoomal* v. *Joomromal* (3) this is not a relevant fact unless the want of signature to the decree was the cause of the delay. Here it was immaterial when the decree was signed for the delay was due to the non-deposit of fee between the 3rd November and the 17th December.

Mr. Mathradas now makes a belated oral application for extension of time under section 5. There are no affidavits to show what the sufficient cause was, and the only plea urged is that the party was under the mistaken belief that time would be allowed until the decree had been signed. At best, this is a mistake of law and, as a matter of fact, it is clear that the date of signing the decree did not operate in the mind of the appellant, for the application for copy of the decree was made five weeks after the decree was signed. The cause required by section 5 of the Limitation Act must be sufficient and substantial for, as remarked in *Karsondas* v. *Bai Gangabai* (4), to admit a time-barred appeal is to deprive a successful litigant of a valuable right which he has secured.

(1) 12 A. 79.
(2) 23 B. 144.
(3) 1 S. L. R. 71.
(4) 30 B. 329; 7 Bom. L. R. 965.

We, therefore, dismiss the appeals as time-barred with costs.

Appeals dismissed.

SIND JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL NO. 14 OF 1910.
APPLICATION NO. 13 OF 1911.
April 6, 1911.

Present:—Mr. Pratt, J. C. and
Mr. Hayward, A. J. C.

KEWALRAM GHANSHAM DAS AND OTHERS—APPELLANTS

versus

MESSRS. DONALD GRAHAM AND CO., AND OTHERS—RESPONDENTS.

Arbitration Act (IX of 1899), s. 15—Appeal from an order under s. 15—Civil Procedure Code (Act V of 1908), ss. 104, 106, 115—Appeal treated as a revision.

A proceeding under the Arbitration Act is not a suit and does not end in a decree. There is no provision in the Act requiring a Court to make an order filing or refusing to file an award. The award is filed by the arbitrators under section 11 and unless it is remitted to them under section 13 (1 or set aside under section 14 it becomes "enforceable as if it were a decree ofthe Court." The order of a Court, under the Act, in whatever terms it may be expressed, is one either setting aside or refusing to set aside an award. There is no provision in section 104, Civil Procedure Code, for an appeal against such an order, and it is outside the scope of section 104 (*f*), which deals with orders filing or refusing to file an award.

The fact that an award is "enforceable as if it were a decree" makes it clear that it is not a decree, though it may be executed as though it were a decree.

In this case an appeal was treated as a revision.

Mr. *Wadhumal*, for the Appellant.

Mr. *Dipchand T. Ojha*, for the Respondent No. 1

ORDER.—This is an appeal from an order passed under section 15 of the Indian Arbitration Act by Waley Cohen, A. J. C., in the District Court jurisdiction, filing an award.

A preliminary objection is raised that no appeal lies from such order.

The Indian Arbitration Act makes no provision for any such appeal but it is said that an appeal is now provided by section 104 (*f*) of the Civil Procedure Code.

Mr. Wadhumal points out that, whereas section 588 of the Code of Civil Procedure was limited to "orders under this Code" these words have been omitted from section 104 of the present Code and he claims that this change has had the effect of rendering obsolete the Full Bench ruling of this Court in *Ghummanmal Pessumal* v. *Dayal Kanji* (1).

We think there is no force in this contention.

In the first place, as pointed out in the judgment in *Ghummanmal Pessumal* v. *Dayal Kanji* (1), the Arbitration Act does not provide for tho Court making an order filing or refusing to file an award. The award is filed by the arbitrators under section 11 of the Act and unless it is remitted to the arbitrators under section 13 (1) or set aside under section 14 it becomes "enforceable as if it were a decree of the Court." The order of the Court, in whatever terms it may be expressed, is under Act one either setting aside or refusing to set aside the award. There is no provision under section 104, Civil Procedure Code, for an appeal against such an order; nor does it fall within the scope of section 104 (*f*) which deals with an order filing or refusing to file an award.

Paragraphs (*a*) to (*f*) of section 104, Civil Procedure Code, dealing with appeals from orders made in arbitration clearly and exactly follow the various paragraphs of Schedule II dealing with arbitration under the Civil Procedure Code. Section 104 (1) (*a*) refers to an order made under paragraph 5 (2), (*b*) to an order under paragraph 11, (*c*) to an order under paragraph 12, (*d*) to an order under paragraph 17 (4), (*e*) to an order under paragraph (18) and (*f*) to an order under paragraph 21. It is, we think, clear that the appeals there provided are appeals from orders made under Schedule II.

Again, proceedings under the Schedule either begin with a plaint in a suit or with an application which is numbered or registered as a suit. That is, for the purposes of the Code the proceedings are suits and end in a decree. The appeal provided by section 104 would, under section 106, lie to the Court to which an appeal would lie from that decree. But a proceeding under the Arbitration Act is not a suit and does not end in a decree This distinction was pointed out in *Ghumanmal's* case (1). The award is, no doubt, "enforceable as if it were a decree" but these very words make it clear that it is *not* a decree though is may be executed as though it were a decree. It, therefore, appears clear that no appeal

(1) I S. L. R. 86.

from an order under the Arbitration Act was contemplated under sections 104 and 106, Civil Procedure Code.

We, therefore, allow the preliminary objection and proceed to dispose of this appeal as an application for revision.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 769 OF 1909.

April, 22, 1911.

Present:—Mr. Justice Shah Din and Mr. Justice Chevis.

SHAHAB-UD-DIN—APPELLANT

versus

ANJUMAN-I-NAUMANIA—RESPONDENT.

Civil Procedure Code (Act XIV of 1882)—Civil Procedure Code (Act V of 1908)—Non-joinder of parties—Misjoinder of parties and causes of action—Rejection—Dismissal—Non-joinder or misjoinder of parties, whether justifies rejection of plaint

The mere fact that there is a misjoinder of parties and of causes of action or non-joinder of parties does not justify a Court in rejecting a plaint.

Second appeal from the order of the Additional Divisional Judge, Lahore, dated the 6th April 1909, affirming that of the Sub-Judge, Lahore, dated the 19th March 1908.

Messrs. *Oertel* and *Gopal Chand*, for the Appellant.

Mr. *Fazal-i-Husain*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff-appellant against the defendants-respondents, who are members of the Anjuman-i-Naumania, Lahore, for possession of 412 *kanals*, 10 *marlas* of land situate in *Mauza* Ghandra, *Tahsil* Lahore.

The allegations on which the plaintiff's claim was based are very fully set forth in the judgment of the Court of first instance which also gives the pleas of the defendants in some detail.

Upon the pleadings of the parties the Court framed altogether nine issues, of which the 1st, the 2nd, the 3rd, the 8th and the 9th, which were regarded as preliminary issues, are as follows.

(1) Whether there is a misjoinder by reason of the fact that the suit has been brought against defendant No. 1 personally and also as Secretary of the Anjuman-i-Naumania?

(2) Whether amendments have not been made in the plaint as directed by the Court: if so, what is its effect?

(3) Whether there are other members of the Anjuman-i-Naumania than the defendants, and, if so, whether the suit cannot lie without joining them as defendants?

(8) Whether, on account of the proof adduced by the plaintiff regarding the issues, the *onus* of which lay upon him, his statement and the evidence for him are discrepant from the plaint and whether, therefore, the suit cannot proceed?

(9) Whether the suit cannot lie without joining Nabi Bakhsh of Fatehgarh?

On these issues the Court of first instance held (1) that the suit was bad for misjoinder of causes of action and of parties; (2) that the plaintiff had not amended his plaint in accordance with the order of the Court dated the 18th June 1906, and that the plaint was liable to be rejected under section 54 of the Code of Civil Procedure, 1882; (3) that the Anjuman-i-Naumania had a large number of members other than the defendants, and that as those members were necessary parties and had not been impleaded as defendants, the suit could not proceed; (4) that the proof adduced by the plaintiff was at variance with his pleadings; and (5) that Nabi Bakhsh, being a party to the alleged contract between the plaintiff and the defendants, should have been joined either as a co-plaintiff or as a defendant, and that as he had not been so joined the claim was defective. As a result of these findings, the Court rejected the plaint but it did so without specifying the provisions of the Civil Procedure Code under which the order of rejection was passed.

On appeal, the learned Additional Divisional Judge concurred with the first Court in holding that the suit was bad for misjoinder of causes of action and of parties; and without considering and deciding the question as to whether the order of the first Court dated the 18th June 1906 directing the plaintiff to amend his plaint in certain particulars had or had not been complied with by him and as to what were the legal consequences of a non-compliance with that order on the part of the plaintiff, the learned Judge upheld the order

rejecting the plaint and dismissed the appeal.

The plaintiff has preferred a further appeal to this Court. Before we deal with the appeal on the merits we must consider and decide the question whether, having regard to the nature and value of the suit the plaintiff is entitled to appeal to this Court as of right. It appears from the record that the plaintiff originally sued for possession of 412 *kanals* 10 *marlas* of land in dispute and valued his suit for purposes of Court-fee at five times the *jama* Rs. 63-2 and for purposes of jurisdiction at 30 times the *jama* Rs. 378-12. On the 14th August 1905 the defendants objected that the amount of the Court-fee affixed to the plaint was insufficient, urging that the suit was really one for specific performance of a contract, and that under section 7, clause X, of the Court Fees Act, Court-fee must be paid according to the amount of the consideration alleged to have been fixed for the sale of the land in dispute namely, Rs. 3,000. They also said that the value of the suit for purposes of jurisdiction would be the same as for purposes of Court-fee. This objecion was accepted by the Court, which by order dated the 23th August 1905 directed the plaintiff to pay full stamp on Rs. 3,000, the alleged price of the land and that order was duly complied with on the 23rd October. In the first Court, therefore, the suit was treated as one for specific performance of a contract to sell and not one for possession of the land in dispute on the basis of a completed sale, and although the plaintiff in his memorandum of appeal filed in the Divisional Court raised an objection in his sixth ground of appeal to the first Court's order directing him to pay full Court-fee on the amount of the consideration for the sale that ground was withdrawn at the time of argument; and both parties must, therefore, be considered (apart altogether from the merits of the question) to have accepted the position that the suit as laid was not one for possession of land as sold but only one for specific performance of a contract to sell the land, the value of the suit for purposes of Court-fee and of jurisdiction being Rs. 3,000. Mr. Oertel on behalf of his client agrees to treat the suit throughout this litigation as described above and is prepared to abide by the consequences that may hereafter follow from it. Under these circumtances, we must hold that the value of the suit is Rs. 3,000 and that a further appeal lies as of right to this Court.

In support of the appeal, Mr. Oertel has contended that there was in this case no misjoinder of parties and of causes of action; that even if there were such misjoinder, the defendants having omitted to raise an objection as to misjoinder of parties before the first hearing, were precluded from raising it afterwards; that the first Court by order dated the 18th June 1906 had on that ground overrul d the objection of the defendants as to non joinder of the members of the Anjuman-i-Naumania other than the defendants themselves; that the said order so far as it directed the amendment of the plaint, had been fully complied with by the plaintiff; that the Courts below have confused the non-joinder of parties with misjoinder of parties, as also the rejection of the plaint with the dismissal of the suit, and lastly, that whatever grounds there may exist for the dismissal of the suit, there were none whatever for the rejection of the plaint *in limine*. After hearing the respondent's Counsel we think that these contentions must prevail. From the judgment of the first Court it is not quite clear on what specific grounds it rejected the plaint, though reading it as a whole it would appear that the order of rejection was based principally on two reasons,—

(1) that the suit was bad for misjoinder of causes of action and of parties, and

(2) that the order dated the 18th June 1906 directing the plaintiff to amend his plaint had not been fully complied with.

The findings recorded by the first Court on issues Nos. 3, 8 and 9 (the two latter issues being wrongly numbered in the judgment as Nos. 4 and 5) did not nponany view of the law justify the rejection of the plaint, and the respondent's Counsel concedes that the plaint could only have been rejected under section 54 (*d*) of the Civil Procedure Code, 1882, on the sole ground that having been returned for amendment by order dated the 18th June 1906, it was not amended as directed within the time fixed by the Court. Apart from non-compliance with this order, the mere fact (if it was a fact) that there was misjoinder of parties and of causes of action or non-joinder of parties did not, it is conceded, justify the Court in rejecting the plaint; it is only when a plaint is returned for amendment under section 53 (*b*) (*iii*), Civil Procedure Code, 1882

and the necessary amendments are not made within the prescribed period, that under section 54 the Court has power to reject the plaint. This much is freely conceded by the respondent's Counsel; and that being the case it is quite clear that the ground on which the Additional Divisional Judge upheld the order rejecting the plaint, namely, that the suit was bad for misjoinder of parties and of causes of action, is unsustainable. The learned Judge has obviously gone wrong in confusing the non-joinder of parties with misjoinder of parties and has not kept in view the very important distinction between the grounds on which a plaint can be rejected *in limine* under the Civil Procedure Code and those on which a suit can be dismissed as being not maintainable as framed. If, as the Additional Divisional Judge holds, Nabi Bakhsh ought to have been joined as a co-plaintiff, and further, if t' e members of the Anjuman-i-Naumania, other than the defendants, ought to have been impleaded as parties and were not so impleaded, the consequences might be otherwise serious for the plaintiff, but surely these circumstances did not of themselves justify the order *rejecting* the plaint. Furthermore, even if there was misjoinder of parties and of causes of action, there was no provision of the Civil Procedure Code of 1882, except section 53 (*b*) (*iii*), and section 54 (*d*) under wh'ch the plaint could be rejected for such misjoinder; the above-mentioned sections of the Code appear to have been overlooked by the Additional Divisional Judge and he has fallen into the error of supposing that a plaint could be rejected in all cases where a suit could be dismissed for non-joinder of parties or for misjoinder of parties and of causes of action. This view is obviously mistaken, and the respondent's Counsel has made no attempt to support it.

There remains the question whether the order of the first Court, dated the 18th June 1906, directing the plaintiff to amend the plaint was not complied with by him, and whether, in consequence of such non-compliance by him, his plaint was liable to be rejected under section 54 (*d*), Civil Procedure Code. The order in question is not very clear in its terms and was, therefore, liable to misconstruction. In it the Sub-Judge notes four points in respect of which the defendants had urged that the plaint required to be amended, the fourth and last point being that if the plaintiff had a cause of action against the Anjuman-i-Naumania, all the members thereof as far as their names and addresses could be ascertained, must be impleaded as defendants With respect to this last point, the Sub-Judge passed an order to the effect that since this objection relating as it did to non-joinder of parties, had not been taken at the first hearing, it could not be raised that stage of the case, and he concluded by returning the plaint for amendment in regard to the particulars noted by him. We are quite clear that by this order the Sub-Judge intended to overrule and did overrule, the fourth objection raised by one defendant as to the non-joinder of all the members of the Anjuman, and that it was only with reference to the first three points noted in his order that the plaintiff was directed to amend his plaint. This is the only rational interpretation of the order in question; and we hold that by amending the plaint in respect of the first three particulars mentioned therein, the plaintiff fully complied with that order. The plaint was not, therefore, liable to be rejected under section 54 (*d*), Civil Procedure Code, and if the order of rejection passed by the first Court is based on the provisions of the said section as has been urged before us by the respondent's Counsel that order is erroneous.

For the above reasons, we accept this appeal, set aside the order rejecting the plaint and send the case back to the Court of first instance for disposal according to law.

The stamp on the appeal will be refunded and other costs will be costs in the cause.

Appeal allowed.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL NO. 888 OF 1910.
April 18, 1911.
Present:—Mr. Justice Karamat Hussain.
JADU BANS UPADHYA AND OTHERS—DEFENDANTS—APPELLANTS
versus
BHUNESRI UPADHYA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Appeal, ground for—Pleader's inability to go on with the case—Prayer for time not acceded to.

MAHARAJ SINGH *v.* SHANKAR LAL.

Where an appellant'sPleader falls ill on the day of hearing and time is given to engage another Pleader but the Pleader so engaged does not argue the case but applies for time which is not allowed and the case is proceeded with, the order of the Court refusing to allow further time is not open to second appeal.

Second appeal from the decision of the Subordinate Judge of Jaunpur, dated 27th April 1910.

Mr. *Haribans Sahai*, for the Appellants.

Mr. *S. A. Haider*, (with him Mr. *Zahur Ahmed*,) for the Respondents.

JUDGMENT.—This was a suit for recovery of money. The Court of first instance decreed the plaintiff's suit. On appeal the decree of the Court of first instance was affirmed. It, however, appears that on the day fixed for hearing the learned Vakil for the appellant was taken ill. Time was given them to engage another Pleader but the Pleader engaged did not argue the appeal. He, as appears from the order of the lower Appellate Court dated 27th April 1910, applied for time. The lower Appellate Court rejected the application entered into the merits of the case and came to certain findings of fact. The defendant has preferred a second appeal to this Court and the only point argued before me, is that the lower Court ought to have acceded to the prayer of the Pleader. In my opinion this is, not a ground for second appeal. The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 452 OF 1910.

March 1, 1911.

Present:—Mr. Justice Tudball.

MAHARAJ SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

SHANKAR LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (XIV of 1859), s. 4—Acknowledgment—Mortgagee recorded as such in a khewat *which was attested by the mortgagee—Signature made in the hand-writing of a third person but in presence of the signor, effect of.*

A mortgagee was recorded as such in a *khewat* and the entry was duly attested by him. The signature of the mortgagee, however, was written by a third person in his presence and apparently with his sanction.

Held, that the signature was the personal signature of the mortgagee, and the entry in the *khewat* was a valid acknowledgment under section 19 of the Limitation Act.

Second appeal from the decision of the Additional Subordinate Judge of Aligarh, dated the 23rd February 1910.

Mr. *Peare Lal Banerji*, for the Appellants.

Mr. *Govind Prashad*, for the Respondents.

JUDGMENT.—The facts of the case out of which this appeal arises are briefly as follows:—

The property in suit belonged to two persons Wazir-ud-din and Alim-ud-din who on the 26th of March 1847 gave a usufructuary mortgage thereof to the predecessor-in-title of the defendants Nos. 2 and 3. A descendant, representative of Wazir ud-din and Alim-ud-din, by the name of Safdar Ali on the 7th of September 1893 sold the equity of redemption to defendant No. 1. On the 25th of March 1909, *i. e.*, more than 60 years after the date of the original mortgage the defendants Nos. 2 and 3, alleging that they had by lapse of time become the full owners of the property, sold it to the present plaintiffs and promised to secure mutation of names in favour of the latter. The plaintiffs brought this suit for possession of the property claiming title as full owners. The Court of first instance decreed the claim. The lower Appellate Court held that the plaintiffs were actually in possession but that by reason of an acknowledgment of the 6th of July 1876 the mortgage was still in existence, and that the right of redemption was not barred. In this view the lower Court dismissed the suit. In this Court exception is taken to this finding of the Court below. It appears that the original document of the 6th of July was before the lower Court, but a copy thereof was filed, and the Court drew the presumption which is allowed by section 90 of the Evidence Act although the original document was not before it. Exception is also taken that one Qazi Shafi-ud-din, who appears to have signed that document as *Mukhtar-i-am* or agent, has not been proved to have been an agent duly authorized according to explanation 2 of section 19 of the Indian Limitation Act. It seems to me quite unnecessary to go into this point. As

a matter of fact, there is another acknowledgment on the record which, in my opinion, is clear. There is a distinct acknowledgment made by the mortgagee on the 20th of February 1864 which would also equally save limitation. In that year a *khewat* was drawn up at the Settlement time. The Settlement record was in evidence in the Court below, and is now before me. The first page of the *khewat* shows distinctly that Muhammad Farhat Ullah whose name appears at the end of the document (signed by the pen of one Muhammad Wazir) was present, and duly attested that *khewat*. The body of the *khewat* shows that Sheikh Farhat Ullah, son of Amir Ullah, was the mortgagee in possession of the property mortgaged by Wazir-ud-din and Alim-ud-din. The front page of the *khewet* shows that Farhat Ullah who signed that *khewet* was the Furhat Ullah who was a co-sharer of the village. It is, therefore, clear that Sheikh Furhat Ullah whose name is entered in the *khewat* is the Farhat Ullah whose name was signed at the end of the *khewat*. It is nowhere alleged that there was any other Farhat Ullah nor is it contended that Farhat Ullah was not the mortgagee on the date when the *khewat* was drawn up. The document, therefore, clearly establishes the fact that the *khewat* of 1864, in which the mortgagee Farhat Ullah was duly recorded as such mortgagee was duly attested by that mortgagee in person, and that he was clearly present when his name was written at the foot of the *khewat* by Muhammad Wazir. The signature is "Muhammad Farhat Ullah by the pen of Muhammad Wazir" The inference is irresistible that Muhammad Wazir signed Farhat Ullah's name at his (Farhat Ullah's) request and with his sanction, and that for the purposes of that signature Muhammad Wazir was his agent duly authorized by him to sign his name. There is no question as to whether or not Muhammad Wazir was a *Mukhtar-i-am*. He does not purport to have attested the *khewat* at all. It is quite clear that the *khewat* was attested by Farhat Ullah, that he was present, and that in his presence his name was signed in the Court of the Settlement Officer by Muhammad Wazir, and the inference is quite clear that the latter did so at his request and with his sanction. In my opinion, this is a personal signature "*Qui facit per alium facit per se.*" This acknowledgment is, therefore, one in writing signed by a person through whom the present plaintiffs derive their title, and it is binding on them. The right to redeem is, therefore, not, barred by limitation, and in this view the appeal must fail and is dismissed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 751 OF 1910.

March 20, 1911.

Present:—Mr. Justice Richards.

CHETAN DAS AND OTHERS—PLAINTIFFS—APPELLANTS

versus

HARI RAM AND OTHERS—DEFENDANTS—RESPONDENTS

Contract Act (IX of 1872), s. 23 - Consideration—Compromise of a compoundable offence in Criminal Court, whether valid consideration.

An agreement, the consideration for which is a compromise of criminal proceedings in connection with a compoundable offence, is valid and enforceable.

Amir Khan v. *Amir Jan*, 3 C. W. N. 5, referred to.

Shriranga Chariar v. *Ramasami Ayyangar*, 18 M. 189, not approved of.

Second appeal from the decision of the Additional Subordinate Judge, Saharanpur, dated 25th April 1910.

Mr. *Mohanlal Sandal*, for the Appellants.

Mr. *Durgacharan Benerjee* (with him Mr. *Lalitmohan Banerjee*), for the Respondents.

JUDGMENT.—This appeal arises ont of a suit in which the plaintiffs claimed that a platform and cess-pool should be removed The plaintiffs alleged that the platform and the cess-pool had been wrongfully put up and constructed on their land. They also pleaded that, by an agreement dated the 24th February 1906 the defendants had agreed that the *chabutra* and the cess-pool should be removed within fifteen days from the date of the agreement The defendants pleaded that if the platform was on any part of the plaintiffs' land, the plaintiffs had lost the right to have it removed by adverse possession. They further pleaded that the agreement was entered into under the following circumstances, namely, that a criminal case had been brought, which was a false case in order to bring pressure to bear on the defendants and that the plaintiffs by means of undue influence caused certain particulars

contrary to the facts and mutual agreement to be entered therein. The Court of first instance held the agreement to be void because it was made in consideration of the withdrawal of a criminal proceeding and that the platform and the cess-pool were more than twelve years old. It, therefore, dismissed the plaintiffs' suit. The lower Appellate Court did not try the issue as to the agreement being valid or invalid, but held that the *chabutra* and cess-pool were more than twelve years old and confirmed the decree of the Court of first instance. The plaintiffs now appeal to this Court. It has to be admitted by the respondents that if the agreement was a valid agreement, the plaintiffs are entitled to succeed. The appellants, on the other hand, must admit that if the agreement was void, the finding of the Courts below, which is a finding of fact cannot be touched in second appeal. The only question really for decision then is, validity or invalidity of the agreement of the 24th February 1906. It is admitted that it was executed. The respondents are unable to point to any evidence to support the allegation that any matters were fraudulently put into this agreement by the plaintiffs or any one on their behalf, in contravention to the intention of the parties when they executed it. I offered to give time to look into the record to see how the evidence stood on this matter, and it is admitted that there is no evidence in support of any such allegation. The facts connected with the agreement appear to some extent at least to be undisputed and the undisputed facts are as follows. One Ashraf Khan, who was the *karinda* of the plaintiffs brought criminal proceedings under sections 341 and 352, Indian Penal Code, against some of the defendants. Section 341 is the offence of wrongful restraint and is punishable with simple imprisonment for a term which may extend to one month or with fine which may extend to five hundred rupees or with both. It is an offence which is compoundable without the leave of the Court. The offence mentioned in section 352, Indian Penal Code, is the offence commonly called simple assault, punishable with imprisonment either rigorous or simple not exceeding three months, or with fine not exceeding five hundred rupees or with both. It also is a compoundable offence without the leave of the Court. These criminal proceedings were pending at the time the agreement of the 24th February 1906 was entered into. Now, reading the plaint in the present suit in conjunction with the written statement, it is perfectly clear that the platform in question, as it stood at the date of the agreement and at the time of the criminal proceedings, either actually encroached on certain land which on partition had been allotted to the plaintiffs or their ancestors or, if it did not actually so encroach, the plaintiffs were honestly contending that there was such encroachment. The first paragraph of the written statement commences by admitting that plot No. 93 was land which had been allotted to the plaintiffs' ancestors on partition; but the defendants contended that if any part of it was occupied by their platform the plaintiffs had lost that part by adverse possession. The cess-pool also was complained of. Now, let us see what was the nature of the agreement which was entered into between the parties. It provided that the defendants should demolish the platform but only to the extent of one and a half yards and that they should do so within fifteen days. The cess-pool was also to be removed; but the agreement provided for its re-erection elsewhere, proper precaution being taken to make it safe. The agreement then goes on to provide that if the defendants do not comply with the terms, the plaintiffs are to be at liberty to institute a suit for the removal of the platform and the cess-pool. It contains one more term, namely, that in the criminal proceedings to which I have already referred a compromise should be filed. Now, on the face of this agreement, there is nothing unreasonable or unfair. No proceedings have ever been instituted to set it aside on the ground of fraud or duress and plaintiffs took the steps of having it compulsorily registered. The compromise in the criminal proceeding was duly filed. The defendants, however, contend that the agreement is void, having regard to the provisions of section 23 of the Indian Contract Act, as the Courts below have found that it was entered into in consideration of the withdrawal of the criminal proceedings. Section 23 of the Indian Contract Act provides that the consideration or object of an agreement is lawful unless, among other things, the Court regards it as immoral or opposed to public policy,

It is said that the consideration for the present agreement was opposed to public policy on the general principle that its effect was to stifle a prosecution. Reliance is placed on a passage in the case of *Sriranga Chariar* v. *Ramasami Ayyangar* (1). The learned Judge there says,—"There is also no doubt of the law that a consideration that proceeds upon the withdrawal of criminal proceedings that have been instituted is illegal as being opposed to public policy, as it is held to be the stifling of a prosecution. And, even if this illegal consideration is only part of the consideration, it renders the whole agreement void, because there is not good and sufficient consideration." With great respect to the learned Judge, I think that proposition in India at least is too wide. What a Court has to do is to see in each case if it regards the consideration as being opposed to public policy. In the present case I have no doubt that the compromising of the criminal procedings did in fact enter into the consideration of the parties on each side when they executed the agreement. The law, however, in this country allows parties to compromise and compound certain offences. I fail altogether to see how a Court can regard the compounding of an offence which the law permits to be compounded, as being opposed to public policy. See also the exception to section 214, Indian Penal Code. In the present case the offences with which the defendants were charged were of a trivial and private nature and in all probability were directly connected with the very matters in dispute which the parties settled by the agreement of the 24th February 1906. In my opinion the Court of first instance was wrong in holding that the agreement was void and that the lower Appellate Court was in error in not deciding the question. The agreement, in my opinion, was a valid agreement and ought to have been given effect to. This view was taken in the case of *Amir Khan* v. *Amir Jan* (2). See also the judgment in *Badri Bhar* v. *Ram Saran Pande* (3) [decided by a learned Judge of this Court on the 22nd February 1911]. The defendant nowhere alleged that they complied with the terms of the agreement and the agreement provides that if the defendants did not within fifteen days mentioned in the agreement partially demolish the platform and alter the position of the cess-pool, the plaintiffs will be at liberty to institute a suit to have the platform demolished and the cess-pool removed. This being so, the plaintiffs' claim ought to have been decreed. I allow the appeal, set aside the decrees of both the Courts below and decree the plaintiffs' claim with costs.

Appeal allowed.

(1) 18 M. 189 at p. 191.
(2) 3 C. W. N. 5.
(3) 10 Ind. Cas. 189.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 864 OF 1908.

March 20, 1911.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Sundara Aiyar.

MULLA VEETIL SEETHI KUTTI—APPELLANT

versus

KORAMBATH PARUTHOOLI ACHUTAN NAIR AND ANOTHER—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. VI, r. 17—Amendment of plaint—Amendment in second appeal—Complicated question of law involved—Authorities as to remedy open to plaintiff conflicting—Plaintiff adhering to his own view—Amendment allowed—Amendment, when to be allowed—General rule.

Where an amendment is necessitated by the plaintiff's carelessness or mistake, it would ordinarily not be fair to allow him to rectify his error if the amendment would deprive the defendant of an advantage which he can legitimately claim to have gained by the plaintiff's mistake. But it would be hardly proper to apply this test to cases where the plaintiff cannot be charged with not having exercised reasonable care in drafting his plaint.

It cannot be laid down as a general rule that the Court should in no circumstances allow an amendment of the plaint on the ground that the defendant would not be able in consequence to plead limitation as a defence to the suit.

The proposition that a plaintiff will not be allowed to add *fresh causes of action* by way of amendment when if a fresh suit were instituted on those causes of action it would be barred by limitation, is subject to exceptions, *e*, *g*., where the cause of action is the same but the plaintiff has made a mistake as to the appropriate remedy which he would be entitled to in law on that cause of action.

The established practice of the Courts both in England and in India is to act with considerable liberality in the matter of granting admendments. The Court ought to correct all kinds of errors or mistakes which are not fraudulent or intended to overreach the Court.

Where there was considerable conflict in the judgments of the High Courts with respect to the remedies open to a plaintiff, and the plaintiff persisted

in the Courts below in maintaining his view as to the remedies claimed by him though his error was pointed out to him by the defendant:

Held, that it would be unreasonable in second appeal to refuse leave to amend on the ground that the plaintiff's advisers adhered in the Courts below to his view with respect to a complicated question of law especially when that view was accepted by both the lower Courts.

Authorities on the question of amendment discussed.

Second appeal against the decrees of the District Court of South Malabar, in A. S No. 515 of 1907, presented against the decree of District Munsif of Parappangadi, in O. S. No. 111 of 1906.

Mr. *K. P. M. Menon*, for the Appellant.

Mr. *K. P. Govinda Menon*, for the Respondents.

JUDGMENT.—According to the ruling of the Full Bench* the only suit that the plaintiffs in this case were entitled to institute was one for sale on the footing of their mortgage, and as the plaint contains no prayer for sale of the properties mortgaged to them the suit is liable be dismissed. They ask for leave to amend the plaint by substituting a prayer for sale for the reliefs asked for in the plaint. This request is strongly opposed by the learned Counsel for the appellant. His opposition is based on serval grounds. He contends that the proposed amendment would convert the suit into one of a character inconsistent with its present character as the plaint proceeds purely on the title acquired by the purchase of the property by the second plaintiff at the sale in execution of the decree obtained by the first plaintiff. The objection is altogether untenable. The suit is really to enforce the plaintiff's rights on the mortgage and of the Court sale, and the amendment the plaintiffs wish to make now is intended to enforce the right which, according to the Full Bench ruling, they are entitled to in virtue of the mortgage and the sale. To a suit in ejectment based on the auction-purchase only the first plaintiff would not be a necessary party at all. The plaint, moreover, sets out the plaintiff's mortgage and asks the Court to hold that the contending defendants have no subsisting right under their puisne mortgage or only the right to redeem the first mortgage. The cause of action in the plaint as proposed to be amended would be the same as in the original plaint. The relief asked for alone would be different.

The second ground of opposition is, that the plaintiffs persisted in both the Courts below in maintaining their view as to the remedies open to them under the law although the puisne mortgagees pointed out their error. We think that the plaintiffs can hardly be blamed for the view they took of their rights having regard to the fact that both the lower Courts upheld their contention. Besides, as is apparent from the judgment of the Full Bench, there has been considerable conflict in the judgments of the High Courts including this Court with respect to the remedies open to a person in plaintiff's position. Mr. K.P.M. Menon has referred to several cases in which leave to amend was refused in appeal or second appeal when the plaintiff, notwithstanding the objection taken by the defendant, did not ask for leave to amend in the lower Court. We do not consider it necessary to refer to these cases in detail, as none of them lays down any rule of general applicability, they proceed merely on the view taken in each particular case of the conduct of the plaintiff. It would not, in our opinion, be reasonable in the present case to refuse leave to amend on the ground that the plaintiff's advisors adhered in the Courts below to their view with respect to a complicated question of law especially when that view was accepted by two Courts.

The third and most important contention of the appellants' Counsel is, that leave to amend should not be granted where the result of the concession would be that the defendant would be deprived of the advantage which he would have of raising a plea of limitation if the plaintiffs had to institute a fresh suit instead of amending their former plaint. The decision in *Weldon* v. *Neal* (1); *Malikarjuna* v. *Pullayya* (2); *Alagappa Chetti* v. *Velliam Chetti* (3) and *Patta Veeram Kutti* v. *Kunni Kandi Shashath Veethil Appu* (4) are relied on in support of this contention. It is not argued that these cases lay down any general rule that the Court should in no circumstances allow an amendment of the

*9 Ind. Cas. 513.

(1) 19 Q. B. D. 394; 56 L. J. Q. B. 621; 35 W. R. 820.
(2) 16 M. 319.
(3) 18 M. 33.
(4) 2 M. W. N. 181; 9 Ind. Cas. 760; 9 M. L. T. 347.

plaint on the ground that the defendant would not be able in consequence to plead limitation as a defence to the suit; *Weldon* v. *Neal* (1), which is really the basis of all the subsequent rulings, decides merely that a plaintiff will not be allowed to add "fresh causes of action" by way of amendment when if a fresh suit were instituted on these causes of action it would be barred by limitation. Even this position is stated by the learned Judges who decided that case to be subject to exceptions. We cannot hold that the case is applicable where the cause of action is the same, but the plaintiff has made a mistake as to the appropriate remedy which he would be entitled to in law on that cause of action. The established practice of the Courts both in England and in India is to act with considerable liberality in the matter of granting amendments. Bowen, L. J., observed in *Cropper* v. *Smith* (5) "I know of no kind of error or mistake which if not fraudulent or intended to overreach the Court ought not to correct." The true test to be laid down with respect to the defendant's contention appears to us to be this, where an amendment is necessitated by the plaintiff's carelessness or mistake it would not ordinarily be fair to allow him to rectify his error if the amendment would deprive the defendant of an advantage which he can legitimately claim to have gained by the plaintiff's mistake. But it would be hardly proper to apply this test to cases where the plaintiff cannot be charged with not having exercised reasonable care in the drafting of his plaint. See *Nandlal Thakersey* v. *The Bank of Bombay* (6). On the other hand, it would be undesirable according to the view of the Judicial Committee of the Privy Council in *Mahommad Zahoor Ali Khan* v. *Musammat Thakooránee Rztta Koer* (7) to amend his plaint where he has acted with prudence and care. See *Sattappa Chetti* v. *Jogee Soorappa* (8) where leave to amend was granted on the ground that the plaintiff's error, was "not unnatural" one. *Dhani Ram Shah* v. *Bhagirath Shah* (9) where Banerjee, J., overruled the defendants' opposition because there was no fraud or overreaching on the plaintiff's part. *Kisandas Rupchand* v. *Pachappa Vithoba* (10) where Batchelor, J., points out that the bar of limitation, in case a fresh suit if launched would be barred, is sometimes a proper ground for allowing an amendment instead of being an objection to doing so.

The cases in *Malikarjuna* v. *Pullayya* (2) and *Alagappa Chetti* v. *Velliam Chetti* (3) are not in point as the amendment sought in those cases was by way of introduction in new parties into the suit. Section 22 of the Limitation Act expressly lays down that in such a case limitation would run up to the time of the addition of the fresh parties. With reference to the decision in *Patta Veeram Kutti* v. *Kunni Kandi Shashath Veethil Appu* (4), we do not think that the learned Judges who decided that case and proceeded on the authority of *Weldon* v. *Neal* (1) intended to lay down any general rule against allowing amendments where an application would be barred at the date of the amendment but merely held that in the particular case the party asking for leave to amend was not entitled to the indulgence. We are of opinion that, as no blame can be imputed to the plaintiffs in this suit for considering themselves entitled to the reliefs they asked for, we should allow them to amend their plaint by substituting a prayer for sale for the prayers for ejectment and foreclosure. The defendants concerned will be entitled to put in a fresh written statement if so advised and any fresh issues arriving on such written statement must, of course, be tried.

The decrees of the lower Courts are, therefore, reversed and the suit is remanded to the Court of first instance for trial, and in accordance with the above direction.

In the circumstances of the case, all costs incurred up to date must be reserved and abide the final decision of the suit.

Appeal allowed;
Case remanded.

(5) 26 Ch. D. 700 at p. 710; 53 L. J. Ch. 891; 51 L. T. 733; 33 W. R. 60.
(6) 11 Bom. L. R. 926; 4 Ind. Cas. 652.
(7) 11 M. I. A. 468; 9 W. R. (P. C.) 9.
(8) 17 M. 67.
(9) 22 C. 692 at p. 712.
(10) 33 B. 644; 11 Bom. L. R. 1042; 4 Ind. Cas. 726.

NATESA IYER *v.* RAMA IYER.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 830 OF 1908.

April 4, 1911.

Present:—Sir Arnold White, KT., Chief Justice, and Mr. Justice Munro.

NATESA IYER—APPELLANT

versus

RAMA IYER AND OTHERS—RESPONDENTS.

Hindu Law—Famliy settlement—Minor represented in the settlement—Right of minor to impeach the settlement—Bona fides—*Settlement 'fair and prudent'—Compromise of doubtful claims—Absence of due inquiry into facts by minor's guardian.*

A family settlement entered into on behalf of a minor by a person who acted as his guardian, is binding on the minor if it was a compromise of doubtful claims and each side had material of some strength on which to carry on the contest, the outcome of which might reasonably be thought doubtful and which a settlement enabled them legitimately to avoid.

The mere fact that the parties effected the settlement *honestly* is not conclusive of its binding character.

Where the lower Appellate Court found that the minor's guardian did not make due inquiry into certain circumstances forming the basis of the settlement, and yet held that the settlement was 'fair and prudent:"

Held, that the settlement was binding on the minor and could uot be avoided by him.

Second appeal against the decree of the District Court of Tanjore, in Appeal Suit No. 1073 of 1905, presented against the decree of the Subordinate Judge of Negapatam in O. S. No. 48 of 1903.

Messrs. *K. Srinivasa Aiyangar* and *M. Subramanya Aiyar*, for the Appellants

Messrs. *T. R. Ramachandra Aiyar* and *S. Srenivasa Iyer*, for the Respondents.

JUDGMENT.—In this case the plaintiff seeks to set aside a settlement which was entered into on his behalf when he was a minor by his elder brother and guardian. It was in the nature of a family settlement entered into for the purpose of putting an end to family disputes and the third defendant had precisely the same personal interest in the settlement as the plaintiff. Consequently, I think there can be no question as to the honesty of the settlement as far as the third defendant is concerned. That, however, is not conclusive; it may have been perfectly honest but, at the same time, it may not have been such a settlement seeing it was entered into on behalf of a minor as a Court of equity would uphold. The chief difficulty in this case is with regard to the finding of the lower Appellate Court with reference to a sum of Rs. 10,505. This sum of Rs. 10,505 formed a portion of certain alleged debts, the payment of which purports to be the consideration for the exclusion of Exhibit III, the mortgage by the second defendant which the District Judge describes as the basis of Exhibit IV which is the release executed by the second defendant. With regard to this sum of Rs. 10,505, the finding is, "the evidence does not afford sufficient guarantee for the truth of these debts—(these are the debts amounting to Rs. 10,505)—or their re-payment." In summing up the case, the learned Judge, with regard to the debts, the discharge of which according to Exhibit III formed the consideration for that mortgage, finds that if the third defendant the guardian "had made the smallest inquiry into the debts he must have found them as (I am quoting the Judge's words) "ill-supported as they have been here." I suppose we must take it, that the Judge found it as a fact that it is not a sham as regards the Rs. 10,505. The Judge finds the settlement was "fair and prudent," I take it, he means beneficial to the minor. In an earlier portion of his judgment (para. 5) the learned Judge says "turning to issues Nos. 4 and 5 (*a*) I observe that strong reason for supporting the arrangement under discussion beneficial to the plaintiff is available" and then he proceeds to state the reasons which in his judgment constituted that 'strong reason.' So we have here a finding of fact that the family settlement was "fair and prudent." We have this finding of fact notwithstanding the other finding of fact that the guardian before entering into the settlement made no inquiry with regard to the debts referred to in Exhibit III. The learned Judge evidently gave full consideration to the fact that there had been no inquiry in fact. In both the Courts there was very elaborate investigation into the facts of this case. Amongst the findings of fact by the learned Judge there is one that the succession was doubtful and that "disputes existed at the date of the alleged settlement and that each side had material of some strength on which to carry on the contest, the outcome of which might reasonably be thought doubtful and which a settlement enabled them legitimately to avoid."

I am not prepared to say that he was wrong in law in declining to set aside the settlement on the findings of fact arrived at by the learned Judge.

I would dismiss the second appeal with costs.

Appeal Dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 529 OF 1910.

February 14, 1911.

Present:—Mr. Justice Griffin.

HARGOBIND AND OTHERS—DEFENDANTS—APPELLANTS

versus

TULA RAM AND OTHERS—PLAINTIFFS—RESPONDENTS

Mortgage—Consolidation—Clog on equity of redemption—Mashrut-ul-rehn.

A. executed an usufructuary mortgage in respect of certain property in favour of *B.* Later on *A.* executed another mortgage-deed styled *Mashrut-ul-rehn* in which he stipulated that he would not be entitled to redeem the original mortgage without at the same time paying off the further debt:

Held, that both the mortgages were consolidated together and that *A.* could not redeem the earlier mortgage without redeeming the later.

Brij Lal v. *Bhawani Singh*, 7. A. L. J. 821; 7 Ind. Cas. 115, referred to.

Second appeal from the decision of the Additional Subordinate Judge of Agra, dated the 14th March, 1910.

Mr. *Mohan Lal Sundal*, for the Appellants.

Mr. *Girdhari Lal Agarwala*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for redemption of a usufructuary mortgage dated the 17th of December 1894. The property mortgaged was the mortgagor's ex-proprietary tenancy. The suit was defended, among other grounds, upon this, *viz.*, that the plaintiffs could not redeem the mortgage without redeeming a futher mortgage created by an instrument styled *mashrut-ul-rehn* (tacked on to the mortgage) dated the 20th of July 1897. The Court of first instance upheld this contention of the defendants and in its decree directed the plaintiffs to redeem the further charge as well as the original mortgage. The lower Appellate Court took a different view. It held that the later instrument did not and could not create a usufructuary mortgage, that under the law in force at the time of the execution of the instrument, the mortgagors could not make and hypothecation of ex-proprietary rights and that, therefore, the instrument of the 20th of July 1897 created no valid charge upon the mortgaged property and could not be enforced.

The defendants come here in second appeal and it is contended on their behalf that upon the true construction of the instrument of the 28th of July 1897 this instrument was in effect a consolidation of the further advance with the original mortgage, and that the plaintiffs are bound under their covenant to pay off both debts together. Reliance is placed on the case reported in *Brij Lal Singh* v. *Bhawani Singh* (1). The document of the 28th of July 1897 recites the fact of the previous mortgage upon the mortgagor's ex-proprietary holdings and then sets out the further advance which the mortgagors had taken from the defendants. Then follows the important clause.

* * * * *

(We agree that this debt shall be paid off without interest along with the original mortgage-money and the mortgagors shall not be entitled to redeem the original mortgage without at the same time paying off the further debt). This instrument was executed upon stamp paper bearing an impress stamp of Rs. 2, *i.e.*, it was stamped as it would have been if it were a usufructuary mortgage.

On behalf of the respondents it is contended that the decision in the above cited case proceeded upon the interpretation of the deed in this particular case. No doubt, in cases of this nature much will depend upon the wording of the deed between the parties, but I am unable to see that there is much difference between the deed in the case before me and the deed in consideration in he case cited. I have been referred on behalf of the respondents to the ruling in *Hanuman Das* v. *Ambika Prasad* (2) but it appears to me that this ruling has no application to the present case. A further plea advanced on behalf of the respondents is to the effect that the document in suit does not create a usufructuary mortgage as defined in the Transfer of Property Act. Looking to the terms of the deed of the 28th of July 1897, it appears to me that the stipulation that the further advance

(1) 7 A. L J. 821; 7 Ind. Cas 115.
(2) A. W. N (1906)278.

would carry no interest points to the conclusion that the agreement and intention of the parties was that the further advance should be consolidated with the original usufructuary mortgage. The facts of the present case are very similar to those in *Musammat Pancho* v. *Deo Karan* (3) decided by Mr. Justice Tudball and myself, I allow the appeal, set aside the decree of the Court below and restore that of the Court of first instance.

The appellants will have their costs in this Court and the Court below. Costs in this Court will include fees on the higher scale.

Appeal allowed.

(3) 6 Ind. Cas. 165.

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 3 OF 1910.

March 24, 1911.

Present:—Mr. Pratt, J. C., and Mr. Crouch, A. J. C.

SIR AGHA SULTAN MAHOMED SHAH *valad* AGHA ALI SHAH—PLAINTIFF—APPELLANT

versus

SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT—RESPONDENT.

Revenue Jurisdiction Act (*X of* 1876), *s.* 11—*Suit, right of, where the law gives an appeal*—Order *of ejectment appealable—Cause of action, whether* order *or* actual *ejectment—Appeal in the former case and suit in the latter- Suit on title—Limitation Act* (*IX of* 1908), *Sch I, art.* 14.

The *order* of a Collector directing the ejectment of a person being appealable under the Revenue Jurisdiction Act, no suit would lie where the cause of action is only such *order*. But where a person is actually ejected by the Collector a suit would lie, as there is no provision in the Act for an appeal from a physical act of ejectment.

Sakharam v. *Secretary of State for India*, 28 B. 332, referred to.

Obiter.—Article 14 of the Limitation Act does not apply to suits on title.

Balvant Ramchandra v. *Secretary of State*, 29 B. 480; 7 Bom. L. R. 497, referred to.

Mr. *Mathradas*, for the Appellant.

Mr. *Raymond*, for the Respondent.

JUDGMENT.—The plaintiff filed a suit in ejectment against the Secretary of State alleging that he had been dispossessed under the orders of the Collector.

The lower Court has held the suit barred by section 11 of the Revenue Jurisdiction Act as the plaintiff had not exhausted his remedies by way of appeal to the superior Revenue Authorities. The obvious flaw in this decision is that here the cause of action is the ejectment and not the order under which the ejectment was carried out. The Land Revenue Code, no doubt, provides for appeals against orders and decisions but there is no provision for an appeal from a physical act such as an ejectment. This was the *ratio decidendi* of *Sakharam* v. *Secretary of State for India* (1). It is obvious that if the cause of action were the order the suit would be time-barred under Article 14. But this Article was held not to apply to suits on title in *Balvant Ramchandra* v. *Secretary of State* (2).

We accordingly reverse the decree of the lower Court and remand the suit for re-admission and for decision on the merits. Costs to be costs in the cause.

Case remanded.

(1) 28 B. 332.
(2) 29 B. 480; 7 Bom. L. R. 497.

ALLAHABAD HIGH COURT.

CIVIL REVISION NO. 15 OF 1910.

March 8, 1911.

Present:—Mr. Justice Karamat Hussain.

SAJAN KUNWAR—PLAINTIFF—APPLICANT

versus

JOTI PRASHAD—DEFENDANT—RESPONDENT.

Onus on defendant—Plaintiff producing his evidence without waiting for the evidence of the defendant—Whether plaintiff can rely upon the plea that defendant has not discharged his onus—Pleadings.

Where the onus is upon the defendant to prove a certain fact but the plaintiff without waiting for the defendant's evidence takes upon himself to prove it, he cannot subesquently say that the defendant did not discharge his onus.

Makand v. *Bahori Lal*, 3 A. 824, followed.

Revision against the decree of the Small Cause Court of Dehra Dun, dated the 20th November 1909.

Dr. *Satish Chandra Banerjee*, for the Applicant.

Mr. *B. E. O'Conor*, for the Respondent.

JUDGMENT.—In this case, I by my order of the 24th of October 1910, sent down the following issue to the Court of Small Causes for trial. "Did Joti Prasad sign the document, dated the 4th of February 1905 with the intention of taking upon himself the liability created thereby even if it was

not signed by Loti Ram or did Joti Prasad sign it only on the understanding that Loti Ram would also sign it? 'The finding returned by the Court of Small Causes is in the following terms':

"I find that he (Joti Prasad) signed Exhibit I only on the understanding that Loti Ram would also sign." The learned Judge of the Court of Small Causes arrived at the above finding with reference to the evidence adduced by the plaintiff. Regarding the statement made by Joti Prasad before the remand, the learned Judge of the Court of Small Causes in his order of the 28th of January 1911 remarked "Joti Prasad has denied that he intended to execute a bond on his sole responsibility." Objection is taken to the above finding on the ground that the onus was on the defendant to prove that he was not liable under a document executed by himself. Had the plaintiff refrained from adducing any evidence to prove the intention on the part of Joti Prasad there would have been some force in the above contention but as the plaintiff took upon himself to prove a particular intention on the part of the defendant the principle of the case of *Makund* v. *Bahori Lal* (1), in my opinion, applies to this case and the plea of the burden of proof cannot be raised. Besides, there was nothing to prevent the Court of Small Causes from taking into consideration the statement of Joti Prasad recorded by that Court prior to the order of remand to treat it as evidence adduced by the defendant and to come to a finding with reference to the evidence tendered by the parties.

It is further contended by the learned Advocate for the applicant that the bond, dated the 4th of February 1905, may be treated as an acknowledgment to keep a pre-existing debt incurred on the 26th of March 1902 alive, but the record of the case shows that the former bond is not the basis of the claim and that the basis of the claim is the bond of the 4th of February 1905. That being so, the latter bond cannot be treated as an acknowledgment of a pre-existing debt. For the above reasons, I dismiss the application for revision with costs.

Application dismissed.

(1) 3 A. 824.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 918 OF 1910.

March 25, 1911.

Present:—Sir John Stanley, KT., Chief Justice, and Mr. Justice Banerji.

CHIDDA SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

RUP RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Agra Tenancy Act (II of 1901*), s.* 34*—Applicability of the section—Tenant holding with consent of* Zemindar.

Section 34 of the Agra Tenancy Act, 1901, applies to a case where a person occupies land without the consent of the landholder and not where he occupies it as his tenant.

Second appeal from the decision of the District Judge of Aligarh, dated the 27th of July, 1910.

Mr. *Govind Prashad* (with him Mr. *Satya Chandra Mukerji*, for the Appellant.

Mr. *Abdul Raoof*, for the Respondents.

JUDGMENT.—In our judgment the view taken by the learned Judge is correct. The plaintiffs mortgage certain property to the defendants. After redemption of the mortgage, and after formal possession was delivered to the plaintiffs the mortgagees continued to cultivate certain plots of land comprised in the mortgage. The plaintiffs sued them in the Revenue Court for ejectment alleging that they were the tenants of the plaintiffs from year to year, and obtained a decree. The plaintiffs have now sued the defendants in the Revenue Court for rent for the period of their occupation of the land. The suit was brought under section 34 of the Agra Tenancy Act. That section applies where a person occupies the land of the landholder without the latter's consent. The plaintiffs in their suit for ejectment in the Revenue Court admitted that the defendants occupied the land as their tenants. Therefore, defendants did not occupy the land without the plaintiffs' consent, and section 34 has been rightly held not to be applicable. As, by the plaintiffs' own admission, the defendants were their tenants during the period for which rent is claimed a claim for compensation for use and occupation could not be brought in the Civil Court and, therefore, section 197 of the Act is inapplicable. The learned Judge has, in our opinion, rightly held that section 34 not being applicable, the suit must fail. We dismiss the appeal

with costs including fees on the higher scale.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 971 OF 1910.

April 19, 1911.

Present:—Mr. Justice Karamat Hussain.

BADLI DAS AND OTHERS—DEFENDANTS—APPELLANTS

versus

PAJAN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Pre-emption—Wajib-ul-arz—*Custom or contract—Presumption—Rebutting evidence—Register of transfers, whether admissible in evidence to prove the fact of transfers—Evidence—Civil Procedure Code (Act V of 1908), O. XLI, r.* 24—*Power of Appellate Court to decide case on evidence on the record.*

A register of transfers is admissible in evidence to prove the fact of transfers entered therein. The mere entry, however, in such a register that there have been transfers or sales, is not sufficient to rebut the presumption arising out of an entry in the *Waijb-ul-arz* regarding the prevalence of the custom of pre-emption in the village.

Returaji Dubain v. *Pahalwan Bhagat*, 7 A.L.J. 1040; 7 Ind. Cas. 680, referred to.

An Appellate Court has full power, under Order XLI, rule 24, of Act V of 1908, to decide with reference to the evidence on the record the issues left undetermined by the lower Court without sending back the case to the Court below.

Second appeal from the decision of the District Judge of Jhansi, dated 23rd of August 1910.

Mr. *Mohan Lal Sandal*, for the Appellants.

Mr. *Haribans Sahai*, for the Respondents.

JUDGMENT.—This was a suit for pre-emption on the basis of a *wajib-ul-arz*. The pleas raised in defence were that the presumption arising out of the entry in the *wajib ul-arz* as to the existence of the custom of pre-emption was not conclusive, inasmuch as there was evidence to rebut the presumption. The vendees in support of their defence, produced the mutation registers, which showed that there had been certain sales, of which there was no pre-emption. On the pleadings of the parties, the Court of first instance framed the following issues,—Is the entry in the *wajib-ul-arz* a record of custom or contract? (2) and is the custom of pre-emption, if any, fallen into desuetude? (3) Did the plaintiff refuse to parchase the share, if so, what is its effect upon the suits? (4) What is the true sale price?. The Court of first instance, accepting the rebutting evidence adduced by the defendant, found that the custom ceased to exist, and dismissed the claim without deciding the other issues. There was an appeal to the lower Appellate Court which reverssd the decree of the Court of first instance, finding that at the time of the preparation of the *wajib-ul-arz* of 1865 the custom of pre-emption set out in the *wajib-ul-arz* existed in the village, and that the custom had not fallen into desuetude and that it still prevails there. The lower Appellate Court went on to decide issues Nos. 3 and 4. It found that no evidence had been given to prove that the plaintiff refused to purchase or that the sale price was other than that stated in the sale-deed. The lower Appellate Court in its judgment observes that the entries in the Settlement Records were not sufficient to rebut the presumption arising out of the entry in the *wajib-ul-arz*. That Court said to rebut this evidence, defendants endeavoured to prove eight or nine sales to strangers. Two only of these sales are proved by the production of the original sale-deeds. The remainder have been sought to be proved by a Settlement Record and a register of transfers. It appears to me that this method of proof was prohibited by section 91 of the Evidence Act. The learned Munsif held that the said section 91 did not apply because it was not the terms but only the fact of the sale which was sought to be proved. But section 91 does not say that, when the terms of a sale have been reduced to the form of a document, no other evidence shall be given of such terms, but that when the terms of a contract or of a grantor of any other disposition of property have been reduced to the form of a document no other evidence shall be given of such terms. I fail to see how, without taking evidence of the terms of a contract, grant or other disposition of property, any one could satisfy himself judicially, that such contract, grant or disposition was a sale. The learned Munsif has referred to the difficulty of obtaining original documents in such cases, but that difficulty is met by the provisions of the Evidence Act regarding secondary evidence. The preliminary conditions necessary for the production of secondary evidence have not been fulfilled in the case". The defendant has preferred a second appeal to

this Court and the points pressed before me are the following:

(1) That the lower Appellate Court is in error in disregarding the Settlement Record and register of transfers in order to prove the fact of transfer.—

(2) That the lower Appellate Court, on finding that the custom of pre-emption prevailed in the village, was bound to remand the case to the Court of first instance, for the decision of the remaining issues.

In my opinion, the lower Appellate Court is not quite correct when it says that the register of transfers is not admissible to prove the fact of transfer entered therein. But the mere entry in the register that there have been transfers or sales, is not, in my opinion, sufficient to rebut the presumption arising out of the entry in the *wajib-ul-arz*, regarding the prevelance of the custom of pre-emption in the village. Under the Full Bench ruling of this Court, in the case of *Returaji Dubain* v. *Pahalwan Bhagat* (1), the entry in the *wajib-ul-arz*, in the absence of anything to the contrary, must be deemed to be a record of the custom of pre-emption, and the mere entry in the register of transfers, that there have been certain transfers or sales, is not, in my opinion, sufficient to rebut that presumption. The utmost that these entries can prove is, that there have been certain sales. The entries will not show that those sales are such as may entitle a pre-emptor to pre-empt. Even if they be such sales as would entitle a pre emptor to pre-empt, it will have to be proved that there was no pre-emption and if that is proved it will not be enough to put an end to the custom of pre-emption. In this view of the case, the finding of the lower Appellate Court as to the existence of the custom of pre-emption is a correct finding. Regarding the other contentions raised by the learned Vakil for the appellant, it is sufficient to remark that so far as the price is concerned the appellant suffers in no way, for it may be pre-emptor who alleged that the actual price paid was less than that entered in the sale-deed. There is no contention that, in my opinion, the lower Appellate Court could not decide the third issue and was bound to send back the case to the Court of first instance to record a finding on that point, an issue on that point was framed. And the vendees had full opportunity to adduce evidence to prove that the pre-emptor had refused to purchase but they did not do so and the lower Appellate Court, with reference to the evidence on the record, had under, the provisions of Order XLI, rule 24, Act V of 1908, full power to decide the point without sending back the case to the Court of first instance. The result is that the appeal fails and is dismissed with costs. I extend the time for payment of the price entered in the sale-deed to the end of June 1911.

Appeal dismissed.

(1) 7 A. L. J. 1040; 7 Ind. Cas. 680.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 366 OF 1910.

March 20, 1911.

Present:—Mr. Justice Griffin.

JWALA PRASAD—PLAINTIFF—APPELLANT

versus

BHARAT SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Assignment admitted by assignor—When can be impugned by a third party—Pleadings.

Ordinarily, an assignment cannot be impugned by a third party when the assignor admits it. But a third party is entitled to impugn it when the transfer is a colourable one, and has been entered into with the object of defrauding him.

Second appeal from the decision of the Subordinate Judge of Cawnpure, dated the 13th of April, 1910.

Dr. *Satish Chandra Banerji*, for the Appellant.

Mr. *Choudhari*, for the Respondents.

JUDGMENT.—The facts that have given rise to this appeal are as follows:—There were three brothers, Matoi Singh, Mahapal Singh and Makund Singh. Makund Singh survived his brothers, and he was the owner of the property in suit. On his death that property devolved, in consequence of there being no male heirs, on his widow, who by a sale-deed conveyed it to the plaintiff on the 22nd February 1906. On the 22nd November 1906 the widow of Mahapal Singh executed a sale deed of the property in suit in favour of the defendants Nos. 1 and 2, Upon this the plaintiff instituted the suit which has given rise to this appeal, for a declaration, that the sale in favour of defendants Nos. 1 and 2 was null and void and for possession of the

property in suit. The defendant defended the suit upon the allegation, among other grounds, that the sale-deed of 22nd February 1906 was a fictitious document. The Court of first instance found that the widow of Mahapal Singh had no power to execute the sale-deed in favour of defendants Nos. 1 and 2, and while it decreed the plaintiff's suit in respect of the declaration asked for, it dismissed the suit for possession on the ground that the defendants Nos. 1 and 2 were actually in possession by virtue of a mortgage-deed dated the 30th January 1891, executed by Mahapal Singh. On appeal by the defendants, the lower Appellate Court, without deciding the issue as to whether the widow of Mahapal Singh had any title to execute the sale-deed in favour of the defendants Nos. 1 and 2, held that as the plaintiff did not claim consequential relief by seeking to redeem the mortgage, his suit was, therefore, barred by reason of the proviso to section 42 of the Specific Relief Act. The Court further expressed an opinion that the evidence was scarcely sufficient to prove, the genuineness of the sale-deed in favour of the plaintiff. The result of the case in the lower Appellate Court was that the appeal was decreed and the plaintiff's suit was dismissed. Plaintiff comes here in second appeal, and it is contended on his behalf that the Court below had erred in dismissing the plaintiff's suit as barred by reason of the provisions of section 42, Specific Relief Act. It is further urged that the Court below should have given the plaintiff a conditional decree for possession on his redeeming the mortgage. A further ground taken is, that the plaintiff vendor having admitted the transfer in plaintiff's favour, the contesting defendants were not competent to challenge the validity of the sale-deed. Looking to the plaint, I find that the plaintiff did, as a matter of fact, claim consequential relief in addition to the decree that he asked for, *i.e.*, that the sale deed in favour of the defendants be declared null and void, he further prayed that he be put in possession of the property in suit. The Court below having found that the plaintiff was not entitled to immediate possession, inasmuch as the property was in the possession of the mortgagees could have granted the plaintiff a decree for possession, subject to the condition that he redeemed the mortgage on the property. I understand from the arguments of the learned Vakil for the appellant that the plaintiff has no objection to a decree in that form. I have been referred to two cases in *Bajahawan* v. *Nanha* (1) and *Ramcharan* v. *Durga Prasad* (2). But, in my opinion, those cases do not throw much light on the question in issue. I think the Court below should in any case have given the plaintiff an opportunity of amending his plaint by inserting a prayer for permission to redeem the mortgage on the property. It is undesirable that a suit should be dismissed on the purely technical ground on which the present suit has been thrown out. As to the second point which has been argued before me in this appeal, namely, as to the decision of the Court below on the 3rd issue which was "whether Matoi Singh mortgaged the property to defendants Nos. 1 and 2 by means of a deed, dated the 30th January 1891" I have only to observe that the final conclusion of the Court below does not amount to a finding. Ordinarily, the rule of law is, that an assignment cannot be impugned by a third party, when assignor admits it. But the third party is entitled to impugn it when the transfer is a colourable one, entered into with the object of defrauding that third party. In the present case it does not appear that any such fraud could have been in the contemplation of the parties to the deed of 28th February 1906. It was not till nine months later that the defendants Nos. 1 and 2 obtained a sale-deed in their favour from the widow of Mahapal Singh. The execution of the sale-deed in favour of the plaintiff did not in any way injure the defendants' rights as mortgagees. The Court below has omitted to come to any finding upon the other issues. The lower Appellate Court has not decided the remaining issues in the case namely, Nos. 1, 2 and 5. I must, therefore, allow the appeal and remand the suit to the lower Appellate Court under the provisions of Order XLI, rule 23, Act V of 1908, for decision of the case on the merits, having regard to the observations made above. Costs of this appeal will be costs in the suit and shall include in this Court fees on the higher scale.

Appeal allowed.

(1) A. W. N. (1882) 73.
(2) A. W. N. (1884) 78.

SOHNI *v.* MOHAN KUAR.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 814 OF 1910.
March 28, 1911.
Present:—Mr. Justice Karamat Hussain.
Musammat SOHNI—DEFENDANT—APPELLANT
versus
Musammat MOHAN KUAR—PLAINTIFF
—RESPONDENT.

Hindu Law—Mitakshara—*Joint family*—*Sale in execution of a decree on mortgage executed by father*—*Son not a party to the mortgage*—*Right of son's widow to impeach the sale*—*Decree, execution of.*

A Hindu joint family consisted of a father and four sons one of whom was a minor. The father executed a mortgage on the basis of which the mortgagee brought a suit for sale and obtained a decree in execution of which the property was sold. The minor son died leaving a widow:

Held, that it was not open to the widow of the minor son to say that her husband's share could not be mortgaged by his father and could not pass to the auction-purchaser at a sale in execution of the mortgage decree.

Second appeal from the decision of the District Judge of Saharanpur, dated the 28th May 1910.

Mr. *Sital Prashad Ghose*, for the Appellant.

Mr. *Govind Prashad*, for the Respondent.

JUDGMENT.—On 8th November 1882, one Kalyan Rai mortgaged his rights and interests to the extent of half (*haq haquq yani haqadar nisf hisa*) of a house to Mangal Sen. Mangal Sen, on the basis of that mortgage brought a suit for sale, got a decree on 7th December 1894, brought the property to sale and purchased it himself on 2nd September 1897. On 29th October 1897, he sold the property purchased by him to the plaintiff which sale was confirmed on 4th November 1897. Kalayan had four sons Sham Lal, Sheo Ghulam, Sri Ram and Bhagwat Das. The last mentioned Bhagwat Das was a minor. Kalyan for himself and as guardian of his minor son Bhagwat Das, as also his three sons took a lease of the house from the plaintiff.

In 1898, the plaintiff instituted a suit against Kalyan Rai and his sons for arrears of rent. He got a decree against Kalyan Rai and his three sons who were of age. Bhagwat Das, minor son of Kalyan Rai, was exempted on the ground that the lease executed by Kalyan and his three sons was not binding on Bhagwat Das. Kalyan Rai and his three sons left the house but Bhagwat Das continued in possession of one room in the second storey on the ground that he was entitled to 1/5th of the portion of the house mortgaged by Kalyan Rai. After Bhagwat Das's death his widow *Musammat* Sohni continued in possession of that room.

The plaintiff, on the 13th October 1909, instituted a suit for possession against *Musammat* Sohni who resisted the suit on the following grounds: Kalyan Rai had no power to mortgage the share of Bhagwat Das; the debt to secure which Kalyan Rai mortgaged the house in question was not an antecedent debt; the suit was barred by limitation; as Bhagwat Das was no party to the decree in execution of which the plaintiff's vendor purchased the house that decree was not binding on Bhagwat Das or on the defendant.

The Court of first instance found that the defendant failed to prove that the debt for which the mortgage-deed was executed by Kalyan Rai was not binding on her; that the suit was barred by limitation; that half of the house and not only the share of Kalyan Rai in that half was sold in execution of the decree obtained by Mangal Sen. Upon these findings it dismissed the suit.

On appeal, the lower Appellate Court reversed the decree of the Court of first instance finding that the suit was not barred by limitation inasmuch as it was brought within 12 years of the date of the confirmation of the auction-sale, and that it was for the defendant to prove that the debt contracted by Kalyan Rai was not binding on Bhagwat Das. For this latter proposition the lower Appellate Court relied on *Mata Din* v. *Ganga Din* (1).

The defendant has preferred a second appeal to this Court and the points pressed before me are the following: The suit is barred by limitation, the burden of proving that the debt was binding on Bhagwat Das lies on the plaintiff who represents the creditor; if the debt be found to be binding on Bhagwat Das then the defendant as his representative should be allowed an opportunity to redeem the share of Bhagwat Das in the house.

The suit, as remarked by the lower Appellate Court, was instituted within 12 years of the date of the confirmation of sale and is not, therefore, barred by limitation.

In support of his second contention the learned Vakil for appellant relies on the Full Bench ruling of this Court in *Chandra Deo Singh* v. *Mata Prasad* (2), which lays down

(1) 31 A. 599; 6 A. L. J. 799; 6 M. L. T. 99; 3 Ind. Cas. 24.

(2) 31 A. 176; 6 A. L. J. 263; 1 Ind. Cas. 479.

that a father of a Hindu joint family governed by the *Mitakshara* cannot execute a mortgage of joint family property which will be binding on his sons, when the loan is not obtained for family necessity or to meet an antecedent debt and that the creditor suing to enforce the mortgage executed by the father over the joint family property is bound to prove that the loan secured by such mortgage was taken to an antecedent debt or was justified by some other family necessity or at least that he had before advancing the loan made inquiries which reasonably led to the belief that the loan was required for family necessity or to pay off antecedent debts.

The learned Vakil for the respondent distinguishes the case relied on by the appellant on the ground that the rule laid down in that case does not apply when an auction sale has been taken place and that a son in a Hindu joint family governed by the *Mitakshara* who seeks to set aside the auction-sale is bound to establish that the transaction was not entered into to satisfy an antecedent debt or for some other necessity and in support of this he relies upon the following passages from *Debi Singh* v. *Jia Ram* (3). "If the purchasers at a sale in execution had purchased the property from Jia Ram and not through Court it is clear that the appellants could not impeach the sale unless they were in a position to prove that the debt in respect of which the sale was effected was a debt tainted with immorality. The Court has done only what Jia Ram could himself have done. Is the purchaser under the judicial sale to be in a worse position than he would have been if he purchased the property from Jia Ram" and the following passage from *Mata Din* v. *Gaya Din* (1). "In the present case if the father of Chitrakote had sold the property in dispute for the amount of the decree obtained by Beni Ram and Raja Ram the appellant Chitrakote could not have recovered his share of the property from the purchaser save by proving that the debt for which the sale was effected was tainted with immorality and was not otherwise binding on him. The fact that an auction-sale has taken place does not seem to us to make any difference. We are also of opinion that the fact that Chitrakote is not a plaintiff but is a defendant in the suit does not make any difference. If he was not competent to bring a suit for the recovery of his own share in the property otherwise than by establishing that the debt was not binding on him, he is not entitled to resist the claim of the purchaser save on the ground mentioned above."

He also relies on *Jaddo Kuar* v. *Sheo Shankar Ram* (4) and *Kashi Singh* v. *Chunni Lal* (5).

The observations in *Mata Din* v. *Gaya Din* (1), no boubt, go far enough to support the proposition put forward by the learned Vakil for the respondent that after an execution sale the burden of proof shifts from the creditors to the sons who seek to have the sale of their share set aside, but as I am going to decide this appeal on another ground I express no opinion on this point.

It is further contended by the learned Vakil for the respondent that as Kalyan Rai and his four sons have been found to be the members of a Hindu joint family governed by the *Mitakshara* Law Bhagwat Das' interest in half of the house in question by survivorship passed to his brothers and father and the possession of his widow was that of a mere trespasser, she, therefore, as a trespasser could not resist the suit of the plaintiff on the ground that her husband's share could not be mortgaged by Kalyan Rai and could not pass to the auction-purchaser at a sale on the mortgage-decree, that defence, if open at all, was open to Kalyan Rai and his sons. This contention is, in my opinion, well-founded.

Regarding the third plea taken in the memorandum of appeal, it is sufficient to say that in the view I take it is not necessary to decide it. The result is that I look upon the defendant, for the purposes of this case, as a mere trespasser and not a representative of her husband Bhagwat Das whose interest passed by survivorship to his father and brother.

On this ground and this ground alone I uphold the decree of the Court below and dismiss the appeal with costs.

Appeal dismissed.

(3) 25 A. 214.

(4) 7 A. L. J. 945; 7 Ind. Cas. 902.

(5) 8 A. L. J. 216; 9 Ind. Cas. 476.

SOHAN BIBI v. HIRAN BIBI.

ALLAHABAD HIGH COURT.
FIRST CIVIL APPEAL No. 396 OF 1909.
April 6, 1911.
Present:—Sir John Stanley, KT., Chief Justice, and Mr. Justice Banerji.
Musammat SOHAN BIBI—PLAINTIFF—APPELLANT
versus
Musammat HIRAN BIBI AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XIV, r. 5—Power of Court to add fresh issue—New plea should not be allowed after remand—Pleadings—Will—Original not forthcoming—Presumption—Revocation—Hindu Law—Widow—Power to make endowment.

A party to a suit ought not to be allowed to raise, after remand, a new plea, which was not advanced either in the Court below or in the High Court before remand. Although a Court has power under Order XIV, rule 5, of the Code of Civil Procedure, to add any issue before judgment is pronounced, yet in exercising that power it ought not to allow a new plea to be put forward and add an issue shortly before pronouncing judgment.

Where an original Will is not forthcoming the presumption is that it was destroyed by the testator with a view to revoking it.

A Hindu widow has no power to make an endowment of her husband's property except for purposes conducing to the spiritual welfare of her husband.

First appeal from the decision of the Officiating District Judge of Benares, dated the 26th July 1909.

Mr. *C'Conor* (with him Dr. *Tej Bahadur Sapru* and Mr. *Gokul Prashad*), for the Appellant.

The Hon'ble Mr. *Sunder Lal* (with him Dr. *Satish Chandra Banerji*), for the Respondents.

JUDGMENT.—The facts of the case in which this appeal has arisen are set forth in our judgment of 12th February 1909 by which we remanded the case to the Court below. The suit was brought for declaration that a compromise and a decree passed in accordance with it are not binding upon the plaintiff and cannot affect her rights, and that a transfer of property made thereunder cannot enure beyond the life-time of the plaintiff's mother *Musammat* Bindeshri Bahu. The compromise was effected in a suit brought by *Musammat* Puno, one of the three daughters of one Harish Chander. She claimed a third share of her father's property on the allegation that Parsotam Das, the husband of *Musammat* Bindeshri Bahu, was not validly adopted, and that she, as one of the daughters of Harish Chander, was entitled to a third share of his property. The suit was compromised by the plaintiff to that suit and the defendants, one of whom was Bindeshri Bahu, and under the compromise the property of Harish Chander consisting partly of Government promissory-notes and partly of immoveable property was divided between the different parties to the compromise. The plaintiff, who is one of the daughters of Parsotam Das, brought the suit out of which this appeal has arisen for the declaration mentioned above, mainly on the ground that her mother was not competent to enter into the compromise and thereby to alienate the property of Parsotam Das in which she had only a life-estate. The Court below dismissed the suit on the ground that the compromise was binding upon the plaintiff. We set aside that decision, and in accordance with some rulings of this Court we held that the compromise by the plaintiff's mother was not binding on the plaintiff as it amounted to an alienation of her father's estate. We also held that the adoption of Parsotam Das by Manki Bahu the widow of Harish Chander, was valid, and that the plaintiff was entitled to maintain the suit. We were also of opinion that the claim, in so far as it related to moveable property, was time-barred. We set aside the decree of the Court below and remanded the case for trial of the other issues which arose in it and which had not been disposed of by that Court. After the remand, the defendants set up the plea that under a Will made by Parsotam Das on the 9th of December 1883 the property which he had inherited from Harish Chander was absolutely bestowed by him upon Bindeshri Bahu and that the latter was thus the absolute owner of it and was competent to transfer it under the compromise in question. The Court below allowed this plea to be raised, added an issue, and came to the conclusion that under the Will aforesaid Bindeshri Bahu had an absolute interest in the property. The learned Judge also held that an endowment of immoveable property had been made by Manki Bahu, that Parsotam Das accepted this endowment, and relinquished all his interests in the said property, and that, therefore, the plaintiff had no right to maintain the suit. He

accordingly dismissed the claim. The plaintiff has preferred this appeal.

The first question to be considered in the appeal is, whether the Court below was right in admitting in evidence the alleged Will of Parsotam Das and in dismissing the plaintiff's claim on the ground that such a Will was made. In our judgment the learned Judge ought not to have allowed the defendants to set up at such a late stage of the proceedings a plea which they had not advanced either in the Court below or in this Court before the remand to which we have referred. If the defendants' case is true they had knowledge of the Will and they ought to have set it up as a defence to the claim. No doubt the learned Judge had the power under Order XIV, rule 5, of the Code of Civil Procedure to add any issue before judgment was pronounced. But in exercising his discretion he ought to have considered the circumstances of the case, and in view of those circumstances we think he ought not to have allowed a new plea to be put forward and added an issue shortly before pronouncing judgment. Further, we are of opinion that the finding of the Court below in respect to the alleged Will is erroneous. The original Will was not produced, but only a copy was filed. The plaintiff objected to the omission of it, and alleged that if any Will was made by Parsotam Das, it was revoked before his death and destroyed by him. The learned Judge did not consider this allegation of the plaintiff nor did he pronounce any opinion in regard to it. In our opinion, no foundation was laid for the admission of a copy of the alleged Will. The absence of the original Will was not accounted for, and no evidence was given to prove that it existed at the time of Parsotam Das' death and was subsequently lost. Bindeshri Bahu, who, on the application of the defendants, produced the copy to which we have referred above, was not examined as a witness. If the original Will is not forthcoming, the presumption is that it was destroyed by the testator with a view to revoke it. It was apparently in the possession of Parsotam Das, and there is nothing to show that he made it over to any one else. The presumption that the testator revoked the Will and destroyed it may, no doubt, be rebutted by evidence leading to the conclusion that he did not destroy it. But no evidence has been adduced on the point. The fact that it was not relied on by the defendants when the case was first heard by the learned Judge before the remand, raises a strong presumption in favour of the view that the Will did not subsist at the date of Parsotam Das' death and that the defendants knew that it was not in existence. We are, therefore, of opinion that it has not been established that any Will of Parsotam Das was in existence at the time of his death, by virtue of which *Musammat* Bindeshri Bahu became the absolute owner of his property and the decision of the learned Judge on this point cannot be supported.

It is next urged on behalf of the defendants that *Musammat* Manki Bahu, the adoptive mother of Parsotam Das, was the absolute owner of her husband's property, and that it was a condition precedent to the adoption of Parsotam Das that she should remain such owner during her life-time. For this contention reliance is placed upon certain recitals contained in a petition presented by *Musammat* Manki Bahu to the agent to the Governor-General on the 10th of May 1860. In that petition it was stated that it had been stipulated that the applicant would during her life-time retain absolute control over her husband's property, and all management and acts would be done according to directions given by her. We are of opinion that under this petition all that *Musammat* Manki Bahu retained to herself was the power of controlling and managing the property during her life-time, and that she did not reserve to herself an absolute interest in her husband's estate. It is most unlike that the addition was made not with the view that the property of Harish Chander should be perpetuated in his family but simply with the object of leaving an adopted son who would have nothing to do with the property.

We think that in view of the terms of this application it cannot be said that *Musammat* Manki Bahu reserved to herself an absolute interest in the property. It is not, therefore, necessary to consider

whether after the adoption she could legally possess an absolute interest in the property of her deceased husband. The Court below held that under a Will made by *Musammat* Manki Bahu on 9th December 1871, she gave to Parsotam Das only some Government promissory-notes and a house, and that she made an endowment of *zemindari* property and another house, that Parsotam Das assented to this being done, and that he relinquished all his rights to all other portions of the property of Harish Chander. The learned Advocate for the respondents has mainly based his arguments in support of the lower Court's conclusion on a receipt executed by Parsotam Das on the 29th of March 1881. In our judgment, the receipt cannot be construed as containing a relinquishment of his rights by Parsotam Das. In that receipt he referred to the Will of *Musammat* Manki Bahu dated the 9th of December 1871 and stated that by that Will she had made an arrangement in respect to the whole of her property with his consent. The receipt then proceeds,—"The said Will provides that Rs. 12,000 in notes and a house adjoining the Kothi on the north have been given to me the executant and adopted son and that, besides the said property, I, the adopted son, or my descendants or heirs shall have no right or claim to the *imlak*, *i.e.*, the moveable and immoveable properties comprised in the Will." This is merely a recital of what is contained in the Will but it cannot, in our opinion, be regarded as a relinquishment by him of his own rights. Even if it be assumed that the receipt was intended to operate as a relinquishment it might be operative if the Will of Manki Bahu of 1871 was a subsisting Will at the time of her death. But if, as is contended on behalf of the plaintiff, it was revoked by a subsequent Will, the assent of Parsotam Das to the disposition made by the Will of 1871 would not be of any avail to the defendants. It is urged on behalf of the plaintiff that the Will of 1871 to which Parsotam Das gave his assent was revoked by a later Will made by her on the 24th of January 1893. We are of opinion that this contention is well founded. Probate of the Will last mentioned was granted by the Court which treated it as the last Will and testament of *Musammat* Manki Bahu. By it she dealt with all the property referred to in the earlier Will and made a disposition of the whole of it, and in respect to some of it in a manner different from and inconsistent with the provisions of the first Will. The later Will must, therefore, be taken to have revoked the earlier one and wholly supplanted it. As the subsequent Will disposes of the whole of the testator's property, it clearly indicates an intention to revoke the first Will, although in terms it did not purport to do so. We cannot agree with the Court below that the dispositions made by the first Will of 1871 subsisted at the death of *Musammat* Manki Bahu and that, by reason of Parsotam Das having assented to it, he lost all his rights to the property of Harish Chander.

The alleged endowment of the village of Seodasa and of the house mentioned in the plaint was made under the Will of 1893. As *Musammat* Manki Bahu had only a life-interest in the estate of her husband, she was not competent to make the endowment. As a Hindu widow she had no power to make it except for purposes conducing to the spiritual welfare of her husband. The endowment in question was not made for such a purpose, and, therefore, it could not be binding on the reversioner. The fact that by the compromise which is impeached in this case the property, the subject of the endowment, was divided by the parties to the compromise negatives the idea of a valid and subsisting endowment. For these reasons we are of opinion that the learned Judge was not right in holding that the plaintiff could not maintain t e suit in respect to the village Seodasa and the house referred to in the plaint.

We have already held that the claim in regard to the moveable property is time-barred. As regards property other than the village Seodasa and the house mentioned in the plaint, it was contended on behalf of the defendants that it did not form part of the estate of Harish Chander. As to this, it was for the plaintiff to show that that property did belong to Harish Chander. No evidence has been adduced on the point, and, therefore, this part of the claim must be disallowed.

The only question which remains to be considered is that of the appointment of a Receiver which is asked for in the plaint. It has not been alleged that the estate

has been or is about to be wasted, and no other reason has been put forward for depriving Bindeshri Bahu of possession of the property which she is entitled to hold during her life-time. In our opinion a sufficient case has not been made out for the appointment of a Receiver. The result is that we allow the appeal, set aside the decree of the Court below and make a decree declaring that the compromise dated the 2nd April 1896 and the decree dated the 25th May 1896 passed on the basis of the compromise are not binding upon the plaintiff in so far as they affect the village Seodasa and the house mentioned in the plaint. The remainder of the claim is dismissed. The parties will pay and receive costs in both Courts in proportion to failure and success, and the costs in this Court will include fees on the higher scale.

Appeal allowed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 887 OF 1910.

March 28, 1911.

Present:—Mr. Justice Tudball.

HARNARAIN NATH TEWARI—PLAINTIFF—APPELLANT

versus

TILAK DUBE AND OTHERS—DEFENDANTS—RESPONDENTS.

Pre-emption—Wajib-ul-arz—*Presumption—Custom or contract—Evidence rebuttting presumption, sufficiency of.*

In a pre-emption suit the plaintiff relied upon two *Wajib-ul-araiz* of 1833 and 1860 which were *prima facie* evidence of custom. The defendant in order to rebut the presumption arising out of the *Wajib-ul-araiz* produced a *patwari* who deposed that he had been a *patwari* for 18 years and that he had never heard of the existence of a custom of pre-emption in the village:

Held, that such evidence was altogether insufficient to rebut the presumption.

Second appeal from the decision of the Subordinate Judge of Gorakhpur, dated the 20th July 1910.

Mr. *Parmeshwar Dayal*, for the Appellant.

Mr. *Haribans Sahai*, for the Respondents.

JUDGMENT.—This appeal arises cut of a suit brought to enforce a right of pre-emption based upon village custom. The plaintiff-appellant produced a *wajib-ul-arz* of 1833 and one of 1860 together with certain oral evidence to prove the alleged custom.

The defendant called certain oral evidence to rebut that produced by the plaintiff. The Courts below rejected the oral evidence produced by the plaintiff as unworthy of credit. They also held that the two *wajib-ul-araiz* produced failed to establish the custom but that they were evidence of contract. Without considering the evidence produced by the defendant, the Courts held that the custom had not been established and dismissed the suit. On appeal it is urged that the Full Bench ruling in *Returaji Dubain* v. *Pahlawan Bhagat* (1) exactly covers this case. A comparison of the *wajib-ul-arz* in this case with those considered in the above-mentioned ruling shows that it is impossible to distinguish the present case from the case quoted, and in view of that ruling I must hold that the two *wajib-ul-araiz* in suit are *prima facie* evidence of custom. It is urged on behalf of the respondent that there is rebutting evidence which has not been considered by the lower Appellate Court. That evidence consists of the statement of one Shankar Lal *Patwari* which merely amounts to this that he has been *Patwari* for 18 years and has never heard of the existence of a custom. Such evidence in my opinion is utterly insufficient to rebut the evidence furnished by the two *wajib-ul-araiz* mentioned above. The appeal must succeed. I set aside the decrees of the Courts below and remand the case to the Court of first instance through the lower Appellate Court for decision on its merits. Costs in this Court will abide the result.

Appeal allowed.
Case remanded.

(1) 7 A. L. J. 1040; 7 Ind. Cas. 680.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 91 OF 1910.

March 25, 1911.

Present:—Mr. Justice Karamat Hussain.

BACHCHA LAL—PLAINTIFF—APPELLANT

versus

HANUMAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Registration Act (III of 1877), s. 50—Unregistered mortgage—Subsequent registered sale—Vendee having no notice of the mortgage—Priority.

A subsequent registered sale will take effect against a prior unregistered mortgage if the vendee had no notice of the mortgage.

BACHCHA LAL *v.* HANUMAN.

Ishan Chandra Das Sirkar v. *Bishen Sirdar*, 24 C. 825; 1 C. W. N. 665; *Hakim Lal* v. *Mooshahar Sahu*, 34 C. 999; 6 C. L. J. 410; 11 C. W. N. 889; *Diwan Singh* v. *Jado Singh*, 19 A. 145; *Bhikhi Rai* v. *Udit Narain Singh*, 25 A. 366; *Khiali Rai* v. *Himat*, 5 A. L. J. 07; 30 A. 238; A. W. N. (1908) 99, referred to.

Second appeal from the decision of the District Judge of Banda, dated the 29th November 1900.

Dr. *Tej Bahadur Sapru*, for the Appellant.

The Hon'ble Mr. *Moti Lal Nehru*, for the Respondents.

JUDGMENT.—The plaintiff Bachcha Lal sued Hanuman, his son Ram Parshad and his mother-in-law Jamunia for sale of a property, mortgaged to him by Hanuman on the 6th of June 1901. That mortgage was unregistered. One of the pleas in defence put forward by *Musammat* Jamunia was that she, having purchased the house without knowledge of any amount due to the plaintiff, in good faith and for valuable consideration made a gift of it to Ram Prasad. Hanuman after the mortgage, which is the basis of the claim sold the above house to *Musammat* Jamunia on the 7th of September 1908 and she made a gift of it to Ram Prasad on the 6th of November 1908. Both these documents are registered. The Court of first instance dismissed the claim and its decree was affirmed by the lower Appellate Court which in its judgment observes: "But the lower Court has also held that the suit must fail on another ground. The sale-deed and the deed of gift are registered while the mortgage-deed is not and they must prevail against it. It is also said that Jamunia had notice of the mortgage, but this is not satisfactorily proved."

The plaintiff preferred a second appeal to this Court and I by my order dated the 26th of November 1910 send down the following issues to the lower Appellate Court for trial:—

(*i*) Did *Musammat* Jamunia derive her title to the house in question from Dularia or from Hanuman, and in the latter case did Hanuman ever acquire any title to the house, and if so, when did he acquire it and from whom?

(*ii*) Was the sale by Hanuman to Jamunia fraudulent with a view to defeat the mortgage executed in favour of the plaintiff on the 6th of June 1901?

The findings returned by the lower Appellate Court are in substance as follows:—

Hanuman had no title to the house, he never acquired any. Jamunia derived her title from Hanuman. The sale to Jamunia was collusive and fraudulent. The lower Appellate Court further observes,—"The oral evidence produced before me by the plaintiff to show that *Musammat* Jamunia had knowledge of the plaintiff's mortgage-deed and of Hanuman's indebtedness is more or less worthless and need not be noticed."

The learned Advocate for the appellant, on the above findings, contends that his client is entitled to a decree. The learned Counsel for the respondents in answer to this contention urges that in order to constitute a fraudulent transfer the intention of the transferor to defeat his creditor is not sufficient and that in addition to it the transferee must be a party to the design on the part of the transferor to defeat or delay his creditor. In support of this contention he relies on *Ishan Chandra Das Sirkar* v. *Bishen Sirdar* (1); *Hakim Lal* v. *Mooshahar Sahu* (2) and *Husain Bakhsh* v. *Hafiz Musahib Khan* (3). He further says that, having regard to the finding by the lower Appellate Court that *Musammat* Jamunia had no knowledge of the plaintiff's mortgage-deed, it necessarily follows that she could not be a party to the design, if any, of Hanuman to defeat his creditor. This argument of the learned Counsel for the respondents is, in my opinion, sound. The transfer in her favour by Hanuman, in the absence of any knowledge on her part of the fraudulent intention of Hanuman, will prevail against the unregistered mortgage by him in favour of the plaintiff. The cases of *Diwan Singh* v. *Jado Singh* (4); *Bhikhi Rai* v. *Udit Narain Singh* (5), *Khiali Ram* v. *Himmat* (6), in principle support the view I take. It is, however, contended by the learned Advocate for the appellant that none of these cases

(1) 24 C. 825; 1 C. W. N. 665.
(2) 34 C. 999; 6 C. L. J. 410; 11 C. W. N. 889.
(3) 5 Ind. Cas. 179.
(4) 19 A. 147.
(5) 25 A. 366.
(6) 5 A. L. J. 607; 30 A. 238; A. W. N. (1909) 99.

go the length of laying down that duly registered subsequent sale will take effect as regards the property comprised therein against an unregistered prior mortgage relating to the same property in the sense that the vendee without notice will take it free from the incumbrance created by the prior mortgage. The wordings of the section and the law laid down in the three cases already referred to, in my opinion, irresistibly lead to the conclusion that a subsequent registered sale will take effect against a prior unregistered mortgage if the vendee had no notice of the mortgage. The result is that the appeal is dismissed with costs which in this Court will include fees on the higher scale.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 703 OF 1910.

March 7, 1911.

Present:—Mr. Justice Richards.

JAGANNATH PERSHAD—PLAINTIFF—APPELLANT

versus

MIHIN AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Mortgagee purchasing half of the mortgaged property—Suit to recover the remaining half of the mortgage-money from the other moiety of the property—Maintainability of suit—Discharge of mortgage-debt.

A. and *B.* mortgaged their property to *C.* In execution of a simple money-decree against *A.*, the mortgagee purchased one half of the mortgaged property:

Held, that by the purchase of one moiety of the property by the mortgagee only one moiety of the mortgage-debt was extinguished and that the mortgagee could recover the remaining half of the mortgagee-debt from the other moiety of the property.

Bishesar Dayal v. *Ram Sarup*, 22 A. 284, followed.

Second appeal from the decision of the District Judge of Shahjahanpur dated the 29th of April 1910.

Dr. *Satish Chandra Banerji*, for the Appellant.

Mr. *Sarat Chandra Choudhri*, for the Respondents.

JUDGMENT.—The facts out of which this appeal arises are as follows. Certain property held by two brothers in equal shares was mortgaged. In the events which have happened the mortgage became vested in the plaintiff. One Durga Prasad, who was a brothor of the plaintiff, had a simple money-decree against one of the brothers who mortgaged the property. In execution of that decree half of the mortgaged property was attached and sold. At the time of the sale, it was proclaimed as being subject to the entire mortgage and the sale certificate was to the same effect. The auction-purchase was made by Durga Prasad but the Courts below held that the plaintiff and Durga are one. The plaintiff then instituted the present suit seeking to sell the other moiety of the mortgaged property, admitting that the mortgage debt to the extent of one moiety had been discharged in the events which have happened. Both the Courts below dismissed the plaintiff's suit holding that, in the events which have happened, the entire mortgage must be deemed to have been fully paid up and discharged. The facts in the Full Bench case of *Bishesar Dayal* v *Ram Sarup* (1) seem to me to be identical. The only distinction that could be drawn in principle between the facts of that case and those of the present is that in the case cited the whole of the property and not merely a moiety had been attached and sold. The Court decided that by the purchase of one moiety of the property by the mortgagee only one moiety of the mortgage-debt was extiguished. It is argued here that the fact of proclaiming that the entire mortgage was an incumbrance on the moiety which had been attached, was wrong and consequently the present suit ought to be dismissed. I cannot follow this reasoning. It was legally perfectly correct to proclaim that the entire mortgage was an incumbrance on the moiety of the property. It might, no doubt, have been better if the proclamation had stated that the mortgage was for so much and that it affected the property sought to be sold as well as the other moiety. It seems to me, however, even if fraud had been pleaded, it would be quite wrong to draw the inference of fraud from the mere fact that the sale proclamation did not point out that the mortgage affected property other than the property sold. The owners of the equity of redemption of the property the subject of the present suit have suffered no injustice. They are only asked to pay one moiety of the mortgage-

(1) 22 A. 284.

debt. I must allow the appeal and, setting aside the decrees of the Courts below, remand the case to the Court of first instance with directions to try the suit on the merits. Costs here and hitherto will abide the result. Costs in this Court will include fees on the higher scale.

Appeal allowed;
Case remanded.

PUNJAB CHIEF COURT.
CIVIL REVISION NO. 305 OF 1910.
April 25, 1911.
Present:—Mr. Justice Rattigan.

ALI MOHAMMAD AND OTHERS—DEFENDANTS—PETITIONERS

versus

SURAJ-UD-DIN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Custom—Succession—Muhammadan Jats *of Lahore District—Gift by a female in possession*—Locus standi *of donor's paternal aunt's son to contest the gift—What the plaintiff must prove to contest an alienation—Inheritance—Presumption.*

Ordinarily, among agricultural tribes in the Punjab the last male holder's father's sister's son has no right of inheritance in the absence of agnatic heirs and, therefore, he has no right to contest alienations made by the person, whether male or female, in possession of the property. Where such a right is claimed by custom it must be proved.

Unless the custom of a tribe recognizes a female and her issue as heirs, the right of controlling even a female's alienations does not extend beyond the line of agnatic heirs.

Nur-ul-nissa v. *Gauhar-ul-nissa*, 61 P. R. 1906; *Natha Singh* v. *Mohan Singh*, 93 P. R. 1906; *Makhan* v. *Lali*, P. L. R. 1900 p 301, followed.

Even a trespasser cannot be ousted unless the plaintiff proves that he is entitled by law or custom to eject him.

Therefore, where among Muhamadan *Jats* in the Lahore District, the last male holder's mother succeeded to the estate and while in possession gifted the property to the son of one of her husband's sisters and placed him in possession, and the son of the other sister sought to set aside the gift and oust the donee:

Held, that the plaintiff must have proved two things, *first*, that by the custom of the tribe he is an heir to the property as the son of the last male holder's paternal aunt, and, *secondly*, that as such heir he has a *locus standi* by the custom of the tribe to contest the alienation, there being no presumption in favour of such a power except in the case of near male agnates of the last male bolder.

Nur-ul-nissa v. *Gauhar-ul-nissa*, 61 P. R. 1906, followed.

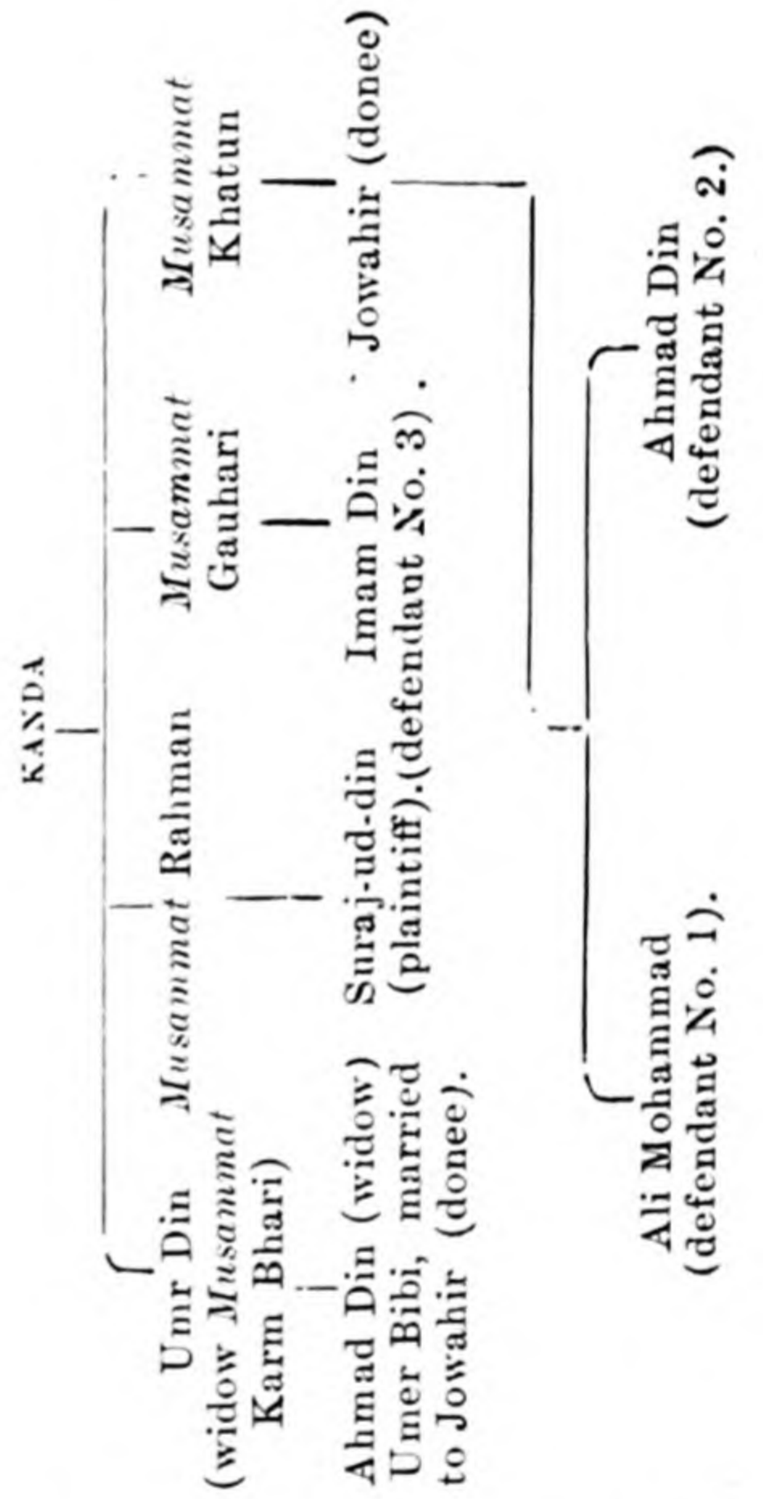
Maqsud-ul-nissa v. *Kaniz Zohra*, 135 P. R. 1908; *Chiragh Bibi* v. *Hasan*, 19 P. R. 1906, referred to.

Bandu Khan v. *Umri*, 63 P. R. 1903, distinguished.

Petition, under section 70 (*b*) of Act XVIII of 1884 amended by Act XXV of 1899, for revision of the order of the Divisional Judge, Lahore, dated 25th October 1909, confirming the order of the Munsif, 2nd class, Sharakpur, dated 26th April 1909, decreeing the claim.

The Hon'ble Mr. *Muhammad Shafi*, for the Petitioners.

JUDGMENT.—The parties are Muhammadan *Jats* of *Mauza* Momanpura in the Lahore *tahsil* and the following table will show their relationship:



Umr Din succeeded to the property of his father Kanda, and on Umr Din's death the property devolved upon Ahmad Din who died without issue in 1896. Ahmad Din left a widow *Musammat* Umr Bibi, but as she re-married, the property went to *Musammat* Karm Bhari, the mother of Ahmad Din and widow of Umr Din, and mutation in her favour was duly sanctioned on the 13th January 1897. In November 1898, *Musammat* Karm Bhari made an oral gift of the property to Jowahir (who had married her sons's widow) and on the 15th December 1898, mutation was effected in favour of the donee who thereafter remained in possession of the property. *Musammat* Karm

Bhari died in February 1907, and in April 1907, plaintiff Suraj-ud-din instituted the present suit claiming possession of one-third of the property on the ground that he is one of the grandsons of Kanda and as such entitled to succeed to that portion of the property inherited from Kanda. It is admitted that there is no agnatic heir. The lower Courts have concurred in granting plaintiff a decree for possession of his alleged one-third share in the property and the defendants have applied to this Court under clause (*b*) of section 70 (1) of the Punjab Courts Act, for revision of those orders.

Mr. Muhammad Shafi has argued the case on behalf of the defendant, but Mr. Ganga Ram who had been engaged on behalf of the plaintiff did not appear until a later hour in the day after the hearing of the case was concluded as he was engaged in another case in one of the Subordinate Courts. His client the plaintiff was present but said that he had nothing to urge in support of the judgments of the lower Court except to say that they were correct. In my opinion, formed after a careful consideration of the points involved, the plaintiff has no *locus standi*. It seems to me that the leaned Divisional Judge, in upholding plaintiff's claim on the ground that the donee, Jowahir, "was no more and no less an heir than plaintiff-respondent and that *Musammat* Karm Bhari had no right to gift away the whole property to Jowahir who stood in exactly the same relationship to Kanda as does the plaintiff," has assumed that Jowahir and plaintiff are both heirs to the property in the absence of agnates, and has, moreover, overlooked the fact that even if the plaintiff is by the custom of the tribe to which the parties belong, a prospective heir with some sort of right, it does not follow that he is, as such prospective heir, entitled to contest an alienation made by *Musammat* Karm Bhari and to oust the donee who is in possession.

Upon the true view of the facts, plaintiff can claim to succeed to *Musammat* Karm Bhari only as the son of the paternal aunt of the last male holder (Amad Din) [*Hamira* v. *Ram Singh* (1), *Kalu* v. *Musammat Kako* (2).] and I know of no case in which it has been held that such a person is by custom entitled to challenge an alienation made by the person for the time being in possession, even though such a person is a female. According to the Customary Law of the Lahore District (page 10), among *Jats* a daughter and a sister have no rights of inheritance, and *a fortiori* the son of the sister of the last male holder's father would have no such right. Indeed, it is rare to find that custom allows a female or a female's descendants to contest alienations made by the person, whether male or female, in possession of the property; as remarked by the learned Judges in *Maqsud-ul-nisa* v. *Kniz Zohra* (3), "when a female, with a right to succeed to the estate held by another female, seeks to control an alienation by the latter, she must first prove two things, (1) that she is in fact entitled to succeed on the death of the alienor; (2) that the alienor is holding as a female with only a limited estate resembling that of a widow. When a female is holding an estate on the same tenure as a male proprietor or male sonless proprietor, another female is not competent to contest her alienations."

Among certain tribes, *e.g.*, *Arains*, daughters are recognized as heirs in the absence of male lineal descendants, and the custom of such tribes recognizes the rights of such females to contest alienations [*Chiragh Bibi* v. *Hassan* (4)]. But unless the custom of the tribe recognizes a female and her issue as heirs, the right of controlling alienations, even by a female, does not extend beyond the line of agnatic heirs [*Nur-ul-Nissa* v *Gohar-ul-Nissa* (5); *Natha Singh* v. *Mohan Singh* (6); *Makhan* v. *Lali* (7)]. In the present case, as plaintiff has not been able to show that by custom he, as the son of the last male holder's paternal aunt, is in the line of heirs, and is entitled as such to challenge the gift made by *Musammat* Karm Bhari, it follows that he cannot claim to oust a person who is in possession of the property by virtue of such gift. The very fact that plaintiff and defendant No. 2 (who has as much right to the property as plaintiff) made no attempt during *Musammat* Karm Bhari's life-time to avoid the gift made by her to Jawahir, tends to show that they well knew that by custom they had no right to challege the alienation, and the result has been that for some nine years the donee has been allowed to remain in undisturbed possession of the property.

(1) 134 P. R. 1907 (F. B.)
(2) 102 P. R. 1909; 4 Ind. Cas. 867.
(3) 135 P. R. 1908.
(4) 19 P. R. 1906.
(5) 61 P. R. 1906.
(6) 93 P. R. 1906.
(7) P. L. R. 1900 p. 301.

CHUNNI *v.* HUKUM SINGH.

The argument that the donee is in a more better position *as an heir* than the plaintiff is fallacious.

It assumes, in the first place, that the donee and the plaintiff are recognised by the custom of the parties' tribe as heirs, whereas there is no proof upon the record to that effect and the provisions of the *Riwaj-i-am* (which are in accordance with the ordinary rules observed by agricultural tribes in the Province) are against any such contention. In the next place it overlooks the fact that defendants are in possession and that even if they are mere trespassers, they cannot be ousted unless and until the plaintiff proves that he is *entitled* by law or custom to eject them. In point of fact, they are not trespassers. They held the property by virtue of a gift made in their favour by a person who was unquestionably entitled for the time being to the property, and unless plaintiff can show that he is entitled to have the gift set aside, defendants can rely upon it in answer to any claim by him. Plaintiff has, in my opinion, entirely failed to prove that by the custom of the tribe he is an heir to the property and that as such heir he is entitled to have the gift set aside. Assuming, however, for the sake of argument, that plaintiff was in a sense prospective heir after the death of *Musammat* Karm Bhari. I still fail to see how he can claim to have the lady's gift set saide. In this connection I would refer to *Nur-ul-nissa* v. *Gauhar ul-nissa* (5), where this Court observed,—We reject the suggestion that apart from tribal custom, there is any natural presumption, as a matter of jurisprudence that an heir simply as prospective heir can control the acts of the person whose estate in the ordinary course he will one day inherit. In this Province it has been found in the case of agricultural tribes that by custom such a power of control belongs to the nearer male agnates of the proprietor and when the parties are agriculturists of such tribes as *Jats* and *Rajputs* the existence of such a power is usually presumed by the Court. This, however, is the result of a long course of research and of judicial decisions based thereupon, and we are not aware of any authority for making a *similar presumption* in favour of control by a female." Of course, in cases where it is found that the custom of a particular tribe recognises a female, such as a daughter, as an heir in the absence of male lineal descendants a similar power of control may be presumed in her favour [*Chirag Bibi* v. *Hassan* (4)]. But such cases are rare and, so far as I know, no tribe in this Province recognises as an heir, in the strict sense of the term; a person who is only the son of the last male owner's paternal aunt. The case relied upon by the Divisional Judge [*Bandu Khan* v. *Umri*(8)], is not in point as it was there held that the direct descendants of a daughter were entitled to succeed in preference to the proprietary body who were of varions *gots*. A daughter and her lineal male heirs are regarded favourably by custom generally in this Province.

I hold accordingly that plaintiff, even if he could be regarded as a prospective heir during the life-time of *Musammat* Karm Bhari (and in my opinion, there is no evidence to support the assumption) is not entitled to have the gift made by the lady set aside and to claim possession of any part of the property as against the donee who has been in possession since 1898, in virtue of the gift in his favour.

I, therefore, accept the petition which was admitted as a further appeal, and setting aside the decree of the lower Appellate Court, I dismiss the plaintiff's suit with costs throughout.

(8) 63 P. R. 1903.

Petition accepted.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 593 OF 1910.

March 30, 1911.

Present:—Mr. Justie Richards.

CHUNNI—PLAINTIFF—APPELLANT

versus

HUKUM SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Res judicata—*Suit decreed in part—Plaintiff's appeal in so far as his claim dismissed—Defendant's appeal in so far as plaintiff's claim decreed—Plaintiff's appeal dismissed and that of defendant decreed—Plaintiff's further appeal only in so far as defendants' appeal allowed, effect of—Limitation Act (IX of* 1871*), s.* 20*—Acknowledgment by one of several joint mortgagees, effect of.*

In the *khewat* of a certain year the names of certain persons were recorded as mortgagees and of certain persons as mortgagors. The *Wajib-ul-arz* in which a

reference was made to this *khewat* was signed by one of the mortgagees:

Held, that the mere signing of the *wajib-ul-arz* which referred among other things to the *khewat* could hardly be considered an acknowledgment of the title of the mortgagor within the meaning of the Limitation Act.

An acknowledgment by one of several joint mortgagees does not save limitation against the other mortgagees.

In a redemption suit the Court decreed redemption of one-third of the property. The plaintiff appealed in respect of the remaining two-thirds while the defendant appealed in respect of the one-third redemption of which had been decreed in plaintiff's favour. The lower Appellate Court dealt with the two appeals in one judgment and dismissing the plaintiff's appeal decreed the defendant's appeal. The plaintiff appealed to the High Court in so far as the defendant's appeal had been allowed by the lower Appellate Court. The plaintiff's appeal in the lower Appellate Court was No. 28 and that of defendant was No. 32:

Held, that plaintiff's Appeal No. 28 was *res juuciata* to the extent of two-thirds of the property, but not in respect of the remaining one third.

Zahari v. *Dibia*, 7 A. L. J. 861; 7 Ind. Cas. 156 referred to.

Second appeal from the decision of the District Judge of Agra, dated 26th April 1910.

Dr. *Tej Bahadur Sapru*, for the Appellant.

Mr. *Mohan Lal Sandal*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit to redeem a mortgage. In the plaint it was alleged that the mortgage was made in 1849, but the plaintiff failed to show when, as a matter of fact, the mortgage was made. They, however, rely on an acknowledgment. The original mortgagor was one Bijai Singh. He had three sons, Lokhan, Gobardhan and Hulasi. Hulasi had two sons Makunda and Jai Ram. Makunda had a son Kalian, and Jai Ram had two sons Mani Ram and Tula. Dhira Singh, plaintiff, has become the owner of an equity of redemption, which was left in Lokhan and Gobardhan. Chuni represents the equity of redemption of the descendants of Hulasi. The original mortgagees were Shahjit, Tulshi and Ghansham. Their transferees were Bharat, Padam and Banwar. In the *khewat* of 1875 Lokhan, Gobardhan and Hulasi were set forth as mortgagors and Bharat, Padam and Banwar were set out as mortgagees. The *wajib-ul-arz* is signed by Bharat and the *wajib-ul-arz* refers to the *khewat*. The Court of first instance held that the entry in the *khewat* verified by the *wajib-ul-arz* was a good acknowledgment against Bharat and, accordingly, it decreed redemption to the extent of one-third of the property. The plaintiffs appealed against this decree of the Court of first instance in so far as it refused redemption of the entire property. The defendants appealed in so far as any part of the property had been ordered to be redeemed. The lower Appellate Court dealt with the two appeals in one judgment. It dismissed the plaintiffs' appeal and decreed the defendants' appeal. The plaintiffs appealed to this Court, but filed only one appeal, which was an appeal against allowing the defendants' appeal in the lower Appellate Court. A preliminary objection in this Court was raised by the respondents. It was contended that the plaintiffs ought to have appealed against both decrees and that not having done so, the present appeal is barred on the principle of *res judicata*. The Full Bench decision in the case of *Zahari* v. *Dibia* (1) was relied on. The plaintiffs' appeal in the lower Appellate Court was No. 28 of 1910. The defendants' appeal in the same Court was No. 32 of 1910. The decree in the lower Appellate Court on the plaintiffs' appeal is simply to dismiss the plaintiffs' appeal, that is to say, it dismisses the complaint of the plaintiffs that their suit was dismissed to the extent of two-thirds of the property. It seems to me that the decree of the lower Appellate Court in Appeal No. 28 is *res judicata* to this extent that it is no longer open to the plaintiffs to ask for the redemption of the property to the extent of two-thirds. If this Court were to now make a decree for two-thirds of the property, there would be two equally binding decrees, one contradicting the other. It is said that although there were two decrees, the judgment covered both. It seems to me that everything that was done by the lower Appellate Court has been appealed against except the actual decree dismissing No. 28. I, therefore, hold that the plaintiffs' appeal, in so far as he asks to redeem the property to the extent of one-third, is not barred on the principle of *res judicata*. The next question is the question of acknowledgment. In the year 1875, the Limitation Act then in force was Act IX of 1871. Article 148 of Schedule II to that Act provides a period of sixty years within which a suit for redemption of a mortgage must be brought. The period from which time begins to run is set forth in the third column as being the

(7) 7 A. L. J. 861; 7 Ind. Cas. 156.

rate of the mortgage, unless *where* there has been made an acknowledgment of title of the mortgagor or of his right of redemption has, before the expiration of the prescribed period in writing, singed by the mortgagee or some person claiming under him and in such case the time begins to run from the date of the acknowledgment. In the present case the mortgage was a joint mortgage and the *wajib ul-arz* was only signed by one of them. Article 148 of Act IX of 1871 does not provide as do the later Acts for the signing of acknowledgment by an agent. In the case of *Hanuman Prasad* v. *Raghunandan Singh* (2) it was held that an acknowledgment by one of two mortgagees could not enure to the benefit of the mortgagor as against the other. The learned Judge, who delivered the judgment of the Court quotes a number of authorities in support of the decision. The appellants contend that the entry in the *khewat* verified, as they allege, by the *wajib-ul-arz* is certainly a sufficient acknowledgment against Baharat and that, therefore, they are entitled to redeem the property to the extent of one-third. The case of *Daia Chand* v. *Sarfraz* (3) is cited. In that case under what appears to be somewhat similar circumstances, the majority of the Court held that there had been a sufficient acknowledgment. It seems to me that the question as to the sufficiency of the acknowledgment must depend to a great extent on the circumstances of each case, and it is a little hard to understand how the mere signing of a lengthy *wajib-ul-arz* which refers among many other things to the *khewat* can be considered an acknowledgment of the title of the mortgagor within the meaning of the Act. The *wajib-ul-arz* contains a lot of matters and so does the *khewat*. If the *khewat* itself had been signed it might fairly be said perhaps that it should be deemed an acknowledgment. However, for the purpose of my decision I shall assume that the case of *Daia Chand* v. *Sarfraz* (3) is a binding authority and that the entry in the *khewat*, such as it is, is a sufficient acknowledgment if it had been made by all the mortgagees. It remains to be considered whether on this assumption it ought to be held to be sufficent acknowledgment as against one-third of the property. It seems to me that the mortgage was a joint mortgage and could not be redeemed in part. It is said that the plaintiffs were ready, when the suit was instituted, to redeem the entire mortgage. This is no doubt correct. But there are two answers. First of all, that although they were ready to redeem the entire mortgage they could not do so, because there had not been sufficient acknowledgment as against all the mortgagees. In other words, in the year 1875 an acknowledgment by one of several mortgagees in a joint mortgage was of no avail whatever. The second objection is that having neglected to appeal against the decree dismissing the suit to the extent of two-thirds, it is now impossible to redeem the entire mortgage. Under the circumstances, it seems to me that the appeal must be dismissed. I, therefore, dismiss it with costs including fees on the higher scale.

Appeal dismissed.

(2) 1 A. L. J. 355.
(3) 1 A. 117.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 179 OF 1911.

April 28, 1911.

Present:—Sir Arthur Reid, KT., Chief Judge.

MUHAMMAD HUSAIN—PLAINTIFF—APPELLANT

versus

GHULAM MUHAMMAD AND OTHERS—DEFENDANTS—RESPONDENTS.

Punjab Pre-emption (Act II of 1905), s. 6—Custom of pre-emption of houses—Mohalla Mimaran *or* mohalla Pansarian in *Kaithal—Sub-division—Evidence Act (I of 1872), s. 13—Instances of pre-emption in the neighbouring* mohallas, *what may indicate—Uncontested instances, value of.*

The custom of pre emption of houses exists in *Mohalla* Mimaran, identical with *Mohalla* Pansarian, a sub-division of Kaithal.

Instances of pre-emption in the neighbourhood of a *mohalla* may indicate the existence of the custom of pre-emption in that *mohalla*.

Dhan Devi v. *Kanshi*, 38 P R. 1906; 89 P. L. R. 1906, *Mamon* v. *Ghaunsa*, 99 P. R. 1906; 130 P. L. R. 1906; *Abdulla Beg* v. *Walaiti Begam*, 120 P. R. 1906; *Manohar Lal* v. *Paras Ram*, 67 P. R. 1907, 51 P. L. R. 1907; 38 P. W. R. 1907 and *Allah Ditta* v. *Raj Kumar*, 138 P. R. 1907, followod.

Uncontested instances are by no means worthless evidence of the existence of a right to pre-empt.

Muhammod Nawaz Khan v. *Musammat Bobo Sahib*, 44 P. R. 1903; 75 P. L. R. 1903 and *Than Singh* v. *Tara Singh*, 26 P. R. 1907, followed.

DUNGRI *v.* EMPEROR.

Appeal from the order of the Divisional Judge, Ambala Division, dated the 24th October 1910, reversing that of the Munsif of the 2nd class, Kaithal, District Karnal, dated the 25th May 1910, decreeing plaintiff's claim.

Lala *Dwarka Das*, for the Appellant.

Rai Bahadur Lala *Lal Chand*, for the Respondents.

JUDGMENT.—The facts are stated in the judgments of the Courts below.

The house of which pre-emption is sought is situate in *Mohalla* Mimaran, a sub-division of Kaithal identical with *Mohalla* Pansarian. Kanshi Ram (D. W. No. 1) admitted that pre-emption of houses obtained in *Mohalla* Pansarian and that his father sued for pre-emption of a house in that *Mohalla* and obtained a decree. Bhiku Mal (P. W. No. 1 corroborated this evidence. Rahim Bakhsh the purchaser's agent admitted that Kanshi Ram's father's suit had been decreed, and that the house, which was the subject matter of that suit, was sixty paces from the house now in suit. Jewan Mal (P. W. No. 2), defendant in Kanshi Ram's case, supported Kanshi Ram's evidence. Radha Kishan (P. W. No. 3) deposed that his father sued Narain Das Balmokand for pre-emption in *Mohalla* Pansarian and got a decree. Abdul Ghani (P. W. No. 4) deposed that his uncle got a house by decree but did not specify that it was a pre-emptive decree. On the 10th February 1909, a judgment of the District Judge allowing pre-emption of a house in another *Mohalla* of Kaithal referred to two cases in *Mohalla* Pansarian. Polu Mal (D. W. No. 2) deposed that a house situate about 100 paces from that in suit was surrendered to him on his issuing a notice of pre-emption. The sale-deed shows that this house is situate in *Mohalla* Pansarian.

The population of Kaithal, in 1890, was a little over 14,500.

In *Jai Devi* v. *Naubat Rai* (1), it was held that the custom of pre-emption based on vicinage existed in *Mohalla* Sheikh Tayyab of Kaithal. *Dhan Devi* v. *Kanshi* (2); *Maman* v. *Ghaunsa* (3); *Abdulla Beg* v. *Walaiti Begam* (4), *Manohar Lal* v. *Paras Ram* (5) and *Allah Ditta* v. *Raj Kumar* (6) are authorities for holding that instances of pre-emption in the neighbourhood of the *mohalla* in question may indicate the existence of custom of pre-emption in that *mohalla*. *Muhammad Nawaz Khan* v. *Musammat Bobo Sahib* (7) and *Than Singh* v. *Tara Singh* (8) are authorities for holding that uncontested instances are by no means worthless evidence of the existence of right.

The evidence on the record establishes, in my opinion, the existence of a custom of pre-emption of houses in the *mohalla* in suit. I decree the appeal under Order XLI, rule 23, of the Code of Civil Procedure, and remand the appeal to the lower Appellate Court for decision of the other points involved. The Court-fee on the memorandum of appeal will be refunded and other costs will be costs in the cause.

Appeal allowed; *Case remanded.*

(1) 71 P. R. 1905; 129 P. L. R 1905.
(2) 38 P. R. 1906; 89 P. L. R. 1906.
(3) 99 P. R. 1906; 130 P. L. R. 1906.
(4) 120 P. R. 1906.
(5) 67 P. R. 1907; 51 P. L. R. 1907; 38 P. W. R. 1907.
(6) 138 P. R. 1907.
(7) 44 P. R. 1903; 75 P. L. R 1903.
(8) 26 P. R. 1907.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL NO. 156 OF 1911.

April 29, 1911.

Present:—Mr. Justice Kensington.

DUNGRI SON OF MOHAMAD ALI—CONVICT—APPELLANT

versus

EMPEROR—COMPLAINANT—RESPONDENT.

Charge—Previous convictions not set out distinctly in the charge sheet, effect of—Material omission—Enhanced punishment—Penal Code (Act XLV of 1860), s. 75.

It is a part of the duty of the Courts to draw charge sheets accurately, and where they fail to do this the persons convicted are entitled to the benefit of any material omission.

Where enhanced sentences are contemplated under section 75, Indian Penal Code, a separate head of charge must be distinctly drawn with this object.

Where this was not done the Court reduced the enhanced punishment awarded under section 75, Indian Penal Code, though there was some reference to previous convictions in the statements of the accused recorded on the reverse of the charge sheets.

Appeal from the order of the Sessions Judge of Multan Division; dated the 24th day of January 1911, convicting the appellant.

JUDGMENT.—The three appeals No. 156 by Dungri, No. 158 by Mir Dost and No. 157 by Shah Nur may be disposed of by one order. These three persons have been convicted of cattle theft under section 379,

Indian Penal Code, and sentenced repectively to imprisonment for seven years, four years and one year, the two heavier sentences having been awarded in consequence of previous conviction on the appellants Dungri and Mir Dost.

The case as presented by the prosecution is very simple and though there is no direct evidence of theft against the appellants, the fact that they were so shortly afterwards caught dealing with the stolen cattle is conclusive against them. There does not appear to be any reasonable doubt that these men were three of the actual thieves. The confused explanation given by the appellants as their defence has, I think, been rightly rejected both by the Assessors and by the learned Sessions Judge; the convictions are accordingly upheld.

In the matter of sentences I should certainly not be disposed to interfere as regards Dungri and Mir Dost looking to the previous records of these men. It has, however, to be considered whether these enhanced sentences awarded under section 75, Indian Penal Code, are justified in view of the fact that the charge-sheets as prepared by the Committing Magistrate did not distinctly say that the appellants were also being proceeded against under section 75, Indian Penal Code. The charges should have been amended in the Sessions Court before the trial began and the case would then have presented little difficulty. There is, no doubt, some reference to previous convictions in the statements of the appellants Dungri and Mir Dost as recorded on the reverse of the charge-sheets, and from the Committing Magistrate's order it is clear that he intended these men to be dealt with under section 75, Indian Penal Code. At the same time, the authorities are clear that when enhanced sentences are contemplated under section 75, Indian Penal Code, a separate head of charge must be distinctly drawn with this object. It may be recognised that both the Magistrate and the Sessions Judge have erred by inadvertence only and it may be that the appellants really understood what was being charged against them at the trial. At the same time, it is part of the duty of the Courts to draw charge-sheets accurately, and where they fail to do so, the persons convicted are entitled to get the benefit of a material omission after consulting the authorities on the point I think it right to take the strictly legal view that the appellants have been sentenced on account with which they were not actually charged. Under these circumstances, the previous convictions can be properly taken into account in determining what sentence should be awarded under section 379, Indian Penal Code, but cannot be treated as justifying enhancement of the sentences under section 75. The result is, that the sentences on Dungri and Mir Dost must be reduced in each case to rigorous imprisonment for three years as being the maximum admissible under section 379, Indian Penal Code. The appeals are otherwise dismissed.

Sentences reduced.

PUNJAB CHIEF COURT.

CIVIL REVISION CASE No. 2063 OF 1909.

April 27, 1911.

Present :—Mr. Justice Rattigan.

HARDYAL—DEFENDANT—PETITIONER

versus

PIR SANT DAS—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act XIV of 1882), s. 78—Service of summons—Defendart absent from home—Endorsement by father, how far effective.

In defendant's absence from home his father, who was residing with him, endorsed on the back of a summons, meant for service on the defendant, that he had gone to Sargodha:

Held, that the summons was not duly served on the defendant within the meaning of section 78, Civil Procedure Code, 1882, as it cannot be said that the defendant "could not be found," especially when no attempt whatever was made to find him and there was nothing to show that he was deliberately keeping out of the way to avoid service.

Petition, under section 70 (*a*) of Act XVIII of 1884, as amended by Act XXV of 1899, for revision of the order of the Divisional Judge, Shahpur, dated the 9th February, 1909, affirming that of the Munsif, 1st class, Jhang, dated the 18th February 1908, rejecting defendant's application.

Mr. *Nanak Chand*, for the Petitioner.

Mr. *Gullu Ram*, for the Respondent.

JUDGMENT.—In my opinion the Courts below are wrong in holding that the summons was duly served on Hardyal, defendant, within the meaning of section 78, Civil Procedure Code, 1882, (Order V, rule 15). It is admitted that defendant was not at his home and that his father endorsed on the back of the summons that Hardyal had gone to Sargodha. In the circumstances, it cannot be

said that defendant "could not be found" especially as no attempt whatever was made to find him and I do not think that the Divisional Judge is justified in saying that defendant deliberately kept out of the way. There is nothing on the record to support this assumption.

Plaintiff did not attempt to execute the *ex parte* decree (which is dated 15th December 1904) until December 1907, and defendant lost no time thereafter in applying to have the said decree set aside.

I accordingly accept this petition and, reversing the orders of the Courts below, I set aside the *ex parte* decree and direct the Munsif, 1st class, to proceed with the original suit (Order IX, rule 14).

Costs to abide the event.

Petition accepted

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL NO. 117 OF 1910.

March 31, 1911.

Present:—Mr. Justice Richards and Mr. Justice Tudball.

LACHMANDAS—PETITIONER—APPELLANT

versus

Musammat RAMDEI—OPPOSITE PARTY—RESPONDENT.

Guardians and Wards Act (VIII of 1890), s 34—Inventory—Sum to be allowed for minor's maintenance.

When appointing a guardian for the estate of a minor the Court should direct the guardian to file an inventory or list of the minor's property in Court, and should allow a maximum sum for the maintenance, education and advancement of the minor, which sum should never be exceeded without the leave of the Court.

First appeal from the District Judge of Bareilly, dated the 5th September, 1910.

Mr. *Sital Prashsad Ghose*, for the Appellant.

The Hon'ble Mr. *Sunder Lal* (with him Dr. *Satish Chandra Banerji*), for the Respondent.

JUDGMENT.—This appeal arises out of an application by one Lachman Das to be appointed guardian of the estate of one Ram Das, minor. We have considered the question and we entirely agree with the judgment of the learned Judge in so far as it appoints *Musammat* Ram Dei guardian in preference to Lachman Das. At the same time, we think that the order which the learned Judge has made requires some modification. In the first place, we think it most essential that there should be now filed in Court an

inventory or list of the minor's property. We also think that it would be desirable that some maximum sum should be allowed for the minor's maintenance and that such sum should never be exceeded at without the leave of the Court. Under ordinary circumstances, it is very desirable that a person appointed as guardian should be ordered to give security for the due performance of his duty. In the present case *Musammat* Ram Dei is a *parda nashin* lady and there may be some difficulty in her furnishing security. If the learned Judge does not think that she ought to give security he ought to be doubly particular that the account of receipts and expenditure of the minor's estate is duly filed. In what we have stated above we intend simply to intimate to the learned Judge matter which we think requires further consideration. We accordingly direct that *Musammat* Ram Dei shall within three months from this date deliver to the Court of the District Judge a statement of the minor's property including money and other moveable property belonging to the minor as well as debts due to or from the minor's estate. We also direct that *Musammat* Ram Dei shall within like period of three months deliver to the District Judge a statement setting forth what sums are necessary under ordinary circumstances for the maintenance, education and advancement of the minor, and that she should give an undertaking to the Court no to expend any sums other than the amount allowed by the Court without special leave of the Court. The learned Judge will be at liberty to consider the statement to be filed and to make all orders therein as may seem to him necessary or expedient. Save for these modifications, we dismiss the appeal. Under the circumstances, we direct each party to bear his own costs.

Order modified.

ALLAHABAD HIGH COURT

SECOND CIVIL APPEAL NO 936 OF 1910.

April 11, 1911.

Present:—Mr. Justice Griffin.

RAMBARAN SINGH—DEFENDANT—APPELLANT

versus

RAMKER SINGH—PLAINTIFF—RESPONDENT.

Mortgage—Stipulation in the bond postponing the period of redemption in case the mortgagor fails to

RAM LAL *v.* KALA PRASHAD.

redeem within a specified period—Valid agreement—Penalty.

In a usufructuary mortgage there was a stipulation that the mortgagor could redeem on the expiry of 13 years and that if he failed so to redeem then the mortgage would hold good for another period of 13 years. The mortgagor did not redeem at the expiry of the first 13 years but brought a suit to redeem about a year after the expiry of the first term of the years:

Held, that his suit was premature as the stipulation postponing the period of redemption was enforceable at law and not penal.

Second appeal from the decision of the District Judge of Benares, dated the 11th March, 1910.

Mr. *Surendro Nath*, for the Appellant.

Mr. *Gokal Prashad*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit for redemption of a mortgage, the material terms of the mortgage being that the property was usufructuarily mortgaged for a term of 13 years; that the mortgagor could redeem upon payment of the mortgage-money on the expiry of this term, and that if the mortgagor failed to pay the mortgage-money on the expiry of the term of 13 years then the mortgage was to hold good for another period of 13 years. About a year after the expiry of the first term of 13 years, the present suit was instituted by the plaintiff, as representative of the mortgagor, upon the allegation that he had tendered payment of mortgage-money just before the expiry of the first period of 13 years, but that the defendant had refused to accept payment. The plaintiff further claimed mesne profits.

The suit has been decreed by the Courts below. The lower Appellate Court has found that the plaintiff did not tender payment of the mortgage-money as alleged by him, but holding that the stipulation regarding the continuance of the mortgage for a further period of 13 years was in the nature of a penalty, decreed the plaintiff's suit for redemption and also for mesne profits.

The defendants come here in second appeal. The learned Vakil for the plaintiff-respondent does not find himself in a position to support the decree of the lower Appellate Court as to mesne profits. It is contended on behalf of the defendants-appellants that the stipulation in the mortgage-deed that if the mortgage money was not paid on the expiry of the first term of 13 years then the mortgage would run for another 13 years is a substantial part of the contract between the parties and not, as held by the Courts below, a penal stipulation. It is pointed out that while the mortgagor under this stipulation is debarred from redeeming, on the other hand, the mortgagee is similarly debarred from recovering his money.

Arrangements of this nature, postponing the remedies, both of the mortgagor and the mortgagee, are of common occurrence, and they are supported on the ground that the contract is valuable to both parties; the mortgagee, on the one hand, being sure of a continuing security for his money and the mortgagor being freed from the expense and trouble of seeking new lenders. (Fishere's Law of Mortgage, 5th edition, 1897, p.668).

No case exactly in point has been referred to me in this appeal, but it appears to me that a stipulation postponing the period of redemption does not confer such an undue advantage on the creditor as to make the stipulation a penal one. The contract was not unilateral, inasmuch as the effect of the stipulation is to bar the mortgagee from recovering his money on the expiry of the first period provided for in the mortgage-deed. In my opinion, therefore, the suit for redemption was premature and ought to have been dismissed. I allow the appeal, set aside the decree of the Courts below and dismiss the plaintiff's suit with costs in all Courts.

Appeal allowed.

ALLAHABAD HIGH COURT.

CIVIL REVISION NO. 78 OF 1910.

April 13, 1911.

Present:—Sir George Knox, KT., Judge, and Mr. Justice Banerji.

RAM LAL—PLAINTIFF—APPELLANT

versus

KALAPRASHAD AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLVII, r. 1—Review—Judgment based on a decision of the Revenue Court—Revenue Court decision upset in appeal—Whether good ground for review.

Where the judgment of a Civil Court is based on the decision of a Revenue Court and the latter decision is reversed by a Revenue Court of Appeal, there is good ground for review of the Civil Court's judgment.

IMTIAZ ALI *v.* BISHAMBHAR DAS.

Waghela Raisangji v. *Sheikh Mushludin*, 13 B. 330; *Waman Hari* v. *Hari Vithal*, 31 B. 128; 8 Bom. L. R. 932, referred to.

Revision against the order of the Munsif of Badaun, dated the 20th of June 1910.

Mr. *Govind Prashad* (with him Mr. *Lachmi Narain*), for the Appellant.

Mr. *Chaudhri*, for the Respondents.

JUDGMENT.—The applicant in the case before us, Ramlal, was plaintiff in the Court below. He instituted a suit in the Civil Court for ejectment of the defendants, second party, as trespassers. They met the suit by a plea that they were tenants of the plaintiff. The learned Munsif very properly stayed his hand and required the defendants to institute a suit in the Revenue Court for a determination of the question raised by them. The defendants then went to the Assistant Collector and got from him a decision that they were the tenants of the plaintiff. In accordance with this decision the Munsif dismissed the plaintiff's suit on the 29th of April 1909. At the time when he passed this order an appeal was pending in the Court of the Commissioner from the order of the Assistant Collector. The Commissioner decided that the defendants were not tenants and this decision was upheld by the Board of Revenue. The Munsif ought to have waited until the final decision of the Revenue Court, and on hearing that the order of the Assistant Collector was under appeal he should have waited still further. The plaintiff armed with the decisions in his favour, applied to the successor of the Munsif for review of the order passed on the 29th of April 1909. We do not understand why the plaintiff waited so long before he went to the Munsif. It is true that he came within 90 days of the decision of the Board of Revenue, but in matters of this kind applications for review should be put in as early as possible. The Munsif before whom the application came refused to entertain it and we are asked to set aside his order on the ground that he failed to exercise the jurisdiction vested in him. The question before us turns upon one point, namely, whethar the decisions of the Commissioner and Board of Revenue can properly be held to be new and important matter within the meaning of Order XLVII, rule 1. No judgment of this Court which is exactly in point has been placed before us. There is, however, a judgment of the Bombay High Court in *Waghela Raisangji.* v. *Sheikh Mushludin* (1) which was approved of in the subsequent case of *Waman Hari* v. *Hari Vithal* (2). We cannot find that the view taken by the Bombay High Court has been disapproved of or dissented from by any of the other High Courts. The case before us is one in which we think, for the ends of justice, we ought to allow a review and, acting upon the precedents quoted above, we allow the application, set aside the order of the Munsif and send back the case to him with directions to re-admit the suit under its original number and to dispose of it according to law. We make no order as to costs.

Application allowed.

(1) 13 B. 330.
(2) 31 B. 128; 8 Bom. L. R. 932.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 637 OF 1910.

April 18, 1911.

Present:—Sir John Stanley, KT., Chief Justice, and Mr. Justice Banerji.

IMTIAZ ALI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

BISHAMBHAR DAS AND ANOTHER—DEFENDANTS—REPONDENTS.

Execution—Attachment—Application for execution dismissed—Attachment still subsisting.

Where property is once attached in execution, an order merely dismissing the application for execution, which does not contain specific words withdrawing the attachment and which is not an order declaring the decree incapable of execution, will not have the effect of raising the attachment. So long as such attachment subsists, an alienation of the property by the judgment-detor is invalid.

Bank of Upper India v. *Sheo Prashad*, 19 A. 482, followed.

Puddomonee v. *Roy Muthoora Nath Chaudhry*, 12 B. L. R. 411; 20 W. R. 133, distinguished.

Second appeal from the decision of the Additional Subordinate Judge of Saharanpur dated the 2nd April 1910.

Mr. *Abdul Raoof*, for the Appellants.

Mr. *D. C. Banerji*, for the Respondents.

JUDGMENT.—This is a suit for a declaration that the plaintiffs and the defendants Nos. 3 and 4 were the owners of certain *zemindari* property and that the sale of that property to the defendant Umme Khatun

in execution of a decree in favour of the defendant Bishamber Das did not affect the rights of the plaintiffs. The property in dispute formerly belonged to *Musammat* Majid-un-nissa. Bishambar Das obtained a decree against her on the 28th of January, 1904; and on the following 6th of August the decree-holder attached the property in execution of his decree. Pending this attachment, namely, on the 21st of November 1904, Majid-un-nissa purported to convey the property to *Musammat* Ummatul Fatma, the mother of the plaintiffs. For some reason which is not explained, the application of the decree-holder for execution of his decree of the 28th January 1904 was dismissed on the 6th of January 1905; but shortly afterwards, namely in February 1905, he made an application to the Court for execution of his decree and asked for sale of the property which had been attached. The Court granted the application but by its order purported to re-attach the property and ordered a sale of it. Both the lower Court dismissed the plaintiffs' claim on the ground that the transfer of the 21st of November 1904 was made by Majid-un-nissa pending the attachment of the property under the decree held by Bishambar Das, and was, therefore, void under section 276 of the Code of Civil Procedure of 1882.

This appeal has been preferred and the ground of appeal which has been pressed before us is, that the attachment of the property in 1904 came to an end on the dismissal of the application for execution and that the transfer of the property made by Majid-un-nissa before the subsequent attachment in favour of the plaintiffs' ancestor was not affected by it. The question is whether the original attachment of 1904 was ever discharged. The decree-holder in applying for execution in 1905 did not ask for the attachment of the property but for the sale of 1904. There is nothing on the record to show the circumstances under which the application for execution of the decree was dismissed, and there is nothing before us to lead us to suppose that the property was, by order of the Court or otherwise, released from attachment. On the contrary, it appears that when order for sale was applied for in 1905 by the decree-holder an office report was filed to the effect that the property attached had been sold on the 21st of March 1904. In consequence of this report, the Revenue Court rejected the decree-holder's application but on appeal the learned District Judge held that the sale was made which the original attachment continued and, therefore, was clearly void; that the attachment of 1904 must be held to have been subsisting not only at the date of the sale but also when the subsequent application for execution was made. In *The Bank of Upper India* v. *Sheo Prasad* (1). Knox and Burkitt, JJ., held that where property is once attached in execution of a decree an order merely dismissing an application for execution, which order does not contain specific words withdrawing the attachment and which is not an order declaring the decree incapable of execution, will not have the effect of raising the attachment, and if in appeal such order is set aside the decree-holder will be in the same position as he was before and entitled to the full benefit of the attachment. Reliance has been placed by the appellant's learned Counsel upon the ruling of their Lordships of the Privy Council in *Puddomonee* v. *Roy Muthoora Nath Chaudhry* (2). In that case their Lordships held that, "generally, where the party prosecuting the decree is compelled to take out execution, his title should be presumed to date from the second attachment." If in the case before us the decree-holder had been obliged to apply anew for attachment the observation of their Lordships in the case above cited would have had weight, but their Lordships go on to say that no broad rule could be laid down upon the question. They observe "Their Lordships do not mean to lay down broadly that in all cases in which an execution is struck off the file such consequences must follow." In the present case all that we know is that the application for execution of the decree-holder was dismissed; that he renewed his application for sale of the property which had been attached; that a sale was ordered while at the same time the attachment was confirmed and that in appeal in execution the Appellate Court held that the original attachment subsisted. We are of opinion that the Courts below rightly dismissed the suit. We dismiss the appeal with costs including fees in this Court on the higher scale.

Appeal dismissed.

(1) 19 A. 482.
(2) 12 B. L. R. 411; 20 W. R. 133.

AMINA BEGAM *v.* NAWAB OF RAMPUR.

ALLAHABAD HIGH COURT.
FIRST CIVIL APPEAL No. 109 OF 1909.
April 19, 1911.
Present:—Sir John Stanley, KT.,
Chief Justice, and Mr. Justice Griffin.
Musammat AMINA BEGAM AND OTHERS
DEFENDANTS—APPELLANTS
versus
HIS HIGHNESS THE NAWAB OF RAMPUR
—PLAINTIFF—RESPONDENT.

Promissory note executed in a Notive State—Stamp affixed according to the laws of that State—Admissibility in evidence in British Indian Courts—Private International law.

A promissory note executed in favour of His Highness the Nawab of Rampur at Rampur on an unstamped paper was *prima facie* in favour of His Highness in his capacity of Nawab of Rampur, and was, therefore, admissible in evidence in a suit brought upon it in British India as it was in accordance with the law in existence at Rampur where it was executed.

First appeal from the decision of the Subordinate Judge of Bareilly dated 21st December 1908.

Dr. *Satish Chandra Banerji*, for the Appellants.

Mr. *B. E. O'Conor* (with him Messrs. *Chowdhri* and *L. M. Banerji*), for the Respondent.

JUDGMENT.—The subject-matter of this litigation is a promissory-note executed on the 13th of July 1906 by Nawab Abdul Ghafur, the then Prime Minister of Rampur State, in favour of His Highness the Nawabof Rampur. The note was executed at Rampur and was on unstamped paper. Nawab Abdul Ghafur having died, the suit out of which this appeal has arisen was instituted on the 5th of March 1908 against his heirs who are residents of British India. Before the promissary note was filed in Court it was stamed by the Pleader for the plaintiff with an one anna stamp of British India. One of the defences set up by the defendants was that the document was void by reason of its not having been stamped at the date on which it was signed, and, therefore, could not be made the basis of a suit.

The Court below overruled this plea holding that it was immaterial whether or not the promissory- note complied with the provisions of the stamp law of the Rampur State, and that it was a valid document being stamped according to the Indian Stamp Act.

We are not disposed to take this view and, therefore, referred several issues to the Court below for determination.

They were as follows:

(1) Whether according to the law of the Rampur State binding on the parties to the suit, a promissory-note must be stamped in order to have legal effect.

(2) If not so stamped, is it absolutely void; and

(3) If not absolutely void, what is its force and effect according to the law in force in the Rampur State.

It was contended before the Court below that the promissory-note in question was not admissible in evidence not having been stamped in accordance with the law of the Rampur State. Section 52 of the Rampur Stamp Act prescribes that any "instrument chargeable with duty but not duly stamped shall not be admitted in evidence for any purpose by any person having by any law, or consent of the parties authority to receive evidence, or shall be acted upon, registered or authenticated by any such person unless such instrument is duly stamped." There are provisos to this section amongst others the following, (C) "When any instrument is completed by or in favour of the State, or if it bears a certificate under section 46, then it will be admitted in evidence, et cetra." It was contended on behalf of the plaintiff that the promissory-note having been executed in favour of His Highness the Nawab of Rampur it was admissible in evidence according to the aforesaid proviso. The Court below held that the note was given to the Nawab in his private capacity for money lent from his private purse and not from the State Treasury and that, therefore, the proviso above referred to did not apply. It further held that under the law of the Rampur State, binding on the parties, a promissory-note requires to be stamped to have legal effect and that the promissory-note sued on not having been stamped was for all practical purposes absolutely void.

Objections have been taken to these findings under Order XLI, rule 26. It is contended on behalf of the plaintiff that the note was completed in favour of the Rampur State and was admissible in evidence and that the Court below was wrong in holding that the plaintiff was not entitled to the benefit of the aforesaid proviso to section 52.

His Highness the Nawab was examined on

commission and he deposed to the circumstances under which the note was executed. In answer to the question whether the debt was due to the State or to himself he said "This debt is due to me personally and ordinarily speaking a debt which is due to me is due to the State and debt which is due to the State is due to me. But the said amount I advanced from my own funds." The note is in the following terms. "I promise to pay to His Highness the Nawab of Rampur on demand the sum of Rs. 45,000 value received," and is signed by Abdul Ghafur, and dated the 13th July 1906. The argument addressed to us on behalf of the defendants is that the Nawab occupies a dual capacity namely that of Ruler of the State of Rampur and that of a private individual independent of the State, and that the money not having been advanced from the funds in the Treasury but from money which His Highness had by him at the time the note cannot be regarded as having been completed in favour of the State. We are unable to accede to this contention. The note was drawn in favour of the Nawab of Rampur and it is not suggested that if the loan had been a loan from the State, the promissory-note would have assumed a different form. But it is said that the money was not taken from the Treasury but from moneys in the hands of His Highness and that, therefore, the note cannot be regarded as having been made in favour of the State. We think that this is too narrow a view of the case. As His Highness in his evidence stated "the debt which is due to me is due to the State and the debt which is due to the State is due to me." If the note was completed in favour of the State, then the proviso to section 52 is applicable, and the note was, in our judgment, admissible in evidence, it being a note in accordance with the law in existence at the place of contract.

The instrument, it is to be observed, is drawn in favour of the Nawab of Rampur, not in favor of Nawab Sir Muhammad Hamid Ali, Khan Bahadur, G.C.S.I. It is, on the face of it, in favour of the plaintiff as Nawab of Rampur and not in favor of him in any capacity other than that of Ruler of the Rampur State. For these reasons we think that the claim of the plaintiff was rightly decreed. It was contended on behalf of the plaintiff that even if the instrument required a stamp inasmuch as it was received in evidence in the Courts below, its admission as material evidence cannot be called in question in appeal on the ground that the instrument was not duly stamped (See section 53 of the Rampur Stamp Act).

It was also contended that under section 14 of the Rampur Stamp Act His Highness the Nawab has power to remit the duty on any instrument and that, under the circumstances of this case, it must be assumed that His Highness in accepting an unstamped promissory-note remitted the duty payable in respect of it. In view of our finding on the main issue it is unnecessary to determine the two last mentioned points.

We think that there is no force in the fifth ground of appeal. The second, third and fourth grounds of appeal were not pressed.

For the foregoing reasons the plaintiff is, in our judgment, entitled to hold the decree which he has obtained. We accordingly dismiss the appeal with costs including fees in this Court on the higher scale.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 282 OF 1911.

April 8, 1911.

Present:—Mr. Justice Banerji.

RAM NIHORA RAI—PLAINTIFF—APPELLANT

versus

MANBODH UPADHEYA—DEFENDANT—RESPONDENT.

Occupancy-holding—Mortgage—Possession delivered to mortgagee—Suit by mortgagor to get back possession without payment of money received from the mortgagee—Whether maintainable—Void contract—Refund of consideration.

A. usufructuarily mortgaged his occupancy-holding to *B.* and delivered possession. The mortgage of the holding was void in law. The mortgagor sued for recovery of possession without offering to re-pay the mortgage-money:

Held, that he could not recover possession of the property without refunding to his mortgagee the money he had taken as the consideration of the mortgage.

Fasihuddin v. *Karamatullah*, A. W. N. (1888) 128, followed.

Bhikham Singh v. *Har Prasad*, 19 A. 35, distinguished.

Second appeal from the District Judge of Ghazipur, dated the 16th December 1910.

Mr. *Haribans Sahai*, for the Appellant.

GANESHI LAL v. MANDE LAL.

JUDGMENT.—The plaintiff-appellant made a mortgage of his occupancy-holding in favour of the respondent and put the mortgagee into possession. but after having done so he brought the suit, out of which this appeal has arisen, for recovery of possession of the holding on the ground that the mortgage of the occupancy-holding was void in law. He did not offer to pay back to the mortgagee the money which he had taken from him. The Court of first instance decreed the claim. The lower Appellate Court held that the plaintiff could not be allowed to take back the property without refunding to the mortgagee the money which he had taken as the consideration for the mortgage, and that as he had not made a tender of such money his suit must fail. It accordingly dismissed the suit. I am of opinion that the decision of the Court below is right. The mortgage made by the plaintiff is, no doubt, void but he is not entitled to get back the property from the mortgagee unless he puts him back in the position in which he was before the mortgage was made. A similar question arose in the case of *Fasih-ud-din* v. *Karamat Ullah* (1). That was a suit in which the plaintiff asked to be put back into possession of *sir* land and which he had sold to the defendant without offer or tender of payment of the portion of the purchase-money given for it. The learned Judges made the following observations: "We are here administering the law and are bound to administer that law as far as we can, according to equity and good conscience, and it seems to us that if we were to pass a decree in favour of the plaintiff in this case, we would be violating every principle of equity and good conscience by allowing a man by means of fraud, to keep in his pocket the purchass money which he had obtained from his vendee and get back by the assistance of the Court possession of the property which that purchase-money represented." This was a decision of a Bench of two Judges and is binding on me. The learned Vakil for the appellant referred to the case of *Bhikam Singh* v. *Har Prasad* (2). That was a converse case to the one now before me. The remarks made in that case in regard to a suit like the present are against the appellant. As the plaintiff did not pay back or offer to pay back the money which he had received from the defendant and as he asked for an unconditional decree, the Court below was, in my opinion, right in refusing to decree it.

I accordingly dismiss the appeal.

Appeal dismissed.

(1) A. W. N. (1881) 128.
(2) 19 A. 35.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1023 OF 1910.

April 13, 1911.

Present:—Sir John Stanley, KT., Chief Justice, and Mr. Justice Griffin.

GANESHI LAL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MANDE LAL—DEFENDANT—RESPONDENT.

Contract Act (IX of 1872), ss. 16, 19—Unconscionable bargain—Presumption—Undue influence—Excessive rate of interest, whether sufficient to render a contract unconscionable—Interest.

The power of a Court to interfere with contracts alleged to be unconscionable is limited by the provisions of sections 16 and 19 of the Indian Contract Act of 1872, and the fact that an excessive rate of interest is charged in a contract is not alone sufficient to establish that the making thereof was induced by undue influence. In order to justify a Court in interfering with a contract of the kind, it must be found that the lender was in a position to dominate the will of the borrower when the contract was entered into, before any presumption can arise that the contract was induced by undue influence.

Second appeal from the decision of the Additional Juge of Meerut, dated 11th June 1910.

Dr. *S. C. Banerji*, for the Appellants.

Mr. *B E. O'Conor*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit for sale on a mortgage of the 22nd of September 1885. On that date *Musammat* Ulfatunnissa, the mother of the defendants Nos. 1 and 2, and paternal grandmother of the defendants Nos. 3--5, together with the defendant No. 1, hypothecated certain property in favour of Lala Sumer Chand, the ancestor of the plaintiffs, to secure a principal sum of Rs. 150 with interest at the rate of Rs. 2-4-0 per cent. per mensem to be calculated with half yearly rests. The lower Appellate Court found that on foot of this mortgage a sum of Rs. 8-14-3 alone remained due on the 29th of October 1887. If further found that this amount swelled to Rs. 35 on the 15th of August 1893. The plaintiff in the

the suit should have been one for rendition of accounts of a dissolved partnership. In my opinion, the appeal succeeds on either ground. In my opinion, the District Judge (Mr. Thomson) was hardly correct in holding that plaintiff was, under the agreement (see p. 3 paper-book), a "lender" who was to get his reward by a share in the profits, *i. e.*, that section 240, Indian Contract Act, covers the case. Nor am I inclined to adopt the suggestion that the relationship of principal and agent obtained between the parties (section 182, Indian Contract Act). According to section 239 of that Act, partnership is "the relation which subsist between persons who have agreed to combine their property, labour or skill in some business, and to share the profits thereof between them. Section 240 lays it down that a loan does not of itself constitute the lender a partner of the borrower merely because the lender is to receive interest at a rate varying with the profits a share of the profits. Section 182 defines an agent as a person employed to do any act for another, or to represent another, in dealings with third persons. The "other" person is the principal.

The contract in the present case is contained in the document marked A A. at p. 3 paper-book. We are not, in my opinion, at liberty to adopt a view inconsistent with the terms of that document, but we can refer to subsequent conduct of the parties for the purpose of making clearer what the document was intended to mean. The important sentences in the deed are these,

"The profits *and losses* to be shared by Baja Ram and myself in equal shares, our *kharch waghiara sanjhi khatha* * * * * *Yih mal Baja Ram ka wa mera nisf nisf nafa wa nuksan ko hai.* The opium will be exported. I shall be responsible for the amount after the opium has been exported from Simla. At present, however, Baja Ram is responsible for it."

This document is signed by defendant No. 1 alone. In my opinion these sentences show,

(*i*) that profits and losses alike were to be shared equally;

(*ii*) that the expenses of the venture were to be borne in equal shares;

(*iii*) that the opium became the joint property of the pair, though, of course, the responsibility for it should rest with plaintiff so long as it was in his custody, and upon defendant No. 1 when it was entrusted to his care.

The opium was procured from the Jubal State, near Simla, and was to be exported for sale to the plains.

This third consideration suffices of itself to take the case out of the purview of section 182 of the Act and into the purview of section 239. No doubt it might be said that a partner who does an act for the firm is an agent for the firm; but he is not agent for his partner and the law applicable is the law of partnership and not that of agency.

The learned District Judge (Mr. Thompson), in deciding that section 240 was applicable, relied upon *Bhaggu Lal* v. *De Gruyther* (1), clearly a case of lender and borrower. These defendants had a Government contract, and all that plaintiff did was to lend him money and to receive a share in the profits. The property, labour and skill, as was pointed out, were all on the side of defendant, plaintiff merely advancing sums of money from time to time. The distinction between that case and the present one seems to me so obvious that I need not discuss the matter further.

As regards the indications (*i*) and (*ii*) above I need only refer to the passage in Lindley on Partnership, 7th Edition, page 45, headed "partnership is the result of an agreement to share profits and losses," and if it be said such an agreement combined with an agreement to share expenses, is not sufficient to constitute partnerships, it is not easy to see how any agreements can ever constitute partnerships.

A few words will suffice to show that the subsequent conduct of the parties, so far as it goes; points to the existence of a partnership. Plaintiff took part in the carrying on of the business—see his explanation at page 22, line 27, paper-book, page 23, line 8. Jagna's evidence page 35, and Exhibit D4 (not in point); and other evidence.

But if the suit should have been for accounts of a dissolved partnership, then the present suit is not in proper form and should be dismissed on this ground alone. It cannot, in my opinion, be altered into a suit for ac-

(1) 4 A. 74.

BERAGI RAM *v.* BAJA RAM.

The Hon'ble Mr. *Shadi Lal*, for the Appellant.

Mr. *Nand Lal*, for the Respondent.

JUDGMENT.

JOHNSTONE, J.—In this case plaintiff sued for Rs. 5,250 in all, being balance of price of 20 *maunds*, 14 *seers*, of opium sold by him to the three defendants *plus* Rs. 157 interest. He stated in his plaint that he was entitled, under his contract, to a considerable additional sum on account of profits upon the ultimate sale of the stuff, but this sum he was unable to sue for, being too poor to pay the necessary Court-fees.

Defendant No. 1, on 23rd August 1906, and apparently again the next day, filed written statements in which he pleaded,—

(*a*) that he and defendants Nos. 2 and 3 did not form a joint Hindu family;

(*b*) that he was liable only for the price of 11 *maunds*, 13 *seers* of opium, which was all that was made over to him by plaintiff;

(*c*) that there were no profits but a loss, the net sum due to defendant No. 1 being Rs. 1,944 for which a decree was prayed.

Issues were framed upon these pleadings on 24th August 1906, the proceedings so far being *ex parte* against defendants Nos. 2 and 3.

On 28th September Lala Jai Lal, Pleader, applied on behalf of defendant No. 3 to be heard, and on behalf of defendant No. 1 for leave to file additional pleas. On 1st October the order for *ex parte* hearing was set aside and defendant No. 1 was allowed to put in his additional pleas, which he did on 9th October; and on that day the issues to be tried were recorded as follows:—

1. (*a*) Is the suit not in proper form?

(*b*) Is the document (*i. e.*, agreement) inadmissible for want of stamp?

(*c*) Is the suit barred by limitation?

(*d*) Is defendant No. 3 liable to plaintiff?

1. Are defendants members of a joint Hindu family?

2. What was the agreement entered into between the parties?

3. How much opium did defendant No. 1 take from plaintiff? And what was the value?

4. What amount has plaintiff been paid and is he entitled to any amount of principal? And to any amount of interest as damages? and, if so, how much and from whom? Can defendant No. 1 claim Rs. 556 deduction without paying stamp for set-off?

6. What profits or loss was there on the transaction?

In the end, defendant No. 1 gave up his set off or counter claim, and thus the last two issues became practically useless.

Issue No. 1 (*a*) was based upon the plea of defendants Nos. 1 and 3 that the affair was not a mere sale of opium by plaintiff but a partnership; and issue No. 1 was the outcome of the plea that only defendant No. 1 (and not defendants Nos. 2 and 3 was liable, if at all, to plaintiff.

The learned District Judge (Mr. Thompson) on 13th November 1906 ruled that there was no partnership, but that the document sued on was "an ordinary agreement," requiring a stamp of 8-annas. Taking this as settled for the time, defendants saw that the plea of time-bar, in view of Article 52, Limitation Act, could not succeed, and said so, the agreement bearing date 2nd November 1901 and the suit being instituted within 6 years, *i. e.*, on 26th June 1906.

Evidence was taken, and finally judgment was delivered on 19th March 1908. The District Judge (Mr. Malan) felt himself bound by the order of 13th November 1906 aforesaid, and so took issue No. 1 (*a*) (*b*) and (*c*) as disposed of. Proceeding he ruled that defendant No. 1 alone was liable under the agreement; that agreement, though not clear, must, in view of the order of 13th November 1906, be taken to embody a sale of 20 *maunds*, 14 *seers* of opium for Rs. 7, 593, the question whether all that opium actually was delivered to defendant No. 1 being immaterial; that defendant No. 1 paid Rs. 6,000 to plaintiff and not merely Rs. 2,800 as admitted by the latter; and that, consequently, interest being inadmissible, plaintiff should have a decree for Rs. 1,593 only.

Defendant No. 1 appeals to have the suit wholly dismissed, while plaintiff has applied for leave to appeal *in forma pauperis* for his full claim. As upon a hearing of defendant No. 1's appeal we are agreed that the plaintiff's suit should be dismissed, it becomes unnecessary to consider plaintiff's application at all.

Defendant No. 1's appeal proceeds both on the merits and on the technical questions whether the parties were partners, and so

son who may be affcted by the act to be done or forborne, to show cause.

Application under section 45 of the Specific Relief Act, (I of 1877).

Messrs. *Pugh* and *B. C. Mitter*, (instructed by Messrs. *Manuel* and *Agarwala*, Solicitors), for the Petitioner.

Mr. *S. P. Sinha* (instructed by Messrs. *Sanderson and Co.*, Solicitors), for the Opposite Party.

JUDGMENT.—The allegations upon which this Rule was issued on an application under section 45 of the Specific Relief Act, may be briefly set out. Maharani Beni Prasad Koeri, Maharani of Dumraon, died on the 13th December 1907. The petitioner Kesho Prasad Singh alleges that he thereupon became entitled to the Dumraon Raj estate, but on the 16th December, 1907, the Court of Wards declared an infant Jang Bahadur Singh as a ward of the Court and took possession of the estate as if it belonged to the infant in question. The petitioner further alleges that he addressed various memorials to the Government of Bengal and protested against the possession by the Court of Wards of the said Raj. As his efforts were unsuccessful, he commenced an action on the 5th February 1909, in the Court of the Subordinate Judge of Shahabad, against the infant represented by his guardian and the Collector of Shahabad as representing the Court of Wards. The trial of the suit lasted from the 1st December 1909, to the 13th July 1910, and on the 12th August 1910, judgment was pronounced in favour of the petitioner. Subsequently, on the 31st August, he applied to the Members of the Board of Revenue, forming the Court of Wards, that the estate might be released in his favour. Intimation was sent to him on the same date that the Court declined to comply with his request. He then obtained this Rule, on the 8th September, 1910, calling upon Mr. Slacke and Mr. Macpherson, members of the Board of Revenue, to show cause why they should not forthwith release the Dumraon Raj estate from the charge of the Court of Wards, and take all necessary steps for the purpose. The learned Counsel who has appeared to show cause has contended that the application is open to various objections, any one of which is sufficient to justify its refusal.

It has been argued, in the *first* place, that the petitioner has failed to comply with rule 483 of the Rule of this Court, which provides that, unless otherwise ordered, every rule issued under section 46 of the Specific Relief Act upon an application under section 45 shall call not only on the public servant, Corporation, or inferior Court, but also on any person other than the applicant who may be affected by the act to be done or forborne, to show cause. It is not disputed that the present rule has been served only upon the members of ths Board of Revenue; it bas not been served upon the infant who would be undoubtedly affected if the application were granted. The objection, therefore, is fatal; it is one of substance and not of mere form, for the principle has been recognised wherever writs of *mandamus* are issued, that if a right, title or interest, in or to real property, is directly involved, all persons owning or claiming the same, must as a rule be joined as parties. We do not desire, however, to rest our decision on this ground, because possibly if the application were meritorious, the Court might, upon payment of all costs by the petitioner, still allow the petition to be amended, and notice thereof given to all necessary parties before the Rule was heard.

It has been contended, in the *second* place, that the application ought to be refused, because the applicant has other specific and adequate legal remedy. It is an elementary principle that recourse ought not be allowed to an extraordinary remedy of this description, when it is not really needed. In the case before us, the plaintiff is entitled to sue in ejectment; he has brought such a suit, and has been successful; he is entitled to execute his decree, but has not yet taken any steps in that direction. It is well settled that a *mandamus* will never be granted to enforce the general law of the land which may be enforced by action; for instance, where the applicant has the ordinary legal remedy of an execution, *mandamus* does not lie. *R.* v. *Chester* (1). Consequently, where an action has been brought and judgment entered against a Company, the Court would refuse to issue a *mandamus* commanding the Company to pay the sum recovered and costs, though it

(1) (1747) Wilson 209.

appears that the Company had no assets, *R.* v *Victoria Park Company* (2). For similar reasons, a *mandamus* is not obtainable in cases where there is a remedy by distress. *R.* v. *London and Black Wall Railway Company* (3). These cases recognise the doctrine that *mandamus* will lie to prevent a failure of justice upon reasons of public policy, to preserve peace, order and good Government, correct official inaction, and enforce official function, but only in cases of last necessity, where the usualforms of procedure are powerless to afford relief, where there is no other clear, adequate, efficient and speedy remedy; in other words, as stated by the Supreme Court of the United States in *Kendell* v. *Stokes* (4), where the petitioner may have relief in an ordinary civil action, *mandamus* will not lie. *R.* v. *Severn* (5), see also *Bank of Bengal* v. *Dinonath* (6), *In re Bombay F. I. Company* (7), *R.* v. *Stepny Borough Council* (8). The second objection, therefore, which goes to the root of the matter, must be sustained.

In the *third* place, no order will be made, unless the Court is satisfied that the doing or forbearing of the act is consonant to right and justice, and such doing or forbearing is, under any law for the time being in force, clearly incumbent on the person against whom the order is sought. In the present case, before the Court could hold that the act sought to be done is clearly incumbent upon the members of the Board of Revenue, we should have to determine that the plaintiff is the rightful owner of the Dumraon Raj estate; but that is the very matter in controversy between the plaintiff and the infant defendant in the regular suit. No doubt, the plaintiff has obtained a decree in the Court of the Subordinate Judge, but the propriety of that decree has to be considered by this Court. It is obviously impossible for this Court to adjudicate, for the purposes of this application, upon the very question in controversy between the parties in the appeal. It is an elementary that principle the title to property will not be tried in *mandamus* proceedings and the writ will not issue, when it is necessary to try or decide complicated or extended questions of fact. *United States* v. *General Land Office* (9) *Gregory* v. *Blanchard* (10). The third objection must, therefore, prevail.

In the fourth place, it has been contended; that the application ought not to be entertained, because the specific act required to be done is not to be done within the local limits of the ordinary original jurisdiction of this Court, as no part of the Dumraon Raj estate is situated within such local limits. The learned Counsel on behalf of this petitioner has, however, argued that this circumstance is immaterial, because the members of the Board of Revenue reside within the local limits mentioned, and all that is required is that a notification should be issued by them in the official Gazette that the estate has been released. The substance of the argument is that the order declaring the infant a ward of Court and directing possession to be taken on his behalf was made within the jurisdiction of this Court, and an order for withdrawal of the original order may similarly be directed to be made here. In support of this view, reliance has been placed upon the decision of the Bombay High Court in *Re Haji Hasan* (11). This case does support the view that the act required to be done, in so far as it may be done within the local limits of the ordinary original civil jurisdiction of this Court. namely, the issue of an order of cancellation of the original order; might, if a good case were made out, be directed under section 45 of the Specific Relief Act. It is not necessary, however, to deal with this matter in further detail nor to arrive at a final decision upon this point, because the application must fail upon the other grounds mentioned. In our opinion, the Rule must be discharged, and as the application has been wholly misconceived, it must be dismissed with costs.

Rule discharged.

(2) (1841) 1 Q. B. 288; 55 R. 249; 4 P. & D 639.
(3) (1845) 3 D. & L. 399; 71 R. R. 849; 4 Railw. Cas. 110; 15 L. J. Q. B. 42; 11 Law. Ed. 506.
(4) (1843) 3 Howard 87.
(5) (1819) 2 B. and Ald. 646; 21 R. R. 433.
(6) 8 C. 166.
(7) 16 B. 398.
(8) (1902) 1 K. B. 317; 71 L. J. K. B. 238; 86 L. T. 21; 50 W. R. 412; 66 J. P. 183.
(9) (1866) 5 Wallace 562.
(10) (1893) 98 Cal. 311; 33 Pacific 656.
(11) 4 Bom. L. R. 773.

KESHO PRASAD SINGH *v.* SRINIVAS PRASAD SINGH.

(s. c. 13 C. L. J. 394.)

CALCUTTA HIGH COURT.

CIVIL RULE NO. 1149 OF 1911.

March 23, 1911.

Present:—Mr. Justice Mookerjee and Mr. Justice Caspersz.

KESHO PRASAD SINGH—PETITIONER

versus

SRINIVAS PRASAD SINGH AND ANOTHER —OPPOSITE PARTY.

Injunction—Plaintiff claiming possession—Injunction against defendant restraining him from enjoyment of benefits—Injunction lacking precision.

Pending an action for possession, while the title is disputed and still finally undetermined, the defendant ought not to be restrained from continuing in possession and from the ordinary natural use of the premises and the enjoyment of all benefits which flow from such possession. If, however, the defendant should attempt to commit any act in the nature of waste, the Court will interfere by injunction to restrain him.

An injunction so framed as to leave it open to the defendant to spend such portion of the income as might be needed for the management of the estates ought not to be granted, because it would be vague and indefinite and consequently valueless.

Rule obtained by the respondent to show cause why the appellant opposite party should not be restrained from spending any some in excess of what is due as Government revenue, etc.

Mr. *B. C. Mitter* and Babus *Pravash Chandra Mitter* and *Narendra Chandra Bose*, for the Petitioner.

Mr. *S. P. Sinha*, Dr. *Rash Behary Ghosh*, Babu *Ram Charan Mitra* and *Mohini Mahan Chatterjee*, for the Opposite Party.

JUDGMENT.—We are invited in this Rule, by the plaintiff-respondent in an appeal from original decree, to grant an injunction upon the defendants-appellants so as to restrain them in the use and enjoyment of the subject-matter of the litigation now in their possession. The circumstances under which the Rule was obtained are not disputed, and may be briefly narrated. The subject-matter of the litigation is known as the Dumraon Raj estate, which was in the possession of Maharani Beni Prased Koeri up to the time of her death, on or about the 13th December 1907. Upon her death, the Court of Wards took possession of the estate on behalf of an infant Jung Bahadur Singh, now known as Maharaj Kumar Srinivsa Prasad Singh, alleged to have been adopted by the late Maharani and entitled to succeed to the Raj as such adopted son. The plaintiff thereupon commenced this litigation in the Court of the Subordinate Judge for recovery of possession of the estate on the allegation that he was the reversionary heir lawfully entitled to succeed to the properties upon the death of the Maharani. The trial lasted for many months, and on the 12th August 1910, a decree was made in favour of the plaintiff. On the 8th September following, the defendants lodged an appeal in this Court, and obtained a Rule for stay of execution as also an order for an *ad interim* stay of proceedings. *Srinivasa Prasad Singh* v. *Kesho Prasad Singh* (1). On the same date, plaintiff obtained a Rule upon the members of the Board of Revenue, under section 45 of the Specific Relief Act, to compel them to release the estate in his favour, *Kesho Prasad Singh* v. *F. A, Slacke* (2). Both these Rules were discharged on the 2nd March 1911. The plaintiff thereupon obtained the Rule now uuder consideration calling upon the defendants-appellants to show cause why they, as also their agents and servants, should not be restrained from spending any sums whatsoever out of the estate; he also asked for an *ad interim* injunction, to restrain the defendants from spending any sums except such sums as are necessary for the payment of Government revenue and other public charges and rents due to superior landlords. This prayer, however, was not granted.

In support of the Rule, it has been argued by the learned Counsel that the defendants-appellants ought not to be allowed to spend the income of the properties in their possession to which the title of the plaintiff has been declared by the Court of first instance, and that, in any event, the defendants ought not to be allowed to spend any sums in excess of what is needed for the payment of Government revenue and other public charges and rents due to superior landlords as also sums needed for the management of the estate. It has been contended in substance that if the defendants are not so restrained, they may spend the whole of the income of the estate, as it is alleged they have done in the past, and that plainly they have no authority to appropriate to their own use, monies which belonged to the plaintiff. In answer to the

(1) 13 C. L. J. 365; 15 C. W. N. 475; 9 Ind. Cas. 862.

(2) 13 C. L. J. 390; 15 C. W. N. 503; 10 Ind. Cas. 253.

Rule it has been argued, that the question of the title of the plaintiff is still in controversy; that, in spite of the decision of the original Court, it cannot be maintained that the plaintiff has any fair prospect of success; that, in any event, the plaintiff has other remedies at his disposal, and that, in any view, the plaintiff cannot by an injunction practically compel the defendants to manage the estate at their cost for his benefit. After careful consideration of the arguments which have been addressed to us on both sides, we are of opinion that the application for an injunction ought to be refused.

It may be conceded that the plaintiff now occupies a position of some advantage by reason of the decision in his favour by the original Court. If the application for injunction had been made during the pendency of the trial in the Court below, the defendants could undoubtedly have contended that the injunction ought not to be granted until the plaintiff had established, as put by Lord Cottenham in *Clayton* v. *Attorney-General* (3), that he has a fair prospect of success, or, as observed in other cases, *Preston* v. *Luck* (4), *Challender* v. *Royle* (5) and *Republic of Peru* v. *Drefus* (6), that he had made out a probable or *prima facie* case. Let us assume, therefore, that as the plaintiff has made out his title after a protracted trial in the Court of first instance, he has a *prima facie* claim to the disputed properties. But this by itself is not sufficient to justify the grant of an injunction. It is well-settled that, as a general rule, where the plaintiff is out of possession and claims possession, the Court will refuse to interfere by grant of injunction against the defendant in possession under a claim of right; but where the threatened injury would be irreparable, an injunction will lie at the instance of a complainant out of possession, though in jurisdictions where a distinction is made between a Court of Law and a Court of Equity, such injunction has been refused even against irreparable injury, if the title has not been established at law and no action to establish it has been brought. *Strelley* v. *Pearson* (7), *Harman* v. *Jones* (8) and *Wilson* v. *Townend* (9). In this country, however, we are not embarrassed by the distinction between a Court of Law and a Court of Equity; in any event, in the case before us, the plaintiff has commenced a suit for declaration of his title and has been successful in the original Court.

The principle, therefore, to be applied here is that, unless irreparable injury is threatened, the Court will not grant an injunction to the plaintiff who is out of possession, as explained in *Lowndes* v. *Bettle* (10), where the decisions were reviewed and classified by Kindersley, V. C. As the learned Judge pointed out, the remedy by injunction is afforded more liberally to a complainant in possession to protect that possession than to one out of possession to protect the property until possession can be recovered by law.

The same doctrine has been recognised in numerous decisions in the American Courts as based on sound principles of justice, equity and good conscience; and it has been repeatedly ruled that a defendant in possession will not be enjoined from the use of the property in controversy, unless it is made to appear that the complainant will otherwise lose the fruits of his action if he establishes his title. The leading decision upon the point is the case of *Snyder* v. *Hopkins* (11), where Mr. Justice Brewer laid down the principle that, pending an action for possession, while the title is disputed and still finally undetermined, the defendant ought not to be restrained from continuing in possession and from the ordinary natural use of the premises and the enjoyment of all benefits which flow from such possession. If, however, the defendant should attempt to commit any act in the nature of waste, the Court will interfere by injunction to restrain him. A similar view was affirmed in *Hunt* v. *Steese* (12), *Williams* v. *Long* (13) and *Taylor* v. *Clark* (14). See also *Lloyd* v. *Trimleston* (15) and *Fingal* v. *Blake* (16). In the case before us, there is no foundation for any

(3) (1841) 1 Cooper Temp. Cottenham 97.
(4) (1884) 27 Ch. D. 497.
(5) (1887) 36 Ch. D. 425; 56 L. J. Ch. 995; 57 L. T. 734; 30 W. R. 353.
(6) (1888) 38 Ch. D. 348.
(7) (1880) 15 Ch. D. 113; 43 L. T. 155; 49 L. J. Ch. 406; 28 W. R. 752.
(8) (1841) Cr. & Ph. 299.
(9) (1860) 1 Dr. & Sm. 324; 30 L. J. Ch. 25; 6 Jur. (N. S.) 1109; 3 L. T. 342; 9 W. R. 30.
(10) (1864) 33 L. J. Ch. 451; 10 L. T. 55; 4 N. R. 609; 12 W. R. 399; 10 Jur. (N. S.) 226.
(11) (1884) 31 Kansas 557; 3 Pacific. 67.
(12) (1888) 75 Cal. 620; 17 Pac. 920.
(13) (1900) 129 Cal. 229; 61 Pac. 1037.
(14) (1898) 89 Fed. Rep. 7.
(15) (1829) 2 Molloy 81.
(16) (1828) 2 Molloy 50.

suggestion that the defendants are about to commit an act in the nature of waste; the plaintiff, therefore, is not entitled to an injunction to restrain them in the enjoyment of the propreties still in their possession.

Apart from the reason just stated, it is clear that no injunction ought to be granted in the case before us as the plaintiff has another adequate remedy. It is plain that the plaintiff can execute the decree he has obtained and thereby obtain full and ample relief. It is also obvious that the injury apprehended by the plaintiff is susceptible of perfect pecuniary compensation, in fact, the plaintiff has obtained a decree for mesne profits during the period of dispossession. No doubt, the mere fact that damages are recoverable is no objection to the grant of an injunction in cases where such damages would not be an adequate compensation for the injury, for instance, where the amount of the damage cannot be accurately computed or where the amount cannot be adequately proved. *Jordeson* v. *Sutton Southcoates & Drypool Gas Company* (17). Here, however, there is no solid ground suggested in support of the view that the plaintiff will not be amply compensated for injury he may suffer if the injunction is refused. Consequently, as an equally efficacious relief is available to the plaintiff, the Court will not grant an injunction.

Lastly, it may be observed that if an injunction were granted, it must necessarily be of the vaguest description. As already stated, the plaintiff prays that the defendants should be restrained from spending any portion of the income of the estate except for payment of Government revenue and other similar demands or rent payable to the superior landlord. This is manifestly unreasonable, because the plaintiff cannot in justice call upon the defendants to manage the estate for him at their expense. The learned Counsel for the plaintiff, therefore, conceded that the injunction, if granted, should be so framed as to leave it open to the defendants to spend such portion of the income as might be needed for the management of the estate. But any injunction so framed, would obviously lack precision, and, consequently, become valueless. If the plaintiff should subsequently apply to this Court to proceed against defendant for alleged violation of the injunction, and if the defendants should plead that any disputed sums they had spent were needed for the protection of the estate, the Court could hardly undertake to determine the validity of the objection; the result would be that the injunction, by reason of indefiniteness, would be practically useless. Under circumstances like these, when the plaintiff really seeks to obtain control over the expenditure of the income of the disputed property during the pendency of the litigation, the appropriate remedy is rather by the appointment of a receiver than by the grant of a vague and indefinite injunction. In our opinion, the objections we have explained are, each of them, fatal to the grant of the injunction.

The result, therefore, is that the Rule is discharged with costs. We assess the hearing fee at ten gold *mohurs*.

Rule discharged.

(17) (1899) 2 Ch. 217; 68 L. J. Ch. 457; 63 J.P. 692; 80 L. T. 815; 15 T. L. R. 374.

(s. c. 2 M. W. N. 265; 9 M. L. T. 479.)

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1254 OF 1907.

January 20, 1911.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Ayling.

SUBBARAYA REDDI—PLAINTIFF—APPELLANT

versus

MANIKKA KOUNDAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), s. 39—Default in performance—Right of rescission—Mortgage—Consideration—Full consideration not paid—Validity of mortgage to the extent of consideration paid.

Section 39 of the Indian Contract Act confers on a party to a contract the right to put an end to it where the other party to the contract fails to perform his promise in its entirety; in such a case the person aggrieved may choose not to avail himself of the right and if he does not do so, there is no provision of law which requires the contract to be treated as having been cancelled.

Motichand v. *Sagun*, 29 B. 46 and *Bajrangi Sahai* v. *Udit Narain Singh*, 10 C. W. N. 932, followed.

Subba Row v. *Devur Chetty*, 18 M. 126, referred to.

A mortgage-bond, of which the whole consideration has not been paid, is valid to the extent of the money advanced unless the mortgagor has expressly put an end to the mortgage.

Second appeal against the decree of the District Court of South Arcot in Appeal Suit No. 6 of 1907, presented against the decree of the Court of the District Munsif of Villupuram in Original Suit No. 984 of 1905.

SUBBARAYA REDDI *v.* MANIKKA KOUNDAN.

FACTS.—In this case the District Munsif held that the mortgage-bond in suit was genuine and that Rs. 235 only was advanced, though the bond recited a consideration of Rs. 400, that the mortgagee refused to pay the balance and he transferred the mortgage to the plaintiff for Rs. 200. The mortgagee having thus made default in performing his part of the contract, the executants of the suit bond were, therefore, entitled to cancel the contract of mortgage. The mortgagee had no right to treat the mortgage valid to the extent of Rs. 235 and transfer the same to the plaintiff. Vide *Subba Row* v. *Devur Chetty* (1). On these findings, the District Munsif dismissed the plaintiff's suit. There was an appeal to the District Judge who observed,—"I cannot, however, accede to the plaintiff's contention that the contract of the mortgage has not been cancelled. There is no doubt that by not paying the full consideration for Exhibit A, Vedanatha Ramanuja Chari prevented defendants Nos. 1 and 2 from discharging their debt to Devanayaga Reddi and thus caused the latter to file O.S. No. 742 of 1899 against defendants Nos. 1, 2, 4 to 9. If defendants have not formally cancelled the contract of mortgage under section 39 of the Indian Contract Act, I am of opinion that a Civil Court is bound to treat the original contract as at an end". The District Judge dismissed the appeal. Then this second appeal was preferred.

Mr. *T. R. Ramachandra Iyer*, for the Appellant.

Mr. *B. Panchapagesa Sastri*, for the Respondents.

JUDGMENT.—The plaintiff is an assignee of a mortgage which was executed by the defendants in favour of one Vedanatha Ramanuja Chariar. The entire amount which was to be advanced under the mortgage was Rs. 400, but, as a matter of fact, the original mortgagee only advanced Rs. 235, and we may take it that he refused to advance the balance. But it was never pleaded that the defendants cancelled the mortgage on that account and the plaintiff assignee of the mortgage seeks to enforce the mortgage to the extent of Rs. 235 actually advanced. The learned District Judge seems to think that, even if the defendants did not in fact put an end to the mortgage by exercising their rights under section 39 of the Indian Contract Act, the Court must still treat the contract as at an end merely by reason of the fact that the mortgagee did not advance the entire amount. Section 39, Indian Contract Act, confers on a party to a contract the right to put an end to the contract in case of default on the part of the other party to the contract to perform his promise in its entirety; but the person aggrieved in such a case may choose not to avail himself of the right. But, if he does not avail himself of the right there is nothing in the law which says that the contract must still be treated as having been cancelled. For instance, in a case like this, it would be clearly inequitable to permit the defendants, who never exercised their right under section 39 or intimated to the mortgagee that the mortgage had been put an end to, to turn round and say "now that the time for recovering the money as a personal debt has expired, I will put an end to the mortgage." The case in *Subba Row* v. *Devur Chetty* (1), to which the learned Judge refers, does not lay down any such proposition. On the other hand, the view we have expressed is supported by the decision in *Motichand* v. *Sagun* (2), *Bajangi Sahai* v. *Udit Narain Singh* (3). The learned District Judge has decided against the appellant also on the ground that he did not join his undivided son in the suit, but no such question as to the defect of parties was ever raised by the defendants, and it was not open to the learned District Judge to dismiss the suit on that ground. We must, therefore, reverse the judgments of both the lower Courts and the plaintiffs will have the usual mortgage-decree as prayed for in the plaint and the costs of the suit in all the Courts. The defendants will be given three months' time for payment of the decree amount.

Appeal allowed.

(1) 18 M. 126.

(2) 29 B. 46 at p. 50.

(3) 10 C. W. N. 932.

ABDULKADIR *v.* BANGARU SWAMI NAICKEN.

(s. c. 2 M. W. N. 270; 9 M. L. T. 429.)

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1940 OF 1908.

February 16, 1911.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Ayling.

SHEIK ABDULKADIR—PLAINTIFF—APPELLANT

versus

BANGARU SWAMI NAICKEN AND OTHERS—DEFENDANTS—RESPONDENTS.

Plaint—Relief misconceived—Granting of appropriate relief—Amendment.

A suit ought not to be dismissed merely because the plaintiff has misconceived the appropriate reliefs to which he was entitled. He should be allowed to amend his plaint by inserting a prayer for proper reliefs.

Second appeal against the decree of the District Court of Madura in Appeal Suit No. 871 of 1907, presented against the decree of the Court of the Subordinate Judge of Madura West, in Original Suit No. 18 of 1906.

FACTS.--Certain land acquisition proceedings were before the District Court in which an award was made to the effect that the money deposited by the Land Acquisition Collector into the District Court be taken by the defendant in a certain manner. Under this order the money in deposit was drawn by the defendants in the present suit severally. The plaintiff in the present suit was no party to the land acquisition proceedings, but he claimed to have a lease-hold interest in the land which was taken up by the Government for public purposes. In the plaint he at first prayed for an injunction restraining the defendants from withdrawing the money in deposit; since the institution of the suit the money having been drawn by the defendants the plaintiff applied to amend his plaint by substituting for the original relief the relief for a mandatory injunction to the defendants to bring and pay into Court the money which they had drawn out of the District Court and to have the same invested in securities which the Court considers proper and direct the defendants to take only a sum of Rs. 15 per annum out of the interest which might accrue thereon and pay the balance to the plaintiff. This was granted by the Subordinate Judge who held that the mandatory injunction could not be granted as the jurisdiction to grant such is confined strictly to cases where the object is to restore things to their former condition and that Courts will not interfere by way of mandatory injunction where the injury done is capable of being fully and abundantly compensated by a pecuniary sum, while the inconvenience to the other party by granting the injunction would be serious. (Vide *Yesoba Damodhar* v. *Secretary of State for India in Council* (1). He was further of opinion that the District Court having exercised a special jurisdiction, he had no jurisdiction to interfere with the same. Then the Subordinate Judge went on to consider whether he could not grant compensation to the plaintiff in this suit even if the prayer for a mandatory injunction should fail. Being of opinion that he had no jurisdiction to grant the injunction, he held that he could not grant an inquiry into the damages. The plaintiff appealed to the District Judge. The District Judge held that the Subordinate Judge had jurisdiction to go into the question of damages and passed the following judgment:—

"The correct view of the case seems to me to be that the plaintiff has failed to show that the defendants at the time the suit was filed had committed any tortuous acts, which amounted to an invasion of his rights for which he can claim damages or compensation. Some of the defendants drew out their shares of the compensation money on the date the suit was filed, but whether before or after the filing of the suit is not clear.

"If it can be shown that some of the defendants drew out their shares of compensation before the suit was filed, then the plaintiff would have a cause of action against them for wrongful detention of his property (*viz.*, the proportionate share due to him as lessee in the compensation awarded for the land taken by Government), and he might be allowed to amend his plaint so as to include only these defendants with a prayer for an alternative relief as against them for compensation.

"The plaintiff, however, has not chosen to apply for any such amendment of his plaint and it would only lead to multifariousness of suits to allow him to sue piecemeal for the relief, to which he seems to be entitled, (if his statement of the facts of ths case is cor-

(1) 7 B. H. C. R. 12.

rect) against some of the defendants in a properly framed suit.

"On these grounds, I decline to interfere with the decree of the lower Court and I dismiss the appeal with costs."

The plaintiff preferred this second appeal.

Mr. *P. S. Sivaswamy Iyer*, for the Appellant.

Mr. *K. Srinivasa Iyengar*, for the Respondents.

JUDGMENT.— We think the lower Courts have rightly refused the specific reliefs which the plaintiff asked for in the plaint. There are no special reasons why the money should not be finally distributed among the parties entitled to it instead of being invested in the manner insisted on by the plaintiff before the Subordinate Judge. But we think that his suit ought not to have been dismissed simply on the ground that the plaintiff misconceived the appropriate reliefs to which he was entitled. If the plaintiff be found to be entitled to compensation for the lease-hold interest which he alleges he had in the land acquired by the Government, there is no good reason why he should be denied that relief. We set aside the decrees of the Courts below and grant leave to the plaintiff to amend his plaint by inserting a prayer for proper reliefs. The plaintiff-appellant will bear the costs of the respondents Nos. 1, 3 and 4 of the present proceedings throughout. There will be one set of costs for all the defendants.

Case remanded.

(s. c. 2 M. W. N. 271; 9 M. L. T. 475.)

MADRAS HIGH COURT.

CRIMINAL APPEAL No. 683 OF 1910.

March 3, 1911.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Ayling.

GOPALAKRISHNA IYER—PRISONER —APPELLANT

versus

EMPEROR—RESPONDENT.

Arms Act (XI of 1878), ss. 19 (f), 20—Concealment of arms after arrest.

The first part of section 20, Arms Act, does not deal with cases of concealment or of attempts at concealment, made by a man who has arms on his person, or in a bag which he is carrying, or which are otherwise in his immediate personal possession, only on being arrested. It is meant to deal with cases of concealment before arrest.

Where an offence under section 19 (*f*) has been committed, no proceedings ought to be instituted without the previous sanction of the District Magistrate. If such sanction has not been obtained the proceedings are null and void. The absence of sanction cannot be treated as a mere irregularity.

Appeal against the order of the Court of Session of the Ramnad Division, in Case No. 34 of the Calendar for 1910.

Mr. *C. S. Venkatachariar*, for the Appellant.

Mr. *C. F. Napier*, for the Crown.

JUDGMENT.— As regards the truth of the main story told by the prosecution witnesses there can be little doubt. The real question is what offence do the facts found by the Sessions Judge amount to. The appellant had no license for the revolvers and the cartridges which were found in his possession in a rolled up bag which he was carrying when he was arrested at Sivaganga. The man was apparently travelling at the time and it is quite possible that he was taking the revolvers and the cartridges in the bag for convenience of carriage. But it appears that after he had been seized by the Police he took out the revolvers from the bag and was going towards a well with the intention of throwing them into it, when he was prevented from carrying out his design. Further, when under the orders of the Sub-Magistrate, to whom he was subsequently taken, the accused took out the contents of the bag, he tried to conceal some cartridges behind a Chombu which he had already brought out and placed on the ground, but he again failed in his attempt at concealment. The question is, do these two attempts at concealment bring the case under the first part of section 20 of the Indian Arms Act, XI of 1878, which provides for cases where a man has in his possession any arms in such a manner as to indicate an intention that his possession of the arms may not be known to any public servant? The question is one of considerable difficulty, but it would rather seem that the Legislature did not intend by the first part of section 20 to deal with cases of concealment or of attempts at concealment made by a man who has arms on his person or in a bag which he is carrying or which are otherwise in his immediate personal possession, only on being arrested. It is meant to deal with cases of concealment before arrest

This seems to be indicated by the second paragraph of section 20, which expressly provides for cases of concealment and attempts at concealment when a house is being searched under section 25 of the Act. Then the words " conceals or attempts to conceal " appear to have been used in order to distinguish the acts contemplated by this paragraph from the acts mentioned in the first paragraph of the section. It would be straining the language of the first paragraph of the section to say that a man who attempts to conceal arms when arrested, supposing he had no intention before such arrest of concealing the fact of his possession of the arms from any public servant, has at the moment he makes the attempt to conceal possession of the arms intending that such possession should not be known to any public servant. At any rate, the Legislature, as it appears from the second paragraph intended to discriminate between a case of concealment at the search from other cases. If the language of the first paragraph be considered to be wide enough to cover a case like the present, it would be wide enough also to cover cases expressly dealt with by the second paragraph. The result of accepting the contention of the Crown in this case would be to treat the second paragraph of the section as superfluous, and this is opposed to the ordinary canons of construction of statutes. Beside, one may well imagine that the Legislature might not have regarded cases like the present, where a man finding himself arrested for being in possession of a revolver, attempts to throw it away, as being an aggravation of the offence which he committed in having possession of the revolver without license. In this view of the scope of section 20, the act of the accused would come only under section 19 (*f*). But section 29 says that when an offence under section 19 (*f*) has been committed, no proceedings shall be instituted without the previous sanction of the District Magistrate. The effect of that would clearly be that if no such sanction has been obtained, all proceedings for an offence under section 19 (*f*) must be null and void and the absence of sanction could not be treated as a mere irregularity in trial. Mr. Napier conceded that, if the case does not come under section 20 the proceedings must be set aside. The conviction and sentence will be set aside and the accused immediately released from custody.

Conviction set aside.

(s. c. 2 M. W. N. 275; 9 M. L. T. 480.)

MADRAS HIGH COURT.

CRIMINAL APPEAL No. 644 OF 1910.

March 7, 1911.

Present:—Mr. Justice Sankaran Nair.

MURUGAIYA NADAN—APPELLANT—PRISONER

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 299, 300—Culpable homicide not amounting to murder—Provocation.

Where a person came out in a challenging manner to meet the accused and they had a fight in the course of which the father of the accused and himself were stabbed, whereupon the accused struck the challanger a blow which caused his death:

Held, that the offence committed was culpable homicide not amounting to murder, as there was grave provocation enough to deprive the accused of self-control and there was great probability that the accused acted while he had lost his self-control.

Appeal against the order of the Court of Session of the Tanjore Division in Case No. 48 of the Calendar for 1910.

FACTS.—The accused was charged with having committed the offence of murder. The facts of the case are as follows: The accused, the deceased, the father of the deceased and the father of the accused all lived in the same house. They were members of an undivided family and had had disputes in regard to the family property. They lived in the house as three separate families occupying different portions of the house. The deceased came one day to the house and found the street door bolted from inside. He used abusive language for which he was rebuked by accused's grandfather, an old man of 100 years, who lived with the accused and his family. The deceased hit the old man for interfering and knocked him down. Later on, when the accused came home his grandfather told him about the deceased and the accused appears to have said: "If I had been there, I would have twisted his head and squeezed his throat." The deceased then came out in challenging manner. A struggle ensued. The deceased had a knife in his

hand and with it wounded the accused in three places on his arm. The accused's father attempted to separate them, but the deceased stabbed him severely on the left side of his chest. A few minutes later the deceased was seen to fall and the accused came from the spot with a knife in his hand. It was held by the Sessions Judge that unless he could prove the existence of exceptional circumstances such as would suffice either to justify his act or to reduce it to some lesser offence the accused was guilty of murder. The accused was silent and the Public Prosecutor contended that it was not open to the accused's pleader to raise any plea on behalf of the accused, citing *Hira Lal Thakur* v. *Emperor* (1) and *In re Jamsheer Sirdar* (2). The accused's pleader referred to *Posput Gope* v. *Ram Bhajan Ojha* (3) and contended that a plea of self defence should be accepted if there was anything in the evidence either for the prosecution or defence to establish it. The Sessions Judge agreed with the accused's pleader but held that the evidence would not support such a plea. He found the accused guilty of murder and sentenced him to transportation for life.

The accused preferred this appeal.

Mr. *G. S. Ramchandra Iyer*, for the Appellant.

The *Public Prosecutor*, Contra.

JUDGMENT.—I agree with the Judge that the plea of self-defence has not been made out. But I am not satisfied that the appellant is guilty of murder. It is found that the deceased came out of his room in a challenging manner to meet the accused, and was fighting with him, when the father of the accused, Sannyasi, interfered. The deceased gave him a severe stab on the left side of the chest. He wounded also the accused. It was in these circumstances that the accused gave the blow that caused the death of the deceased. As the deceased Mannappan's knife was found not in or near his hand but tucked into his waist cloth, it cannot be said that the accused was in any danger from the deceased. Therefore, his plea of self-defence canot prevail. But the provocation was grave enough to deprive him of self-control, and the probabilities are that he acted while he had lost his self-control. I therefore, set asid the conviction for murder and convict him of culpable homicide not amounting to murder and sentence him under section 304 of the Indian Penal Code, to rigorous imprisonment for five years.

Conviction varied.

(1) 8 C. W. N. 715.
(2) 1 C. L. R 64 at p. 74.
(3) 1 C. W. N. 545.

(s. c. 2 M. W. N. 276; 9 M. L T. 451.)

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 138 OF 1908.

March 3, 1911.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Sundara Aiyar.

THE ORIENTAL GOVERNMENT SECURITY LIFE ASSURANCE COMPANY, LIMITED—DEFENDANT—APPELLANT

verses

VANTEDU AMMIRAJU AND OTHERS—PLAINTIFFS—RESPONDENTS.

Life insurance contract—Insurance money, part of estate—Debt—Succession certificate under Succession Certificate Act (VII of 1889), ss. 4, 16—Married Women's Property Act (III of 1874), not applicable to Hindus—Interest.

A. insured his life with a Life Insurance Company for Rs. 3,000; on his death, his sons claimed payment of the amount and produced a succession certificate in support of their claim. The Company wished to be protected against an action by the daughters, by a certificate under the Married Women's Property Act:

Held, (1) that the insurance money formed part of the estate of the deceased, though payable on the death of the insured, and was "a" debt due to him within the meaning of section 4 of the Succession Certificate Act;

(2) that a production of a succession certificate was sufficient protection for the Company;

(3) that under section 16 of the Succession Certificate Act the certificate was a conclusive title to recover the amount from the defendant Company;

(4) that the act of the Company in refusing to make payment of the whole amount was wrongful and the Company was bound to pay interest, from the date on which it was claimed.

Cleaver v. Mutual Reserve Fund Life Association, (1892) 1 Q. B. 147; 61 L. J. Q. B. 128; 66 L. T. 220; 40 W. R. 230; 56 J. P. 180, followed.

Rajamma v. *Ramakrishna*, 29 M. 121 and *Banchharan Mayanduq* v. *Adyanath Bhattacharjee*, 36 C. 936; 10 C. L. J. 180; 13 C. W. N. 966; 3 Ind. Cas. 492, referred to.

The Married Women's Property Act is not applicable to Hindus.

Appeal from the decree of the District Court of Rajamundry.

Mr. *D. M. Downing* on behalf of the Appellant (Oriental Life Assurance Company),—

The Married Women's Property Act of 1874, applies also to Hindus; as there are

daughters, the Company must be protected from any claim on their part. The Company paid the amount in Court and retained in their own hands, the sum of Rs. 700 and odd due to the daughters. This they are bound to retain, until the production of the certificate. The retention is not, therefere, wrongful, and they are not bound to pay interest.

The Hon'ble Mr. *T. V. Seshagiri* (on behalf of the sons).—

The real nature of a life insurance contract is not generally understood. Though the contract may indicate the persons for whose benefit the insurance was effected, still they cannot sue to enforce the contract for they are not parties to it. In such a case, the insurance amount forms part of the estate of the deceased, and is a debt due to the deceased within the meaning of section 4 of Act VII of 1889, and a succession certificate is a sufficient protection.

It is so far a part of the estate of the deceased that it is also open to the insurred to make a disposition of the insured amount by Will, etc., during his life-time. Unless the deceased had created a further trust in favour of his sons and daughters, so as to give the daughters a distinct interest, succession certificate obtained by the sons, is a sufficient protection to the debtor. The detention of the money by the Company, in these circumstances, is a wrongful withholding, so as to make the Company liable for interest from the date on which a notice was sent to the Company that it would be claimed. These principles are well laid down in *Cleave* v. *Mutual Reserve Fund Life Association* (1).

Mr. *D. M. Downing* in reply pointed out that what the Company seeks for, is a protection from being proceeded against by other members of the family, for which purpose only they wish to have an assurance.

JUDGMENT.—This is an appeal from the District Court of Rajamundry in a suit by the four sons of one Nagayya against the Oriental Life Assurance Company to recover the amount alleged to be due to them on a life insurance policy dated the 9th December 1896, executed by the company in favour of the said Nagayya. The policy was intended for the benefit of Nagayya's wife and children. He died in 1902 leaving four sons and two daughters. The sons were all minors and succession certificate, Exhibit B, was obtained on their behalf by their maternal uncle as their guardian for the amount due on the policy. The four sons claimed to be entitled to the amount to the exclusion of the two daughters of Nagayya on the ground that the policy was the ancestral property of Nagayya. But the Company repudiated their exclusive claim being of opinion that under the contract of insurance all the children of Nagayya including the daughters were entitled to the amount due under the policy Exhibit I in the case. This document sets out that the insurance was intended for the benefit of Nagayya's wife and children and the Company undertook, on the death of Nagayya te pay the amount due to the trustee or trustees who may be appointed by the assured in terms of the Married Women's Property Act of 1874 by separte writing duly executed by him and of which the Company shall have due notice given to them in trust for the benefit of his wife Wounterupu Gowerammal and children by her marriage and in default of any such trustee or trustees to the beneficiary or beneficiaries if she, he or they be of age and otherwise capable of giving a discharge to the Company and if any one or more of them be not of age than jointly those of the beneficiaries who shall be of age and to the legal guardian of such of them as shall not be of age? We may point out that the Married Women's Property Act is not applicable to Hindus. The Company overlooked this important circumstance and a printed form of policy appropriate to cases to which the Act would be applicable, was used for the occasion. One of the daughters died subsequently, and the Company required the production of an order appointing some one as guardian to the minors under the Guardians and Wards Act VIII of 1890, and a succession certificate for the share which according to them was due to the deceased daughter and they took up the position that the certificate granted for the policy amount as a debt to the deceased Nagayya was of no use (see their letter Exhibit E dated the 6th October 1904 to the plaintiff's pleader Mr. Venkata Reddi). The first plaintiff on the 17th October 1904 wrote to the Company stating that he had

(1) (1893) 1 Q. B. 147; 61 L. J. Q. B. 128; 66 L. T. 220; 40 W. R. 230; 56 J. P. 180.

attained majority; that he was the guardian of his minor brothers under the Hindu Law and was entitled to receive the Policy money without any order appointing him as guardian under Act VIII of 1890, but offering to obtain such an order if insisted on and wished to know whether the Company would be prepared to pay him four-sixths of the amount due to himself and his brothers leaving the question of their right to the remaining two-sixths to be determined by a Court of competent jurisdiction (see Exhibit VII). He also pointed out in the letter that the Additional Sub-Court of Rajamundry had decided in a suit brought by the son of the deceased daughter claiming a portion of the Policy amount against Nagayya's sons that the daughter was not entitled to any share of the Policy money. The Company replied declining to accept the decision of the Additional Subordinate Court as concluding the right of the daughters and stating that the amount due on the policy was not part of the estate of the deceased Nagayya, and insisting on the production of an order under Act VIII of 1890, referred to in their previous letter. They subsequently offered, however, by letter dated the 31st October 1905 to pay the 1st plaintiff his one-sixth share of the amount, but insisted, with respect to the remainder, on the production of a guardianship order and succession certificate which they had already demanded. The first plaintiff by another letter dated the 6th November 1905, pointed out the difficulty in obtaining an order appointing a guardian to his minor brothers as the property belonged to his undivided family and offering to give an indemnity bond, with respect to the amount due to his minor brothers. But the Company adhered to the position already taken up by it. In their defence to the suit also the Company took up the same position and contended that the plaintiffs were entitled only to four-sixths of the policy amount. The District Judge held that the premia fund for the policy came out of the joint family property of Nagayya and his children and that the plaintiffs alone were entitled to the amount. This finding has not been impeached before us, and the plaintiff's title to recover the whole amount is admitted. There can be no doubt that this view is correct. See *Rajama* v. *Rama Krishnayya* (2) and *Mahadeva Rendia* v. *Rama Narayyana Randia*. The Company denied the plaintiff's claim for any interest. The plaintiffs alleged that they were entitled to it from the 9th July 1904, the date when the plaintiffs' guardian first gave notice that interest would be charged. The District Judge held that the plaintiffs were entitled to interest on Rs. 1,461-2-8, a four-sixths of the amount due, from the 9th October 1904, when the Company refused to recognise the succession certificate Exhibit B and insisted on the production of the guardinship order and succession certificate for the deceased daughter's one sixth share, up to the 26th February 1906, on which date the Company paid the above amount into Court. But he held, that with regard to the remaining two-sixths share, having regard to the terms of the policy, the Company was justified in withholding payment as the proof now given in respect of the plaintiff's claim for such share was not before the Company, and it would not be in a safe position in paying it to the plaintiffs. The fourth issue in the case was whether the plaintiffs are entitled to collect the whole amount under the succession certificate obtained by them from the District Court. The District Judge observes that it was conceded for the plaintiffs that the finding on this issue should be in favour of the Company. The learned Counsel for the appellant contends that the reason given by the lower Court for disallowing interest on the two-sixths share is equally applicable to the sum of Rs. 1,461-2-8, that the Company had no proof that the policy was joint family property, and that the Company was justified in requiring a guardianship order for the minor sons. Mr. Sheshagiri Aiyar for the respondents contends that the amount due on the policy was a "debt due to the deceased;" that the succession certificate (Exhibit B) gave a conclusive title to the sons of Nagayya to recover it from the Company, and that the Company was in law guilty of wrongful detention of the money in refusing to recognise the plaintiff's title to recover it under Exhibit B; that the admission made by the plaintiff's pleader in the lower Court relating to a question of law is not binding on

(2) 29 M. 121.

his clients. We are of opinion that his contention is well-founded and must be upheld. Beyond obtaining the policy, Exhibit I, Nagayya took no steps to create any trust in favour of his wife and children with respect to the policy. The decision in *Cleaver* v. *Mutual Reserve Fund Life Association* (1), is exactly applicable to this case and shows conclusively, that the policy was part of the estate of Nagayya and that his heirs were entitled to the payment of the money on his death. In that case one James Maybrick effected insurance on his life with the Assurance Company for a sum of money in favour of his wife. The Company promised by the policy to pay the amount to the wife if living at the time of the death of the insured. The question arose whether the executors of James Maybrick's Will were entitled to sue the Company, upon the policy granted by it to the testator. There was another important question in the case to which it is not necessary to refer here. The Court of Appeal held that, apart from the Married Women's Property Act, no one would have any right under the policy except the assured and his representatives: Lord Esher, Master of the Rolls, observes. "The contract is with the husband and with no body else. The wife is no party to it. Apart from the statute, the right to sue on such a contract would clearly pass to the legal personal representatives of the husband. The promise is one which could only take effect upon his death, and, therefore, it must be meant to be enforced by them. The condition in which the money is to be come payable is the death of James Maybrick."

"Apart from the statute, what would be the effect of making the money payable to the wife? It seems to me that as between the executors and the defendants it could have no effect. She is no party to the contract and I do not think that the defendants could have any right to follow the money they were bound to pay and consider how the executors might apply it. It does not seem to me that, apart from the statute, such a policy would create any trust in favour of the wife. James Maybrick might have altered the destination of the money at any time and might have dealt with it by Will or settlement. If he had done so, the defendants could not have interfered. I think that apart from the statute, no interest would have passed to the wife by reason merely of her being named in the policy; and if the husband wished any such interest to pass to her, he must have left the money to her by Will or settled it upon her during his life. Otherwise, it would have passed to his executors or administrators." Fry, Lord Justice, says: "Independently of the Married Women's Property Act, 1882, the effect of this transaction was, in my opinion, to create a contract by the defendants with James Maybrick that the defendants would, in the event which has occurred, pay Florence Maybrick two thousand pounds assured; it would break by non-payment to her, but the cause of action resulting from such breach would vest in the executors of the assured and not in the payee. She was, independently of the statute, a stranger to the contract; it might have been put an end to by the contracting parties without her consent, and the breach of it would have given her no cause of action against any one." *In Rajamma* v. *Rama Krishnayya* (2), this Court held that the widow of a person holding a policy of insurance would be entitled to succession certificate if it was his self-acquired property. In *Banchharan Mayundaq* v. *Adyanath Bhattacharjee* (3), the Full Bench of the Calcutta High Court held that the fact that a debt existing during the life-time of the creditor was not payable until after his death did not affect its being a part of his estate and that a decree could not be passed for it in favour of his representatives without a succession certificate. We are clearly of opinion that the policy money was part of the estate of the deceased Nagayya and that under section 16 of the Succession Certificate Act, the plaintiffs obtained a conclusive title to recover it from the defendant company and that the Company acted wrongly in refusing to make payment and that the decision of the District Court awarding interest to the plaintiffs is right. We dismiss the appeal with costs.

Appeal dismissed.

(2) 36 C. 936; 10 C. L. J. 180; 13 C. W. N. 966; 3 Ind. Cas. 492.

SOWDAGER NABHEEKAN *v.* MUHAMMAD HUSSAIN.

(s. c. 9 M. L. T. 372.)

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 64 OF 1910.

February 16, 1911.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Ayling.

SOWDAGER NABHEEKAN SAHIB—PLAINTIFF—APPELLANT

versus

T. S. MUHAMMAD HUSSAIN SAHIB—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act XIV of 1882), s. 16—Suit for recovery of price of lands—Jurisdiction—Small Cause suit—Provincial Small Cause Courts Act (IX of 1887), s. 23, effect of.

A suit to recover unpaid purchase-money of land is not a suit for the determination of a right to, or interest in, immoveable property and is congnizable by a Small Cause Court.

Section 16 of the Civil Procedure Code, 1882, does not preclude all Courts, other than the Court within whose local jurisdiction certain immoveable property is situated, from trying any question relating to title to that property where it is merely incidental to the reliefs which the plaintiff seeks by his suit.

Where a Small Cause Court returns a plaint under section 23 of the Provincial Small Cause Courts Act for presentation to the proper Court on the ground that the relief claimed by the plaintiff depends on proof of plaintiff's title to land, it is not incumbent on the plaintiff to present the plaint to the Court having local jurisdiction over the property. He may present his plaint to any Civil Court which has jurisdiction to try the suit.

The effect of an order under section 23 is merely to remove the bar to the jurisdiction of the ordinary Courts imposed by section 16 of the Provincial Small Cause Courts Act.

Veeraraghava v. *Krishnasami*, 6 M. 344 and *Ahmad Khan* v. *Abdul Rahman Khan*, 26 A. 603, followed.

Matur Subbayya v. *Kota Krishnaiya*, 28 M. 227, not approved.

Appeal against the order of the Temporary Subordinate Judge's Court of Guntur in A. S. No. 152 of 1907 (O. S. No. 582 of 1905 on the file of the District Munsif's Court of Guntur) dated the 5th day of February 1910.

JUDGMENT.—The appellant instituted this suit in the District Munsif's Court at Guntur in its ordinary civil jurisdiction in order to recover a certain sum of money which the defendant had agreed to pay to the Government as consideration for a certain parcel of land situate in Tenali, which the plaintiff, who had originally acquired the land from the Government, sold to the defendant and which the defendant failed to pay as required by the contract. We have no doubt that such a suit is not a suit for the determination of a right to, or an interest in, immoveable property, within the meaning of section 16, Civil Procedure Code of 1882, although by reason of the defence set up by the defendants the plaintiff's right to recover the money may incidentally involve the determination of the plaintiff's right to immoveable property. Sub-section (*d*) applies only to suits the object of which is to obtain a determination of the title to immoveable property, and obviously it was not intended by that section to preclude all Courts other than the Court within whose local jurisdiction certain immoveable property is situated from trying any question relating to title to that property where it is merely incidental to the reliefs which the plaintiff really seeks by his suit. The cases of *Viraraghava* v. *Krishnaswami* (1) and *Ahmad Khan* v. *Abdul Rahman Khan* (2) are clear authorities for this view. Our attention has, however, been drawn by the learned Counsel for the respondent to *Maturi Subbayya* v. *Kota Krishnayya* (3) which holds that a suit for the recovery of unpaid purchase-money is a suit to which section 16, sub-section (*d*), applies. That is not exactly the case here; but it seems to us that the principle of that decision, if we are prepared to accept it, would apply to the present case. We are unable, however, with great deference to the learned Judges who decided *Matur Subbayya* v. *Kota Krishnayya* (3), to accept this interpretation of the section. It does not appear that the decision reported in *Viraraghava* v. *Krishnaswami* (1) and *Ahmad Khan* v. *Abdul Rahman Khan* (2) were brought to their notice and it does not seem to us that a suit to recover unpaid purchase-money can well be called a suit for the determination of a right to, or interest in, immoveable property.

The next question relates to the proper construction of section 23, Provincial Small Cause Courts Act. The facts which raise that question are these. The plaint in this suit was first presented in the District Munsif's Court at Guntur in its small cause jurisdiction but the District Munsif, holding upon the pleadings that the relief claimed by the plaintiff depended upon the proof of the plaintiff's title to the parcel of land sold by

(1) 6 M. 344.
(2) 26 A. 603.
(3) 28 M. 227.

the plaintiff to the defendant, returned the plaint for presentation to the proper Court. The plaintiff then filed the plaint in the same District Munsif's Court in its ordinary jurisdiction and he tried the suit and decreed it in favour of the plaintiff. It is contended in support of the Subordinate Judge's judgment that, when the plaint was returned under section 23 of the Provincial Small Cause Courts Act for presentation to the proper Court, it could only be presented to the Court within whose local jurisdiction the land was situate. We are unable to accede to this contention. The section does not say that the plaint is to be presented to the Court having local jurisdiction over the property but to the Court having jurisdiction to determine the title. If the Guntur District Munsif's Court had jurisdiction as we have held that it had, to determine the question of title to the land in Tenali in a suit in which that question arose incidentally, section 23 of the Provincial Small Cause Courts Act cannot help the defendant. The effect of an order under section 23 is merely to remove the bar to the jurisdiction of the ordinary Courts imposed by section 16 of the Provincial Small Cause Courts Act. The decree of the Subordinate Judge will be set aside and he will be directed to dispose of the appeal according to law. Costs will abide the result.

Decree set aside.

(s. c. 13 C. L. J. 432.)

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 595 OF 1910.

February 24, 1911.

Present:—Mr. Justice Mookerjee and Mr. Justice Teunon.

GOLAB CHAND—JUDGMENT-DEBTOR—APPELLANT

versus

BAHURIA RAM MURAT KOER—DECREE-HOLDER—RESPONDENT.

Court-fees—Extension of time originally fixed for payment of Court fees—Power of Court—Court Fees Act (VII of 1870), s. 11—Civil Procedure Code (Act V of 1908), ss. 148, 149.

A Court has power under section 11 of the Court Fees Act to enlarge the time originally fixed for the payment of Court-fees, even when application to enlarge the time is made after the expiry of the time within which the Court-fees were ordered to be paid.

Appeal heard under Order XLI, rule 11, of the Code of Civil Procedure, from the order of the District Judge of Saran, dated the 13th September, 1910, affirming that of the Subordinate Judge of Saran, dated the 31st March 1909.

Babus *Dwarka Nath Mitter* and *Bejoy Kumar Bhattacharjee*, for the Appellant.

JUDGMENT.—This is an appeal on behalf of the judgment-debtor against an order made in the course of proceedings for assessment if mesne profits as directed by the decree in the suit. Upon the application of the decree-holders, the mesne profits were assessed; it was then found that the Court-fees paid on the plaint were insufficient. They were, therefore, directed under section 11 of the Court Fees Act to pay the additional fees within a week from the 6th April 1910. The Court fees, however, were not paid till the 14th May, 1910, when the decree-holders prayed that the time fixed for payment might be enlarged. This application was granted, and the fees accepted. Thereupon the judgment-debtor objected that the Court had no jurisdiction to extend the time and that it was obligatory upon the Court to dismiss the application for mesne profits under section 11 of the Court Fees Act. This objection was overruled. The judgment-debtor thereupon appealed to the District Judge. He has held that the order in question was not open to appeal and that at any rate there was no substance in the objection of the judgment-debtor.

The judgment-debtar has now appealed to this Court, and on his behalf it has been contended that section 148 of the Code of 1908 has no application to this case, as the order for payment of additional Court-fees was made under section 11 of the Court Fees Act. It has further been urged upon the authority of the decision of this Court in the case of *Kewal Kishan Singh* v. *Sookhari* (1) that it was not competent to the Court to make any order other than one of dismissal of the application. In our opinion, there is no force in these contentions. In the first place, the case upon which reliance has been placed is clearly distinguishable. There an application had been made for assessment of mesne profits. The mesne profits were assessed and the decree-holder was called upon to pay the additional Court-fees within a time prescrib-

(1) 24 C. 173; 1 C. W. N. 243.

ed. He failed to carry out the order of the Court, and the application was dismissed. He subsequently made another application for assessment of mesne profits. It was ruled, under those circumstances, that the second application could not be maintained and that the proper course for the decree-holder to pursue was to take appropriate steps for revival of the previous application. It is worthy of note that the subsequent decision of this Court in the case of *Ram Kishore Ghose* v. *Gopi Kant Shaha*(2), shows that even this doctrine is of a limited application. In any event, this principle can have no possible application to the facts of the present case, because here the application has not been dismissed; the Court has, on the other hand, extended the time and accepted the Court-fees tendered. But it has been argued that section 148 of the Code of 1908 has no application, because that section applies only to acts prescribed or allowed by the Code. It is not necessary, however, to decide whether section 148 has any direct application here, though the view may possibly be maintained that even independently of section 11 of the Court Fees Act, the Court might have proceeded under section 149 of the Code of 1908 in which event section 148 would have been applicable. But even if it be conceded that section 148 has no application, we think that it is not a reasonable construction of section 11 of the Court Fees Act, to hold that the Court has no power to enlarge the time originally fixed for the payment of Court fees. A similar question was raised with reference to the provisions of section 549 of the Code of 1882 which authorizes the Appellate Court to require security for costs from the appellant. That section provides that if the security demanded, be not furnished within such time as the Court orders, the Court shall reject the appeal. Upon a construction of this provision, it was argued in two cases that once the time granted by the Court had expired, it was not competent to the Court to enlarge the time. But this view was negatived by their Lordships of the Judicial Committee. *Rajab Ali* v. *Amir Hossain* (3) and *Badri Narain* v. *Sheo Kcer* (4). In the latter case Sir Richard Couch observed that the words "if such security be not furnished within such time as the Court orders, the Court shall reject the appeal" appeared to be consistent with the Court having power to make fresh orders with regard to the time within which the security should be furnished and not to fetter in the way that was contended for by the learned Counsel, that having once made an order and fixed a time they could make no alteration in it, no matter what circumstances might occur which would render it impossible for that order to be complied with, that would not be a reasonable construction of that Act; the other construction was a reasonable one, that the application to the Court to enlarge the time for giving security might be made either before or after the expiration of the time within which the security had been ordered to be furnished, and the Court might thereupon enlarge the time according to any necessity which might arise, where it was proper that they should do so. This principle of construction is, in our opinion, clearly applicable to the provisions of section 11 of the Court Fees Act. The course pursued by the Court of first instance was, therefore, right in the circumstances of this case, and no reason has been shown why we should interfere with the exercise of discretion by that Court. The appeal is, therefore, dismissed.

Appeal dismissed.

(2) 28 C. 242.
(3) 17 C. 1.
(4) 17 C. 512; 17 I. A. 1.

(s. c. 13 C. L. J. 447.)

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 781 OF 1908.

May 16, 1910.

Present:—Mr. Justice Mookerjee and Mr. Justice Carnduff.

CHARU CHANDRA PAL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

KALIDAS CHANDRA—DEFENDANT—RESPONDENT.

Administrator—Alienation without leave of Court—Voidable, not void—Benefit to estate—Repayment of debt of owner of property—Avoidance of alienation—Keeping advantage obtained under alienation—Probate and Administration Act (V of 1881), s. 90.

An alienation by an administrator without leave of the Court, where such leave is necessary under section 90 of the Probate and Administration Act, is not void but merely voidable; and, consequently, no person who is entitled to avoid the transaction ought to be allowed to do so in such a manner as to

enable him to recover property which would otherwise be lost to him and at the same time to keep the money or other advantages which he has obtained under it.

The Eastern Mortgage and Agency Co. Ld. v. *Rebati Kumar Roy*, 3 C. L. J. 260 followed.

Where it is found that an administrator created a mortgage without the permission of the Court, but he did it for the benefit of the estate, that is, to repay a loan taken by the original owner, the mortgage should not be avoided unconditionally; and when the plaintiff does not offer to pay off the mortgage, the transaction cannot be set aside.

Appeal from the decree of the District Judge of 24-Pergannas, dated the 2nd January 1908, confirming that of the Subordinate Judge of 24-Pargannas, dated the 8th September 1906.

Babu *Bepin Behary Ghose*, for the Appellants.

Babu *Debendra Chandra Mullick*, for the Respondent.

JUDGMENT.—This is an appeal on behalf of the plaintiffs in a suit for declaration that a mortgage executed by their mother, as administratrix to the estate of their maternal grandfather, is not binding upon them as reversionary heirs. The learned Judge in the Court below has found that this mortgage was executed by the administratrix in order to re-pay a loan taken by the maternal grandfather of the plaintiffs. He has further held that, although this mortgage was created without the previous permission of the Court as required by section 90 sub-section (3) of the Probate and Administration Act and was consequently voidable, yet as the transaction was for the benefit of the estate, the plaintiffs ought not to be allowed to avoid it except upon equitable terms. In this view the District Judge has dismissed the suit. In our opinion, the decree made by the District Judge is just and ought to be affirmed. It has been pointed out by this Court in the case of *The Eastern Mortgage and Agency Co. Ld.* v. *Rebati Kumar Roy* (1), that an alienation by an administrator without leave of the Court where such leave is necessary under section 90 of the Probate and Administration Act, is not void but merely voidable; and, consequently, no person who is entitled to avoid the transaction ought to be allowed to do so in such a manner as to enable him to recover property which would otherwise be lost to him and at the same time to keep the money or other advantages which he has obtained under it. In the present case, the plaintiffs have not offered to pay up the mortgagee, whose money went to satisfy the debt of their maternal grandfather. Consequently, they are not entitled to obtain the declaration which they seek. They cannot be permitted to take his estate while they refuse to bear the burden of his debts. The District Judge has correctly found that the plaintiffs as reversionary heirs are persons interested in the property, at whose instance the mortgage may be avoided under section 90, but they are not entitled to avoid it unconditionally as they seek to do. The result, therefore, is that the decree made by the Court below must be affirmed and this appeal dismissed with costs.

Appeal dismissed.

(1) 3 C. L. J. 260.

(s. c. 13 C. L. J. 454.)

CALCUTTA HIGH COURT.

REGULAR CIVIL APPEAL NO. 385 OF 1909.

May 5, 1910.

Present:—Mr. Justice Mookerjee and Mr. Justice Carnduff.

HEMANTA KUMAR GHOSE—DEFENDANT—APPELLANT

versus

RAJENDRA BALA DASI—PLAINTIFF—RESPONDENT.

Bengal Tenancy Act (VIII of 1885), s. 171—Under-tenure-holder, deposit by—Saving superior tenure from sale for arrears of rent—Sale likely to be brought about partially by reason of his own default—Equitable defence.

An under-tenure-holder, who has saved a superior tenure from sale in execution of a decree for arrears of rent by a deposit under section 171 of the Bengal Tenancy Act, is entitled to maintain a suit for the recovery of the amount deposited by him by enforcing the charge created in his favour by the section, although the impending sale was likely to be brought about partially, at any rate, by reason of his own default.

But to such a claim the defendant is entitled to interpose an equitable defence.

If it is established that part of the sum deposited by him to avert the sale was payable by him to the superior landlord, he is not entitled to recover that sum.

Appeal from the decree of the Subordinate Judge of Khulna, dated the 4th June 1909.

HEMANTA KUMAR GHOSE *v.* RAJENDRA BALA DASI.

Babu *Basanta Coomar Bose*, Dr. *Sarat Chandra Basak*, Babus *Harihar Prasad Sinha* and *Raghunath Singh*, for the Appellant.

Babus *Jogesh Chandra Roy* and *Sarat Chandra Ghose*, for the Respondent.

JUDGMENT.—The question of law raised in this appeal relates to the right of an under-tenure-holder who has saved superior tenure from sale in execution of a decree for arrears of rent by a deposit under section 171 of the Bengal Tenancy Act, when it is found that the impending sale was likely to be brought about partially at any rate by reason of his own default.

There is no controversy as to the facts which have given rise to the present litigation. On the 26th January 1885, one Shama Sundari granted a *darputni* lease in respect of the land which has been subsequently acquired by the present appellant by purchase in 1905. On the 17th June 1895, the then holder of the *darganti* executed an *ijara* lease for 40 years in respect of six-annas share of the land comprised in the *darganti*. The first plaintiff is the present holder of the *ijara* interest. Under the terms of *ijara* contract, Rs. 500 was fixed as the annual rent; but out of this sum the *ijaradar* was to pay Rs. 236 and odd to Shama Sundari and the balance Rs. 263 and odd to the *dargantidar*. On the 1st July 1907, Shama Sundari obtained a decree for arrears of rent against the recorded *dargantidar*. She took out execution and as the property was about to be sold, the two plaintiffs averted the sale by a deposit of Rs. 8,421-6 under the Bengal Tenancy Act. Out of this sum, the first plaintiff who is the holder of the *ijara* interest deposited Rs. 7,000; the remainder was deposited by the second plaintiff, who is the tenant under her. On the 8th April 1908, the plaintiffs commenced the present action for recovery of this sum by enforcing the charge created in their favour by section 171 of the Bengal Tenancy Act. One of the defences raised to the claim was to the effect that as the first plaintiff was herself in default the suit was not maintainable. The Court below has overruled this objection, and, in our opinion, very properly. On behalf of the appellant it has been contended, however, that although the suit may be maintainable, the first plaintiff is not entitled to recover the entire sum deposited by her, inasmuch as the sale which she averted by the deposit was about to take place, partially at any rate, owing to her own default. This contention is clearly just. There can be no question that if it is established that the first plaintiff failed to pay the head-rent due to Shama Sundari as agreed upon by the *ijaradar* under the contract of the 17th June, 1895, the defendant-appellant is entitled to urge that such amount should be deducted from the claim. No doubt, section 171 of the Bengal Tenancy Act provides that the person who averts the sale is to obtain a charge upon the property saved and is also entitled to be placed in possession of the tenure or holding. The section, however, expressly provides that nothing therein shall affect any other remedy to which any such person would be entitled. The plaintiffs in this case have not availed themselves of their remedy under section 171; they have not prayed to be placed in possession of the tenure but they have asked for recovery of the money. To such a claim the defendant is entitled to interpose an equitable defence. But it is necessary for the determination of this point to send back the case to the Subordinate Judge, because the question whether the first plaintiff was in default or not has not been investigated. In so far as the second plaintiff is concerned, it is conceded by the learned Vakil for the appellant that this equitable defence is not available. In so far, therefore, as the first plaintiff is concerned, if it is established that part of the sum deposited by her to avert the sale was payable by her to the superior landlord under the *ijara* lease of the 17th June 1895, it is manifest that she is not entitled to recover that sum from the defendant.

The result, therefore, is that this appeal is allowed, the decree of the Subordinate Judge set aside in so far as the first plaintiff is concerned, and the case remitted to him in order that accounts may be taken to determine whether the first plaintiff was in default and whether any portion of the sum actually deposited by her was payable by her under the lease of 1895. It has not been disputed that as the *ijara* lease covered only six-sixteenth of the land included in the *darganti*, the first plaintiff is

entitled to ten-sixteenth of the sum deposited by her. The equitable defence, if it prevails at all, will be operative only against the six-sixteenth share. Costs of this appeal will abide the result. We assess the hearing fee at five gold *mohurs*.

Appeal allowed; Case remanded.

(s. c. 15 C. W. N. 441; 9 M. L. T. 445)

PRIVY COUNCIL.

APPEAL FROM THE MADRAS HIGH COURT.

February 15, 1911.

Present:—Lord Macnaghten, Lord Robson, Sir Arthur Wilson and Mr. Ameer Ali.

LINGAM KRISHNA BHUPATI DEVA GARU—DEFENDANT—APPELLANT

versus

SRI MIRZA SRI PASUPATI VIJAYA RAMA GAJAPATIRAJ MAHARAJA MANYA SULTAN BAHADUR OF VIZIANAGRAM—PLAINTIFF—RESPONDENT.

Mortgage—Simple or anomalous—Mortgagee's option to take possession on default of payment of interest—Decree for sale, whether mortgagee entitled to—Agreement to pay.

A mortgage-bond contained a covenant to the effect that if the whole or a portion of the interest remains unpaid by the due date, the mortgagee shall take possession of the mortgaged properties immediately thereafter and enjoy the said properties as under a usufructuary mortgage, and the profit shall be credited towards the interest of this document. If it be not sufficient for the interest, the mortgagor shall pay off the deficit interest on the liability of the mortgage property, over other properties and himself. The bond further provided that after the discharge of the entire principal and interest of this document, the mortgagor shall receive back the mortgaged properties, this document and the title-deeds. For the principal and interest of this document, this mortgaged property, the mortgagor and his heirs and other properties shall be liable:

Held, that the bond was a simple mortgage bond and the mortgagee was entitled to a decree for sale.

Appeal from the decree of the High Court of Madras, dated January 9, 1908, affirming that of the District Judge of Vizagapatam, dated April 5th, 1904.

FACTS:—The mortgage-deed, the terms of which are stated in the head-note, was executed on May 21st, 1895 for the re-payment of Rs. 75,000 advanced by the plaintiff to the defendants. The interest was to run at the rate of 4 per cent. per annum. The mortgagor not having paid off the money, the present suit was brought on January 13th, 1899 for the amount of the bond, and for sale, or in

the alternative for possession of the mortgage property, in the event of the mortgage not being redeemed. The plaint contained an offer to redeem. The defence was that a suit to enforce the mortgage by a suit for sale does not lie; the mortgage was an anomalous mortgage, and the mortgagee was entitled to possession of the property only.

Both the Courts below overruled the defendant's objection and gave a decree to the plaintiff for sale. The defendant appealed.

Mr. *A. Cohen*, *K. C.* and Mr. *Dunne*, for the Defendant-Appellant.

Sir *R. Finlay*, *K. C.*, and Messrs. *L. De-Gruyther*, *K. C.* and *Brown*, for the Plaintiff-Respondent.

JUDGMENT.

LORD MACNAGHTEN.—It seems to their Lordships that this case is perfectly clear and the judgment appealed from perfectly right.

The mortgagee advanced a large sum of money on terms very favourable to the mortgagor. At the same time, he retained the position of a simple mortgagee. That is so expressed in the deed itself the mortgagor has not fulfilled the obligations he undertook. After prolonged forbearance and fifteen years after the mortgage was made, the mortgagee, whose interest is greatly in arrear, comes forward and says. "I am a simple mortgagee," and he asks the Court to enforce his rights. The decree was a matter of course.

Their Lordships will, therefore, humbly advise His Majesty to dismiss the appeal and the appellant must pay the costs.

Solicitors: Messrs. *Chapman*, *Walker* and *Shephard*, for the Appellant.

Solicitor: Mr. *D. Grant*, for the Respondent.

Appeal dismissed.

(s. c. 15 C. W. N. 442; 9 M. L. T. 446; 8 A. L. J. 480.)

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

February 28, 1911.

Present:—Lord Macnaghten, Lord Mersey, Lord Robson, Sir Arthur Wilson and Mr. Ameer Ali

Sheikh MAHOMED JAN—PLAINTIFF—APPELLANT

versus

Munshi GANGA BISHUN SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Contract Act (IX of 1872), ss. 59, 60—Appropriation

of payment to specified debt—Amount credited to another debt by creditor without consent of debtor, if valid—Revenue sale—Payment of specified arrear—Appropriation to other arrear by Collector, if legal—Sale for specified arrears, if valid.

Where money is expressly paid by a debtor to satisfy a specified debt, and it is received and acknowledged on that account, it is not in the power of one of the parties to the transaction, without the assent of the other, to vary the effect of the transaction by altering the appropriation in which both originally concurred.

A proprietor of a certain *mehal* paid into the treasury a sum of money appropriating that payment to the revenue for the *kist* of January, 1902, and the payment was received and accepted on that account. Subsequently, the officers of the treasury appropriated the sum paid, in the first place, to the satisfaction of the *kist* of September 1901, and then, as far as the money would go, towards the January 1902 *kist*, and afterwards the Collector put up the property for sale in respect of the balance of the January *kist*:

Held, that the amount of the January *kist* was not really due at the time of the sale, and the sale was illegal.

Ganga Bishun Singh v. *Mahomed Jan*, 33 C. 1193; 10 C. W. N. 948, reversed.

Appeal from the judgment of the High Court at Calcutta dated July 6th, 1906 and reported at 33 C. 1193: 10 C. W. N. 948, reversing that of the First Sub-Judge of Chapra, dated August 16th, 1904.

Mr. *L. DeGruyther*, *K. C.*, and Mr. *J. M. Parekh*, for the Plaintiff-Appellant.

Mr. *B. Dube*, for the Respondents.

JUDGMENT.

SIR ARTHUR WILSON.—This is an appeal from a decision of the High Court, Calcutta, overruling that of the Subordinate Judge of Chapra. The object of the suit, as brought by the plaintiff and now appellant, was to set aside a Revenue sale, and to recover possession of the property sold. The defendants were the purchasers and others who derived title from him. In the first Court the decision was in favour of the plaintiff upon grounds which it is unnecessary now to examine.

From that decision there was an appeal to the High Court, and that Court overruled the decision of the first Court. Various grounds were urged on the one side and on the other, on the argument of that appeal, all of which were dealt with by the learned Judges in their judgment, but of all those grounds, there is only one which it appears to their Lordships necessary now to consider.

The facts, so far as it is necessary to examine them at the present stage, can be shortly stated. The property in question is an *ijmali kalam*, forming part of the Mahal Bhawaspur. That property was put up for sale by the Collector of Chapra on the 16th September 1901, in respect of arrears of revenue, but as no bidder offered, the Collector stopped the sale, and declared that the whole estate would be put up to sale at a later date, acting under section 14 of the Revenue Sale Law (Act XI of 1859).

On the 17th September 1901, the plaintiff (as permitted by section 14 already referred to) paid the arrear due, and was declared the purchaser of the *ijamli kalam*. He did not, however, receive his sale certificate until the 8th February 1902. In the meantime, between the sale and the sale certificate, *kists* of revenue became payable in respect of the property in September 1901 and in January 1902.

On the 13th January 1902, the purchaser, the plaintiff-appellant, paid into the Treasury a sum of Rs. 73, appropriating that payment in the document which accompanied the payment to the Government to the January *kists*, and payment was received and accepted on that account. Subsequently, however, the officers of the Treasury appropriated the sum paid, in the first place to the satisfaction of the September 1901 *kists*, and then, as far as the money would go, towards the January 1902 *kists*, the result being, according to this method of accounting, to leave a sum of, Rs. 16-12-2 still due in respect of the January *kist*.

Subsequently, on the 26th March 1902, the Collector put up the property for sale in respect of the amount, so appearing due, of the January *kist*.

The only point which their Lordships think it necessary to dispose of on the present appeal is, whether the amount of the January *kist* in respect of which the sale was made was really due at the time of the sale, and whether, therefore, there was any legal power to sell.

Much was said in the argument about the bearing upon the present case of certain provisions of the Contract Act relating to the appropriation of payments. Those enactments might, perhaps, have had a bearing upon the case, if the parties had not by their own actions placed the matter beyond doubt.

The money in question in the present case was expressly paid to satisfy the January *kist*, and it was received and acknowledged on

that account. It requires no statutory provision to show, that when money has been so paid and received and appropriated, it is not in the power of one of the parties to the transaction, without the assent of the other, to vary the effect of the transaction by altering the appropriation in which both originally concurred.

For these reasons their Lordships are of opinion that no arrears in respect of the January *kist* were due at the date of the sale, and that, therefore, the sale was without jurisdiction. Accordingly, they will humbly advise His Majesty that the judgment and decree of the High Court should be set aside, and that of the Subordinate Judge restored, with costs in both Courts.

The respondents will pay the costs of this appeal.

Appeal allowed.

Solicitor for the Appellant: *Mr. E. Delgado.*

Solicitors for the Respondents: *Messrs. Barrow, Rogers and Nevill.*

(s. c. 15 C. W. N. 466; 13 C. L. J. 441; 9 M. L. T. 465; 8 A. L. J. 474.)

PRIVY COUNCIL.

APPEAL FROM THE ALLAHABAD HIGH COURT.

February 15, 1911.

Present:—Lord Macnaghten, Lord Robson, Sir Arthur Wilson and Mr. Ameer Ali,

Musammat BHAWANI KUNWAR—DEFENDANT—APPELLANT

versus

Kunwar HIMMAT BAHADUR AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Hindu Law – Widow—Payment by wife of husband's debt during his life-time – Voluntary payment – Wife, whether entitled to pay herself by sale of husband's property after his death – Proof that husband or estate liable to pay—Burden of proof.

The payment by a Hindu wife of her husband's debt during his life-time must be considered, in the absence of evidence to the contrary, as a voluntary payment, and will not support an alienation by the widow after her husband's death of the estate which has descended to her from him.

An obligation lies upon the purchaser to prove that the husband or his estate was bound to pay the money which was paid by his wife.

Appeal from the judgment of the Allahabad High Court (Stanley, C. J., and Karamat Husain, J.,) dated May 1st 1908, and reported as 30 A. 352, setting aside that of the Subordinate Judge of Saharanpur, dated August 11th 1905.

FACTS.—One Nityanand was a separated Hindu. Certain debts of his were paid off by his wife Mulo Kunwar during his life-time, from the sale-proceeds of a certain property. That sale having been set aside, Mulo Kunwar was called upon to pay the money. At that time her husband was dead and she paid the money by selling a property which she had inherited from her husband. After her death, the plaintiffs who were her reversioners being Nityanand's daughter's sons brought this suit against the purchaser on the allegation that the sale of the property by Mulo Kunwar was without legal necessity and was, therefore, void against them and that they were entitled to a decree for proprietary possession thereof. The defence was *inter alia* that it was the duty of Mulo Kunwar to sell the property of Nityanand to pay his debts and that the sale was binding upon the plaintiffs. The Sub-Judge dismissed the suit. The plaintiffs appealed to the High Court which allowed the appeal and decreed the suit. A portion of the judgment of the High Court is given below*

"* * * First, it was urged that as the payments which were made by Mulo Kunwar were made in the life-time of her husband, they could not come within the meaning of the term "debt" for the discharge of which his widow could lawfully sell the property she had inherited from him. * * * The first contention, in my opinion, is well-founded. The obligation to pay the debt of a person whose estate is taken by another person rests, as Mr. Mayne puts it, 'upon the broad equity that he who takes the benefit should take the burden also.' (Mayne on Hindu Law, section 327, page 423, 7th Edition). The existence of debts due by the ancestor at the time of his death is, therefore, a condition precedent to the liability of the heir to pay them. If there are no debts due by the deceased, his heir has no burden to take. In the case before us, certain debts incurred by Nityanand were, no doubt, paid off by his wife, but they were paid in his life-time. In the absence of any evidence to prove the contrary, those payments must be presumed to have been voluntary payments and the presumption gains much strength from the relationship of husband and wife in which the parties stood to each other. Such being the case, the property

* 30 A. 352 at p. 358.

which Mulo Kunwar inherited from her husband Nityanand could not be made liable for the debts which had no existence at his death and the transfer of such property by her could not be deemed to be a transfer made for the payment of his debts. The plaintiffs, therefore, could not be bound by the sale deed executed by Mulo Kunwar on the 30th September 1890."

The defendant appealed to the Privy Council.

Mr. *Raikes*, for the Appellant.

Mr. *L. DeGruyther*, *K. C.*, and Mr. *Ross*, for the Respondents.

JUDGMENT.

LORD MACNAGHTEN.—The facts of this case are very complicated in detail, but it seems to their Lordships that judgment can be given in a single sentence.

The appellant has not proved that there was any obligation on the part of Nityanand or his estate to pay the monies which were paid by his wife. The obligation lay upon the appellant to prove that there was such liability, and she has not satisfied it.

Their Lordships will, therefore, humbly advise His Majesty that the appeal should be dismissed, and the appellant will pay the costs.

Appeal dismissed.

Solicitors for the Appellant: *Messrs. T. C. Summerhays & Son.*

Solicitors for the Respondents: *Messrs. Ranken, Ford & Co.*

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 54 OF 1910.

April 24, 1911.

Present:—Mr. Justice Chitty and Mr. Justice N. Chatterjea.

INDU MEAH—PETITIONER—APPELLANT

versus

DARBAKSH BHUIYAN—OPPOSITE PARTY—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XLI, rr. 11, 21—Appeal heard ex parte against defendant No. 2 in lower Appellate Court—Second appeal by defendant No. 1 making plaintiff alone respondent—Re-hearing of appeal, application for, by defendant No. 2—Jurisdiction of lower Appellate Court to entertain application.

A suit was brought by the plaintiff for recovery of possession of land against defendant No. 5. He obtained a decree for one-fifth of his claim. He appealed against the decree to the lower Appellate Court making all the defendants respondents, but defendant No. 1 alone appeared. The lower Appellate Court gave the plaintiff a decree in full. The defendant No. 1 preferred a second appeal to the High Court which was summarily dismissed under Order XLI, rule 11. The defendant No. 2, against whom the decree of the lower Appellate Court was made *ex parte*, then applied to that Court under Order XLI, rule 21, for a re-hearing of the appeal in that Court as against him, and his application was dismissed on the ground of want of jurisdiction:

Held, that as the defendant No. 2 was no party to the second appeal even in name, the lower Appellate Court had jurisdiction to entertain the application.

Damodar Manna v. *Sarat Chandra Dhal*, 13 C. W. N. 846; 3 Ind. Cas. 468; *Kumudnath Roy Chowdhury* v. *Rai Jatindra Nath Chowdhury*, 9 Ind. Cas. 189; 13 C. L. J. 221; 15 C. W. N. 399 and *Dhonai Sardar*, v. *Tarak Nath Chowdhuri*, 5 Ind. Cas. 525; 12 C. L. J. 53, distinguished.

Appeal from the order of the Sub-Judge of Chittagong, dated October 9th, 1909.

Babus *Mohendra Nath Roy* and *Krishna Prasad Sarbadhikari*, for the Appellant.

Babus *Surendra Nath Guha*, for the Respondent.

JUDGMENT.—This is an appeal from an order of the 2nd Subordinate Judge of Chittagong refusing the petitioner's application to set aside an *ex parte* decree under Order XLI, rule 21, of the Civil Procedure Code. The learned Subordinate Judge decided that he had no jurisdiction to entertain the application. It appears that the plaintiff brought a suit for possession of certain land against five defendants, basing his title on a lease from defendant No. 5, and alleging that defendants Nos. 1 to 4 were trespassers. The Court of first instance found that the land belonged jointly to all five defendants and on 14th February 1908 gave the plaintiff a decree for one-fifth of his claim, and for possession jointly with defendants Nos. 1 to 4. The plaintiff appealed against the decree making all the defendants respondents but defendant No. 1 alone appeared. On 22nd December 1908 the lower Appellate Court varied the decree of the Court of first instance and gave plaintiff a decree for the whole land. That decree was *ex parte* so far as defendant No. 2 (the petitioner-appellant before us) was concerned. Defendant No. 1 preferred an appeal to this Court making the plaintiff alone respondent, and his appeal was summarily dismissed under Order XLI, rule 11, on 14th

May 1909. On 28th July 1909 defendant No. 2 applied to the lower Appellate Court under Order XLI, rule 21, for a re-hearing of the appeal in that Court as against him, and his application, as we have said, has been dismissed. The sole point for our determination is, whether the lower Appellate Court had jurisdiction to entertain the application. In the petition of objection filed by the plaintiff the only objection taken to the jurisdiction of the lower Appellate Court was that by virtue of the appeal by defendant No. 1 to this Court and its dismissal under Order XLI, rule 11, the decree of the lower Appellate Court had become the decree of this Court, and that it was, therefore, this Court alone which could entertain the application of defendant No. 2. From the judgment of the Second Subordinate Judge it appears that there was a second objection, namely, that the lower Appellate Court which passed the *ex parte* decree was the Court of the Additional Subordinate Judge which has since been abolished and not that of the Subordinate Judge. We may say at once that there is no force in this objection and it has not even been argued before us.

Turning to the real point in the case we are of opinion that the various decisions connected with amendment of decrees and reviews of judgment, which have been cited in argument, are not of much assistance. They turn upon a different state of facts and upon different sections of the Civil Procedure Code. Somewhat more in point are those cases which decide that an original Court can entertain an application to set aside an *ex parte* decree even where the applicant has preferred an appeal against that decree to a higher Court. See *Damodar Manna* v. *Sarat Chandra Dhal* (1) and *Kumud Nath Roy Chowdhry* v. *Rai Jatindra Nath Chowdhry* (2). In those cases, however, the application to set aside the *ex parte* decree was made while the appeal against it was pending and not finally disposed of. The case of *Dhonai Sardar* v. *Tarak Nath Chowdhuri* (3) more closely resembles the present, inasmuch as the application there was made after the disposal of the appeal preferred by the other defendants. At the same time, it is not clear from the report or from the file of that case in this Court which we have examined, that defendant No. 7 in that case was not made a party respondent to the appeal of defendants Nos. 1 and 4 which was dismissed. In the appeal before us it is certain that the present appellant was no party to the appeal of his brother defendant No. 1 even in name so that that case may be distinguished on that ground. If it were not distinguishable, it might have been necessary to consider whether the point should not be referred to a Full Bench: for, with all respect to the learned Judges who decided that case, we entertain doubts as to the correctness of their decision. It appears to proceed upon the ground that because the Appellate Court could, under section 544 of the Civil Procedure Code, 1882, on appeal by two of the defendants, have reversed the decree appealed from in favour of all, it must have acquired jurisdiction over the entire subject-matter and was competent to come to a determination in regard to the same as between all parties to the suit, and that that jurisdiction continued throughout. This, however, seems to lose sight of the fact that power to pass a decree in favour of parties who are absent and who have not asked for such relief, was expressly conferred by section 544 of the Civil Procedure Code, 1882, now represented by Order XLI, rule 4, and supplamented by rule 33. There can, after all, be no harm in deciding in a man's favour, even in his absence and without any direct request by him. But the converse does not necessarily follow, and indeed it is a well-established principle of our jurisprudence that no person is bound by a decreee passed against him in his absence and against which he has had no opportunity of showing cause.

Upon the undoubted facts of the present case it is difficult to see how the decree of this Court, to which the present appellant was not a party even by name and of which he had no notice, can be said to be a decree against him.

As a matter of convenience, it is obvious that the lower Appellate Court is in a much better position to deal with the present application than this Court as the default in appearance took place in that Court.

For these reasons we think that the learned Subordinate Judge had jurisdiction to entertain the application, and we accordingly set aside his order of dismissal and remand the case to the lower Court for hearing and

(1) 13 C. W. N. 846; 3 Ind. Cas. 468.

(2) 13 C. L. J. 221; 15 C. W. N. 399; 9 Ind. Cas. 289.

(3) 12 C. L. J. 52; 5 Ind. Cas. 525.

disposal of the application on the merits. The appellant's costs of this appeal must be paid by the respondent. We fix the hearing-fee at two gold *mohurs*.

Case remanded.

PUNJAB CHIEF COURT

SECOND CIVIL APPEAL No. 70 OF 1910.

April 25, 1911.

Present :—Mr. Justice Shah Din and Mr. Justice Chevis.

LACHHMAN—PLAINTIFF—APPELLANT

versus

BHAGWAN SAHAI AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Gift—Reversion of property to donor and his descendants on donee's death—No reversion if donee leaves male or female descendants—Donee's descendants pass on succession to their own children—"Lawald," *meaning of.*

In the absence of a special custom, the donor and his descendants are not entitled, on the donee's death, to oust the female descendants of the donee in the direct line.

Gurdit Singh v. *Musammat Prem Koer*, 84 P. R. 1909; 76 P.L.R. 1909; 118 P. W. R 1909; 3 Ind. Cas. 604, followed.

The daughters and sons, in other words, both the male and female descendants of a donee hold not only for their own life-time but also pass the succession to their children, and it is only in the event of the total extinction of the donee's descendants that the property reverts to the donor's line.

The word "*lawald*" is often used of a man who has no sons.

Second appeal from the order of the Divisional Judge, Ambala Division, dated the 20th November 1909, reversing that of the Munsif 1st Class, Karnal, dated the 24th July 1909, decreeing plaintiff's claim.

Lala *Dwarka Das*, for the Appellant.

Mr. *Devi Dyal*, for the Respondents.

JUDGMENT.—Plaintiff and his aunt gifted the land in suit to Shibba, who has now gifted it to his son-in-law Bhagwan Sahai. Plaintiff, claiming to be the next heir on the death of Shibba, sues for a declaration that the gift shall not affect his rights. Plaintiff is not a collateral of Shibba, but Shibba is sonless, and plaintiff claims that the land will revert to him on Shibba's death. The first Court gave plaintiff a decree but the learned Divisional Judge quoting *Gurdit Singh* v. *Musammat Prem Koer* (1), held that plaintiff would not succeed so long as any direct descendants of Shibba, either male or female were alive, and dismissed the suit, holding that plaintiff's chance of succession in the presence of Shibba's five daughters and three grandsons was too remote to entitle him to a decree.

Plaintiff appeals, and on his behalf it is urged that on the death of a donee, the donor will succeed in the absence of descendants in the direct male line to the exclusion of the donee's daughters and their sons. No doubt in a case of contest between collaterals and daughters the onus of proving that the daughters or their issue succeed to the exclusion of collaterals rests on the daughters. But plaintiff is not a collateral of the donee, and the case is not one of ordinary inheritance. *Gurdit Singh* v. *Musammat Prem Koer* (1) is a clear authority for the proposition that the donor and his descendants are not entitled to oust the female descendants of the donee in the direct line. In that judgment it is said the learned Counsel for the appellant admitted that he could not quote any authority in which it was laid down that when there are daughters, land which has been gifted to her lineal ancestors reverts to the donor's line and no such authority has been quoted before us. No doubt, there are rulings in which it is stated that the donor succeeds in the event of the donee dying sonless, but in none of these cases did the question of the rights of a female descendant of the donee arise, and these rulings cannot, therefore, be taken to decide that the donor excludes the daughters of the donee. *Gurdit Singh* v. *Musammat Prem Koer* (1) is a direct ruling in support of the Divisional Judge's decision, and in the absence of any ruling to the contrary, we must follow *Gurdit Singh* v. *Musammat Prem Koer* (1).

Then it is urged that, at the most, the daughters have only a life-interest in such cases, but again no authority is quoted in support of this view, and we are of opinion that no distinction can be drawn between the daughters and the sons of a donee and that both male and female descendants not only hold for their own life-time but also pass the succession on to their children, and that only in the event of the total extinction of descendants of the donee does the land revert to the donor's line. The custom of reversion to the line of the donor is quite a different custom to the succession of collaterals, and we consider that no arguments in support of the proposition that the

(1) 84 P. R. 1909; 76 P. L. R. 1909; 118 P. W. R. 1909; 3 Ind Cas 604.

daughter of a donee has only a life-interest can be based on authorities dealing with the case of a collateral. As there are no less than eight descendants of the donee alive *viz.*, five daughters and three grandsons, we agree with the learned Divisional Judge that plaintiff's chance of succession is too remote to justify his obtaining a decree.

No doubt, plaintiff could have succeeded had he proved a special custom applicable to the parties by which the donor would exclude female descendants of the donee but no such special custom has been proved. It is urged, however, that the right of daughters to succeed was never pleaded, and that plaintiff consequently could not know what he was required to prove. But clause 4 of the plaint says that Shibba is *lawald*, and that after his death the land reverts to plaintiff, and in defendant's pleas, the answer to this clause is, that clause 4 is wrong and that plaintiff has no *locas standi*. The word *lawald* is, no doubt, often used of a man who has no *sons*, but the denial that Shibba is *lawald* can only be interpreted to mean that Shibba is not *childless* for all the parties knew well that Shibba has no sons. So, whatever plaintiff meant by the word *lawald*, it is clear that by denying the correctness of clause 4 of the plaint the defendants mean to say that Shibba was not childless, and that the land would not revert to plaintiff on his death. Plaintiff was represented by a pleader in the first Court, who, in reply, stated that plaintiff was the next heir to Shibba. Plaintiff's witnesses, no doubt, said in examination-in-chief that plaintiff was the next heir, but in cross-examination they were questioned as to the existence of daughters. So it cannot be said that either in the pleadings or in the evidence the defendants omitted to set forward the existence of the daughters as a bar to plaintiff's claim.

We uphold the decision of the learned Divisional Judge dismissing the suit and dismiss the appeal with costs.

Appeal dismissed.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 707 OF 1910.

April 5, 1911.

Present:—Mr. Justice Kensington and Mr. Justice Johnstone.

HARDIT SINGH AND OTHERS—APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 71, 147, 149, 323, 332—Separate sentences for rioting and causing hurt—Offence of rioting not complete till hurt is caused—Public servant not acting in public capacity—Applicability of s. 332, Indian Penal Code—Criminal Procedure Code (Act V of 1893), s. 408—Some members of unlawful assembly sentenced to various terms exceeding four years in aggregate—Appeal lies to the Chief Court—Appeal presented to Sessions Court—Duty of Sessions Judge to return appeal for presentation to proper Court—Power of Sessions Judge to report case to Chief Court.

The appellants, five in number, drove off the cattle of certain canal officials. On their way to the cattle pound they were overtaken by the owners who tried to rescue their cattle, but failing in this gave up the idea of using violence and began to take down the names of the accused with a view to instituting legal proceedings against them. At this the accused got excited and attacked their pursuers causing simple hurt to two of them. The accused were tried, convicted and sentenced as follows:

Two accused	...	(*i*) Two years under section 147, Indian Penal Code,
		(*ii*) One year under sections 323/149, Indian Penal Code,
		(*iii*) Three years under sections 332/149, Indian Penal Code,
One accused	...	(*i*) The same as above in (*i*),
		(*ii*) Six months under sections 323/149, Indian Penal Code,
		(*iii*) The same as above in (*iii*).
Two accused	...	(*i*) One year under section 147, Indian Penal Code,
		(*ii*) Six months under sections 323/149, Indian Penal Code,
		(*iii*) 18 months under sections 332/149, Indian Penal Code.

An appeal was presented to the Sessions Judge who reported the case to the Chief Court:

Held, (1) that the appeal lay to the Chief Court, and that the Sessions Judge instead of reporting the case should have returned the appeal petition for presentation to the Chief Court.

Queen-Empress v. *Jai Singh*, 12 P. R. 1900 Cr.; P. L. R. 1900, p. 56 Cr., followed.

(2) that, as an unlawful assembly becomes one guilty of rioting when violence is used, and in this case the unlawful assembly rioted when two of the pursuers were attacked, the members of it cannot be convicted and sentenced separately for rioting and causing hurt.

Bhagwan Singh v. *Emperor*, 4 P. R. 1901 Cr.; 52 P. L. R. 1901 (F. B.), followed.

(3) that section 332, Indian Penal Code, had no application to the case inasmuch as the cattle were

the private property of the canal officials, who in attempting their rescue, were acting as private individuals.

Appeal from the order of the District Magistrate, Gurdaspur, dated 28th October 1910, convicting the appellants.

Mr. *Roshan Lal*, for Jagat Singh, Kishen Singh and Hardit Singh, Appellants.

Mr. *Broadway*, Assistant Legal Remembrancer, for the Respondent.

JUDGMENT.—Seven persons were *chalaned* before the District Magisrate, Gurdaspur, for rioting and other offences. Of these, two boys, by name Bhana and Mohun, were discharged and we are no longer concerned with them. The other five were all convicted and sentenced as follows :—

Kishen Singh and Jagat Singh ...	(*i*)	two years under section 147, Indian Penal Code;
	(*ii*)	one year under sections 323/149;
	(*iii*)	three years under sections 332/149.
Hardit Singh ...	(*i*)	two years under section 147, Indian Penal Code;
	(*ii*)	six months under sections 323/149, Indian Penal Code;
	(*iii*)	three years under sections 332/149, Indian Penal Code;
Achar Singh Ishar Singh	(*i*)	one year under section 147:
	(*ii*)	six months under sections 323/ 149;
	(*iii*)	18 months under sections 332/149.

We need not detail the story of the affair, which is told with sufficient clearness by the learned District Magistrate. Conviction (*i*) in each case is on account of the unlawful assembly, which was constituted after Mr. Cox began to note names conviction (*ii*) on account of the assault by Hardit Singh and Jagat Singh upon Mr. Cox, and conviction (*iii*) on account of the assault upon Ratan Chand after the unlawful assembly had come into existence; and the first important criticism of the judgment under appeal is that this method of piecemeal convictions and consecutive sentences is illegal.

The criticism seems to us a sound one. Perusal of *Bhagwan Singh* v. *Emperor* (1) shows the error into which the District Magistrate has fallen. An unlawful assembly becomes one guilty of rioting when violence is used. Therefore, this unlawful assembly rioted only when Ratan Chand and Mr. Cox were attacked and the members of it cannot be convicted and sentenced separately for rioting and for the assaults in question, which latter form part of the offence of rioting. We, therefore, hold that at most the accused can only be convicted of and sentenced for rioting. We note here that there is no charge and no conviction on account of the attack by Kishen Singh upon Mr. Cox. This was a distinct offence by one of the accused only, and by law could not be dealt with in this trial.

Again, we cannot see that section 332, Indian Penal Code, has any hearing on this case. The cattle seized by the villagers were the private property of the Sub-overseer Ratan Chand and the *chowkidar* Kala, and Mr. Cox and Ratan Chand, in attempting to rescue them, were acting as private persons.

Nor can the words towards the end of section 332, "in consequence of something done &c.," bring that section in, for however much the resentment of the villagers may have been enhanced by the previous conduct of Ratan Chand, the immediate cause of the attack was the sitting down to note names of culprits for purposes of further proceedings.

But it seems to us quite clear that the accused were rioting. No doubt they try to make out *alibis*, but the result is a melancholy failure. Analysed, what happened seems to be this. Certain villagers unknown drove off the cattle which, according to the prosecution evidence, which is unrebutted, were grazing not in the villager's crops but just by the gate of the canal bungalow compound. One owner Ratan Chand and Mr. Cox and others went in pursuit, and after certain adventures arrived at Kotla village to find the beasts just being driven into its precincts. Mr. Cox trying to head them off was struck by Kishen Singh, accused, and then both he and Ratan Chand seem to have given up the idea of using violence. Mr. Cox began to take down names at Ratan Chand's dictation and the villagers got excited and attacked the

(1) 4 P. R. 1901 Cr; 52 P. L. R. 1901.

latter, whom they considered their enemy because of the many prosections he had launched against them in connection with canal offences. Mr. Cox tried to help his subordinate but was thrown down and held down by Hardit Singh and Jagat Singh, accused. Now, it seems to us that Mr. Cox and his followers were within their rights in trying to get back the cattle by force; but even if they were not, they had renounced the use of force before the accused, becoming an unlawful assembly, attacked them, and thus the attack was a wholly lawless and criminal one.

Many other minor points in the case have been discussed; but in our opinion, the above is an adequate presentation of the real merits of the affair.

The case seems to have been tried in a somewhat hasty manner. There is no intelligible map on the record and we think the District Magistrate might have made special inquiry as to whether it was possible that the cattle were trespassing on cultivated fields or not, according to the map the nearest such field to the bungalow is 1,300 *karams*, or more than a mile away which seems hardly to be correct. We need not make an inquiry now for, according to our way of looking at the case, the accused are guilty of rioting even if in the first instance they were justified in seizing the cattle. As a matter of fact, they have not proved that they were so justified.

Slight discrepancies, such as whether Hardit Singh or Jagat Singh actually threw down Mr. Cox—both certainly attacked him - seem to us of little importance.

It seems that when Mr. Cox arrived at the Batala *thona* at 9 P. M. he found the cattle there. It is said Hardit Singh had taken them there; but he left without signing any report or Register This has but little bearing on the case, unless it shows that Hardit Singh was afraid to admit his identity as one of the captors of the cattle.

Lastly, we think we should point out that when appeal was made to the Sessions Court that Court should not on 24th November last have reported the case to this Court for orders. Appeal lay in this Court,—See [*Queen-Empress* v. *Jai Singh* (2)] and the appeal petition should have been returned for presentation here.

(2(12 P, R. 1900 Cr.; P. L. R. 1900 p. 56 Cr.

Returning to the merits of the case we think these appeals (Nos. 707 and 772 of 1910) should be accepted, the convictions and sentences under sections 323 and 332 with section 149 being setaside, and that the convictions, under section 147, Indian Penal Code, in the case of each appellant should be confirmed. We think the appropriate sentences, judging by the parts taken in the affair by each appellant and the previous record of each as shown in the file, should be—

Hardit and Kishen Singh each 2 years' rigorous imprisonment;

Jagat Singh, who is their youngest brother, 18 months' rigorous imprisonment, Ishar Singh and Achar Singh one year.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 201 OF 1911.

April 13, 1911.

Present:—Mr. Justice Tudball.

KINOO JATTI—PLAINTIFF—APPELLANT

versus

Thakar BIRJ NANDAN LAL—

DEFENDANT—RESPONDENT.

Patwari's *papers—Presumption as to correctness—Rebuttable presumption.*

There may be a presumption that what is entered in the *patwari's* papers is correct but that presumption is rebuttable.

Second appeal from the decision of the District Judge of Gorakhpur, dated 6th December 1910.

Mr. *Haribans Sahai*, for the Appellant

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff-appellant to recover excess rent alleged to have been extorted by the *zemindar* and also compensation for the same. His case was that his rent was Rs. 13 per annum and that the defendant a co-sharer, who was entitled to a one-third share in the rent had forced him to pay Rs. 8 odd which was some Rs. 4 or more excess rent. The defence was that the real rent was Rs. 25 odd, that this rent had for many years past been regularly paid, and that Rs. 8 odd which was taken by the defendant was the correct amount due from the plaintiff for which it is admitted a receipt was granted. The Courts below have found, as a matter of fact, that for many years the rent actually paid was Rs. 25 a year and that there was no extortion. The plaintiff comes here in second appeal and it

VELAGUPUDI APPAYYA *v.* EMPEROR.

is urged that the Courts below have erred in law in that they have gone behind a certain attestation of rent by the defendant. It appears, as far as one can see from the record, that a *kanungo* went to the village to check the entries in the *patwari's* papers and that on that occasion the parties to the present suit admitted before him that the rent of this holding was Rs. 13. At the utmost, this was merely an admission by the defendant and an admission which he has most clearly proved to have been incorrect by evidence both documentary and oral which has been accepted by the Courts below. There has been no such attestation of any lease as contemplated by section 97 of the Tenancy Act. There is no evidence on the record of any agreement between the parties whereby rent of Rs. 13 was fixed. In this respect, therefore, the Courts below have not committed an error in law. The only other ground taken is that the Courts below could not go behind the entry in the *patwari's* papers. There may be a presumption that what is entered in the *patwari's* papers is correct but that is a presumption which can be rebutted and in the present case has been rebutted by the evidence called in defence, which evidence has been accepted by both the Courts below. I find that no error in law have been committed by the Court below. The question is one of fact. There is no force in this appeal. It is, therefore, dismissed.

Appeal dismissed.

MADRAS HIGH COURT.

CRIMINAL APPEAL No. 89 OF 1911.

April 21, 1911.

Present:—Mr. Justice Sankaran Nair.

VELAGUPUDI APPAYYA—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860*)*, *s.* 363—*Kidnapping—Lawful guardian—Complaint by* de facto *guardian.*

A *de facto* guardian of a minor, whose guardianship is not against the wishes of the *de jure* guardian, is a lawful guardian within the meaning of section 363, Indian Penal Code.

Therefore, a charge of kidnapping is sustainable on the complaint of the father of a minor, alleged to have been kidnapped, the father acting as the minor's *de facto* guardian and such guardianship not having been proved to be against the wishes of the husband of the minor.

Appeal against the order of the Court of

PANJARI PAKEERAPPA *v.* EMPEROR.

Session of Chingleput Division in Case No. 48 of the Calendar for 1910.

The Hon'ble Mr. *L. A. Govindaraghava Aiyar*, for the Appellant.

Mr. *P. R. Grant*, for the Public Prosecutor, Contra.

JUDGMENT.—The evidence of prosecution first witness and the extract from the birth and death register show that the girl was below 16 years of age. It is also proved that the father was the *de facto* guardian of the girl, and as his guardianship has not been proved to be against the wishes of the husband he is lawful guardian under section 363 of the Indian Penal Code.

As to the proof of kidnapping, the evidence of the witnesses who speak to having seen the accused and the girl together when going away or alone just before their disappearance is unsatisfactory. But it is proved that the girl was often going to Bramaramba's house and was meeting the accused and others with him there; that accused was not seen in the village after her disappearance; that warrants issued for their arrest were returned unexecuted as they could not be found; that the accused was arrested in the house of his brother-in-law when the girl also was there, and that she was attempting, on the arrest of the accused, to leave the house when she also was arrested. On these facts I am of opinion that the offence of kidnapping is made out. I affirm the conviction and sentence and dismiss the appeal.

Appeal dismissed.

MADRAS HIGH COURT.

CRIMINAL APPEALS Nos. 38, 43 AND 44 OF 1911.

April 25, 1911.

Present:—Mr. Justice Sundara Iyer and Mr. Justice Ayling.

(IN CR. A. No. 28)

PANJARI PAKEERAPPA AND OTHERS—APPELLANTS

(IN CR. A. No. 43)

BASAVAN GOWD AND OTHERS—APPELLANTS

(IN CR. A. No. 44)

KAMANNANJUNDAPPA—APPELLANTS—

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898*)*, *s.* 269—*Penal Code (Act XLV of* 1860*)*. *ss.* 147, 395—*Joint trial of Jury and non-jury cases—Assessors selected*

HAMIDULLAH KHAN *v.* NAJJO.

for the non-jury case from out of the Jury—Illegality.

Accused were charged under sections 147 and 395, Indian Penal Code. Five gentlemen were selected to form a Jury to try the charge under section 395. Two of these were chosen as assessors to help the Judge in the trial of the non-jury case.

The trial of the accused on the charges was joint. The Jury acquitted the accused of the charge under section 395, Indian Penal Code. The Judge, differing from the Jury, convicted them of rioting:

Held, that the procedure adopted was illegal and that the Judge was bound to constitute all the members of the Jury as assessors for trying the non-jury offence.

Ramakrishna Reddi v. *Emperor*, 10 M. 598, applied.

Appeal against the order of the Court of Session of the Bellary Division, in Case No. 82 of the Calendar for 1910.

Dr. *S. Swaminadhan* and Mr. *S. Ranganadha Iyer*, for the Appellant.

The *Public Prosecutor*, Contra.

JUDGMENT.—In this case the accused were charged with an offence under section 395 of the Indian Penal Code triable by a Jury and also with offences under section 147 and other sections triable by a Judge with the help of assessors. Five gentlemen were selected to form a Jury and two of them were chosen as assessors to help the Judge with reference to the charges not triable by a Jury. The trial of the accused on all the charges was joint. The accused were acquitted by the Jury of the offence under section 395, Indian Penal Code. The Judge, differing from the two assessors, convicted them of rioting. It is contended in appeal that according to section 269 of the Code of Criminal Procedure the Judge was bound to constitute all the members of the Jury as assessors for trying the non-jury offences, and that he not having done so the conviction is illegal. This contention appears to us to be sound and to be in accordance with the principle of the decision in *Ramakrishna Reddi* v. *Emperor* (1), though on the facts that case may be distinguishable. We must set aside the conviction and the sentences passed on the accused and direct a re-trial of the accused on the charges triable with the help of assessors. The accused may remain on the same bail as now.

Conviction quashed.

(1) 10 M. 598.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 844 OF 1910.

April 18, 1911.

Present:—Sir John Stanley, KT., Chief Justice, and Mr. Justice Banerji.

HAMIDULLAH KHAN AND OTHERS—DEFENDANTS—APPELLANTS

versus

Musammat NAJJO—PLAINTIFF RESPONDENT.

Muhammadan Law—Dower—Widow in possesson of husband's property in lieu of her dower—Dispossession by heirs · Suit to recover dower-debt—Limitation Act (XV of 1877), Sch. II, Art. 104, application of.

F., a Muhammadan, put his wife in possession of his property in order that she might satisfy her dower thereout. *F.* died in 1895 His heirs wrongfully took possession of his property in 1906. In a suit for recovery of the balance of the dower-debt in 1907, it was *held*, that limitation ran from the date of dispossession and not from the date of the death of the husband, and that Article 104 of the Limitation Act did not apply.

Second appeal from the decision of the District Judge of Saharanpur, dated 4th May 1910

Mr. *Durga Charan Banerji*, (with him Mr. *Ghulam Mujtaba*), for the Appellants.

Mr. *Muhammad Ishaq*, for the Respondent.

JUDGMENT.—This was a suit for recovery of the plaintiff's share of the dower-debt due to one *Musammat* Waziran at the time of the death of her husband Faizullah Khan. The facts are these: Faizullah Khan died childless in December 1895, leaving his widow *Musammat* Waziran him surviving. Prior to his death Faizullah put his widow into possession of his estate in order that she might satisfy her dower-debt stated to be Rs. 5,000 thereout. In 1906, before the dower-debt was discharged, Waziran made a transfer of the estate which led to litigation between her and the other heirs of Faizullah. During this litigation Waziran died and the other heirs of Faizullah Khan took possession of three-fourths of the estate and obtained a decree declaring them entitled to pre-empt Waziran's $\frac{1}{4}$th share. The plaintiff, *Musammat* Najjo, is one of two sisters of *Musammat* Waziran and she instituted the suit out of which this appeal has arisen for recovery of her share of the balance of the dower-debt remaining due to *Musammat* Waziran at the time of her death.

Both the lower Courts have decreed her claim. Hence this appeal. The principal ground of appeal is based upon the Indian Limitation Act. The contention of the defendants-appellants is that Waziran's dower became payable in December 1895 when Faizullah died, and that the suit should have been brought within three years from that date under Article 104 of Schedule II to the Limitation Act. We are not prepared to accept this plea. It is found by the Courts below that *Musammat* Waziran was put into possession of her husband's estate by her husband for satisfaction of her dower-debt. She and her heirs were, therefore, entitled to remain in possession until the dower-debt was satisfied. Despite the agreement between Faizullah Khan and his wife the defendants-appellants wrongfully took possession of the estate of Faizullah, and thereby committed a breach of the agreement entered into between him and Waziran. Having thus lost the property which was appropriated by Faizullah to the payment of his wife's dower, it appears to us that the plaintiff was entitled to maintain this suit for recovery of her share of the dower remaining due to *Musammat* Waziran at the time of her death out of the assets of Faizullah Khan in the hands of the defendants. The balance of the dower due to Waziran was a debt payable out of the estate of Faizullah Khan and the defendants having wrongfully appropriated the estate which was liable to discharge this debt cannot be permitted to hold the estate without discharging the liabilities attaching to it. Wrongful possession was only taken in 1906. This suit was brought in 1907. Consequently, it is not barred by any Article of limitation. The suit is not, in our opinion, governed by Article 104 of Schedule II to the Limitation Act, but is a suit the right to bring which accrued when the defendants took possession of the estate of Faizullah Khan and refused to pay the amount due to the plaintiff in respect of her share of Waziran's dower. We, therefore, dismiss the appeal with costs including fees in this Court on the higher scale.

Appeal dismissed.

MADRAS HIGH COURT.

ORIGINAL SIDE CIVIL APPEAL NO. 3 OF 1911.

March 21, 1911.

Present:—Sir Arnold White, KT., Chief Justice, and Mr. Justice Sankaran Nair.

G. V. M. KRISHNASWAMI CHETTY—APPELLANT

versus

COTTAH MANGAMMAH—RESPONDENT.

Guardians and Wards Act (VIII of 1890*), s.* 17—*Guardianship of the person of a minor—Unfitness of the presumptive heir—Mother-in-law and father-in-law, priority as between, for guardianship of minor widowed daughter-in-law—Hindu Law.*

Usually, it is undesirable to appoint any one guardian of the person of a minor, who is the presumptive heir to the minor's property.

Sami Row Jagadab v. *Eliavatha Row Gayabavadhu*, 16 M. L J. 357, referred to.

Under the Hindu Law, the father-in-law has a minor right to the mother-in-law for the custody of a minor widowed daughter-in-law.

Appeal from the order of the Hon'ble. Mr. Justice Wallis dated the 5th day of January 1910, in the ordinary Original Civil Jurisdiction of this Court.

Mr. *T. R. Ramachandra Aiyar* and Mr. *K. Ramachandran*, for the Appellant.

Mr. *M. A. Tirunarayanachari*, instructed by Messrs. *Short and Bewes*, for the Respondent.

JUDGMENT.—We do not feel called upon to interfere with the order of Wallis, J. The minor has lived with her husband, who came of age in 1908 and died in 1909, since her marriage in 1905. We have examined her and she has expressed her desire to continue to live with her mother-in-law.

The father-in-law will apparently under the Hindu Law have a minor claim to the mother-in-law. Before Wallis, J., he did not oppose his wife's application. In this Court he has put in an affidavit in which he alleges his wife's unfitness on personal grounds. He was cross-examined on his affidavit and it seems obvious to us that he is materially incapable of acting as guardian.

Usually, it is undesirable to appoint any one guardian of the person who is the presumptive heir to the property. (See *Sami Row Jagadab* v. *Eliavatha Row Goyabavadhu* (1)). In the present case the natural father was formerly a clerk in a Bangalore Municipality on Rs. 15 a month. There is no evidence that amongst the minor's relations by blood there is any one as suitable, as the

(1) 16 M. L. J. 357.

mother-in-law. From the point of the view of the welfare of the child we cannot say that the order of Wallis, J., was wrong. The appeal is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.
CRIMINAL APPEAL No. 54 OF 1911.
(REFERENCE TRIAL No. 5 OF 1911.)
March 13, 1911.
Present:—Mr. Justice Munro and
Mr. Justice Abdur Rahim.
NANZIGADU AND OTHERS—PRISONERS—APPELLANTS
versus
EMPEROR—OPPOSITE PARTY.

Approver—Conviction based on evidence of approver alone.

A conviction should not be based on the evidence of an approver alone unless it is corroborated by reliable, independent evidence.

Appeal by the second prisoner against the sentence of death and by the prisoners Nos. 3 to 6 against the sentence of transportation for life passed by the Court of Session of the Bellary Division, in the said Case No. 3 of the Calendar for 1911.

The *Public Prosecutor*, for the Crown.

JUDGMENT.—The conviction in this case is based upon a statement, Exhibit E, made by the prosecution 2nd witness before the Committing Magistrate. Upon the evidence of the approver alone we should not be prepared to base a conviction. It is not of such a nature as to warrant us in departing from the ordinary rule requiring corroboration by reliable evidence. The presence of the approver is itself open to doubt, for seeing that there were according to the prosecution five other persons concerned in the murder, the need for pressing the approver into service is not apparent especially as, on his own showing, he was an unwilling instrument. We think it impossible to regard the statement, Exhibit E, as reliable evidence. The prosecution 2nd witness at the inquest said he knew nothing as to how the murder had been committed. On the 8th October, however, he made the statement, Exhibibit E, at the preliminary inquiry. In the Sessions Court he retracted this story and went back to his story at the inquest. He says he was left by the police at the station between the day of the inquest and the making of Exhibit F1 and that he said what they told him to say. We think it regrettable that in a case like this the police officer who investigated the case was not examined for the prosecution. We set aside the conviction, acquit the accused of murder and direct their release.

Conviction quashed.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 643 OF 1910.
March 6, 1911.
Present:—Mr. Justice Griffin.
JAGANNATH AND OTHERS—DEFENDANTS—APPELLANTS
versus
GURDIYAL SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Landlord and tenant—Plot in abadi*—Right of an agriculturist tenant to build upon—Agra Tenancy Act (II of 1901), s. 4 (12)—Improvement.*

An agriculturist tenant has no right to build a shed upon a plot of land in the *abadi* without the permission of the *zemindar* although he has been throwing rubbish over it for a long time.

A structure built on a plot of land within the *abadi* is not an improvement within the definition of the word in section 4 (12) of the Tenancy Act.

Second appeal from the decision of the Subordinate Judge of Mainpuri, dated 30th May 1910.

Mr. *Girdhari Lal Agarwala*, for the Appellants.

Mr. *Gulzari Lal*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiffs *zemindars* for possession of a plot of *abadi* land on which defendants, who are agricultural tenants, built a shed. It has been found by the Court below that the defendants have been using this plot for a considerable time past for throwing rubbish on it.

The suit has been decreed by the lower Appellate Court. The defendants come here in second appeal.

The contention advanced in this Court is that as the dwelling house of an agriculturist may be deemed to be an appurtenant to his holding this plot of land may in like manner be deemed to be appurtenant to their dwelling house. Apparently, the contention of the appellants is that they can do what they like on the plot of land although they admit it does not belong to them. The position of the defendants in respect of this plot was that of licensees and they had no right to build on this plot without the permission of the

zemindar. The plot built on being a part of the village site, the structure upon it does not come within the definition of "improvement" as defined in section 4 (12) (*d*) of the Tenancy Act.

In my opinion the decision of the Court below was a right one and I dismiss this appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1528 OF 1909.

March 24, 1911.

Present: – Sir Ralph Benson, Judge, and Mr. Justice Sundara Aiyar.

ARUNACHALA REDDY—APPELLANT

versus

ARUNACHALA REDDY—RESPONDENT.

Hindu Law—Joint family—Marriage expenses of male members—Charge on property.

The marriage expenses of the male members of an undivided Hindu family are a legitimate charge on the family property.

Kameswara Sastry v. *Veeracharlu*, 20 M. L. J. 855; 8 Ind. Cas. 195, followed.

Second appeal against the decree of the District Court of Trichinopoly in Appeal Suit No. 8 of 1909 presented against the decree of the Court of the District Munsif of Kulitalai in Original Suit No. 1227 of 1906.

Mr. *N. Rajagopalachariar*, for the Appellant.

Mr. *T. Natesa Iyer*, for the Respondent.

JUDGMENT.—The District Judge is mistaken in supposing that the portion of the debt borrowed under Exhibit C, for the expenses of the plaintiff's marriage is not binding on the defendant. Subsequent to the decision in *Govindrazulu Narasimham* v. *Devarabhotla Venkatanarasayya* (1), this Court has held that the expenses of the marriages of the male members of an undivided family are a legitimate charge on the family property. See *Kameswara Sastry* v. *Veeracharlu* (2). With that decision we agree. The plaintiff is, therefore, entitled to the amount disallowed by the District Judge. He is also entitled to interest at 6 per cent. per annum on the principal amount decreed by the District Munsif, namely, Rs. 129-8-2 from the 3rd August 1904 up to date of payment. The judgment of the lower Appellate Court is set aside and that of the District Munsif restored with interest as stated above. The respondent will pay the appellant's costs in this and in the lower Appellate Court.

Appeal allowed

(1) 27 M. 206.
(2) 20 M. L. J. 855; 8 Ind. Cas. 195.

(s. c. 15 C. W. N. 497; 8 A. L. J. 465; 13 C. L. J. 519.)

PRIVY COUNCIL.

APPEAL FROM THE JUDICIAL COMMISSIONER OF OUDH.

February 28, 1911.

Present: – Lord Macnaghten, Lord Robson, Sir Arthur Wilson and Mr. Ameer Ali.

Thakur UMRAO SINGH AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

Thakur LACHHMAN SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Will—Family arrangement – Immediate operation—Final and irrevocable—Whether document is Will—Inconsistency in pleadings—Costs

An instrument which was a family arrangement arrived at by the mediation of certain gentlemen who were old friends of the family, and which was intended to be operative immediately and to be final and irrevocable, was *held* to be a non-testamentary instrument, and, therefore, void as regards immoveable property, because it was not registered.

Notwithstanding conflicting views presented by the appellants, their Lordships gave effect to the real character of the instrument, but did not allow costs to the successful appellants.

Appeal from the decree of the Court of the Judicial Commissioner of Oudh, dated August 19th, 1907, reversing that of the Sub-Judge of Sitapur, dated September 8th 1906.

Mr. *DeGruyther*, *K. C.*, and Mr. *Kyffin*, for the Appellants.

Sir *Robert Finlay*, *K. C.*, and Mr. *Ross*, for Respondents.

JUDGMENT.

LORD MACNAGHTEN.—This is an appeal from a decree of the Court of the Judicial Commissioner of Oudh reversing the decision of the Subordinate Judge of Sitapur.

The dispute between the parties relates to the right of succession to one-third of the estate of Ramkote, of which a Hindu gentleman, named Kalka Bakhsh Singh, was the last owner.

In the course of the discussion before this Board the controversy was reduced to two questions, and two questions only—

(1) Was a certain document executed by

Kalka Bakhsh on the 23rd of May 1884, a testamentary or a non-testamentary instrument?

(2) Is that question now open, having regard to the course of the proceedings in the Courts below?

After the confiscation of Oudh the second Summary Settlement of the Ramkote estate was made with Kalka Bakhsh. He obtained a *sanad* from the Government. His name was entered in Lists Nos. 1, 4 and 6, prepared under the provisions of section 8 of Act I of 1869. And he remained absolute owner of the property until his death.

Kalka Bakhsh died on the 14th of October 1893. He had three sons, Umrao Singh, Pirthipal Singh, and Baldeo Singh. Pirthipal Singh died in his father's life-time, leaving two sons, who were defendants in the suit and are the respondents to this appeal.

On the 9th of January 1862, Kalka Bakhsh, in compliance with the directions issued by the Government, declared that his wish was that after his death his estate should continue in his family undivided, in accordance with the custom of Rajgaddi, and that the younger brothers should be entitled to maintenance.

It is not disputed that this declaration was a valid testamentary disposition by Kalka Bakhsh of his estate in favour of his eldest son.

Kalka Bakhsh and his second son, Pirthipal Singh, were on bad terms, so much so, that Pirthipal Singh threatened personal violence to his father, and Kalka Bakhsh commenced criminal proceedings against his son. The quarrel, however, was for the time compromised by the intervention of two friends of the family, Jote Singh of Bihat and Ratan Singh of Rojah. At their instance the following document was drawn up and signed by Kalka Bakhsh in their presence on the 23rd of May 1384:—

"This *sanad* is executed by me, Thakur Kalka Bakhsh, Talukdar of Ramkote. For Pirthipal Singh, who is my son, I fix Rs. 300 annually, so that he may maintain himself. Besides this, whatever I may give I will give equally to the three sons, except provisions, which they may take from my godown (*kothar*). He may take 6 annas in *kharif* (crop) and ten annas in *rabi* (crop) out of my treasury (*tahwil*). The marriage and *gauna* expenses of the sons and daughters shall be borne by me. After me the three sons are to divide the property, moveable and immoveable. This has been settled through the mediation of Thakur Jote Singh of Bihat and Thakur Ratan Singh of Rojah."

Kalka Bakhsh, though he executed the document without demur, did not comply with its terms, if, indeed, he ever meant to do so. In February 1886, Pirthipal Singh, who apparently was then in destitution, brought a suit to recover arrears of maintenance and a sum of money equal to an amount alleged to have been given by Kalka Bakhsh to his youngest son Baldeo Bakhsh. The suit, which was founded on the instrument of May 1884, was dismissed by the Subordinate Judge, and the dismissal was affirmed on appeal, except as regards arrears of maintenance then due, amounting to Rs. 412-8.

In May 1892, Kalka Bakhsh brought a suit for cancellation of the instrument of May 1884. Pirthipal, however, died in November 1892, before the suit could be heard, and it was consequently withdrawn.

After Kalka Bakhsh's death there was the usual quarrel as to registration in the Revenue records. On the 14th of May 1894, the Deputy Commissioner of Sitapur, without pronouncing any opinion on the questions in dispute, made an order directing the entry of one-third of the estate in the name of Umrao Singh, one-third in the name of Baldeo Bakhsh, and the remaining third in the names of Pirthinpal's two sons.

Umrao Singh then transferred his interest in the estate to his brother Baldeo Bakhsh and they brought this suit as co-plaintiffs to recover the one-third of the estate entered in th names of the sons of Pirthipal Singh. They relied mainly on a Will alleged to have been executed on the 4th of October 1893, up to which date, as they contended, the testamentary instrument of the 9th of January 1862, was in force. They asserted, too, that the instrument of the 23rd of May 1884 was obtained from Kalka Bakhsh by undue influence, and was wholly inoperative.

The Subordinate Judge gave effect to the plaintiffs' claim except so far as it was founded on the alleged Will of October 1893. He decided against them on the issue as to the validity of that document, stating that the execution thereof "was not very clear to his mind." The decree was made without costs.

On appeal the Judicial Commissioner

affirmed the findings of the Subordinate Judge in regard to the Will of 1862, and alleged Will of 1893. But as regards the inrtrument of 1884, they held that its execution was not procured by undue influence, and that it operated as a valid devise to Pirthipal Singh, the benefit of which passed on his death to two sons. In the result, they reversed the decree of the Subordinate Juge and dismissed the suit with costs.

Their Lordships agree with the Court of the Judicial Commissioner in thinking that the instrument of 1884 was not procured by undue influence. Indeed, there seems to be no ground whatever for such a suggestion. On the other hand, it seems clear that that document is a non-testamentary instrument. It was a family arrangement arrived at by the mediation or arbitration of two gentlemen, who were old friends of the family, and interested in maintaining its honour. It was plainly intended to be operative immediately, and to be final and irrevocable. It fails of effect simply because it was not registered, as required by the Registration Act III of 1877, section 17. It is, therefore, void as regards immoveable property.

As regards the second question, their Lordships must hold that they are not precluded by what took place in the Courts below from considering and determining the real question in the case. In the Courts below neither party pursued a consistent course. As long as the question of the validity of the alleged Will of the 4th of October 1893 was undetermined the appellants, contended that the instrument of May 1884 was testamentary, while the defendants contended that it was a settlement and not a Will. As soon as the alleged Will of 1893 was successfully impeached, the defendants maintained that the instrument of 1884 was a Will and not a settlement, and the appellants changed their attitude. Their Lordships think that, notwithstanding the conflicting views presented by the appellants in the Courts below, they are bound to give effect to the real character of the instrument. At the same time, they consider that the appellants, though successful in the result, ought not to be allowed costs on this appeal or any costs in the Courts below.

Their Lordships will, therefore, humbly advise His Majesty that the appeal ought to be allowed and the decree of the Subordinate Judge restored, and that any costs paid under the order of the Court of the Judicial Commissioner must be returned. There will be no costs of the appeal.

Appeal allowed with costs.

Solicitors for the Appellants: *Messrs. T. L. Wilson & Co.*

Solicitors for the Respondents: *Messrs. Young, Jackson, Beard* and *King.*

(s. c. 15 C. W. N 515.)

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2405 OF 1907.

February 9, 1910.

Present:—Mr. Justice Caspersz and Mr. Justice Doss.

NOBENDRA KISHORE ROY AND OTHERS—PLAINTIFFS—APPELLANTS

versus

DURGA CHARAN CHOWDHRY AND OTHERS—DEFENDANTS—RESPONDENTS.

Revenue Sale Law (Act XI of 1859*)*, *s.* 37—*Portion of* taluq *existing at Permanent Settlement*—Chitta—*Distributing public revenue at partition—Public document*—*Evidence Act (I of* 1872*)*, *s.* 74.

A *taluq* derived and descended from an ancient *taluq* existing from before the Permanent Settlement, and recognised by the landlord, must be deemed to have existed from before the Permanent Settlement and to be protected from annulment under section 37, excep. 1 or 2, of the Revenue Sale Law.

A *chitta* prepared at the time of partition for the purpose of distributing in equal manner the public revenue on the separate shares, is a document of a public nature and of the state of affairs then existing, and is, therefore, admissible in evidence.

Appeal from the decree of the District Judge of Noakhali, dated August 6th, 1907, modifying that of the Sub-Judge of that District dated July 31st, 1906.

Babu *D. N. Chakravarti Akhoy Kumar Banerjee* and *Ramesh Chandra Sen*, for the Appellants.

Babus *D. L. Khastgir* and *Biraj Mohan Mozumdar*, for the Respondents.

JUDGMENT.—This is an appeal in a suit brought by the plaintiffs who are auction-purchasers of an entire estate known as the four-anna share carved out of 12 annas of *Perganah* Dandra and which was sold under the provisions of Act XI of 1859. The plaintiffs sought to recover *khas* possession of 21 plots of land on annulment of the encumbrances. The defence, in effect, was that the tenure was protected by the provisos to section 37 of the Act.

The Subordinate Judge framed the neces-

sary issues, among them the 4th issue, "whether the defendant's *taluk* is a *mokurari istemrari taluk* existing from before the Permanent Settlement. If so, is it liable to be avoided?" On a consideration of the evidence, the Subordinate Judge dismissed the suit.

The plaintiffs then went to the District Judge on appeal and succeeded in obtaining from him a decree with regard to some of the plots in suit but not with regard to plots Nos. 1 to 14, which, accordingly, are the subject-matter of the present second appeal.

The District Judge has accepted the judgment of the first Court on the 4th issue without recapitulating the reasons of the Subordinate Judge; but he has based his judgment in favour of the plaintiffs, with regard to the plots decreed, upon the question whether all the lands in suit are included within the defendant's *taluk* and to that question he has returned an affirmative answer with regard to the plots Nos. 1 to 14.

The argument in the lower Appellate Court was, *first* that, for the purposes of proving the inclusion of these plots within the *taluk* of the defendants, the *chitta* of 1844 was inadmissible in evidence, and, *secondly*, *mudafat* description, in respect of some of the plots, not appearing in the said *chitta*, it cannot be held that these plots, at any rate, form part and parcel of the defendant's *taluk*, or, rather, of the parent *taluks*, Jadab Roy and Srinarayan Roy.

The District Judge has found the *chitta* of 1844 to be admissible in evidence, and held that the mere omission of the word "*Mudafat*" (name of the previous owner) against the plots in question from the *chitta* of 1844 is immaterial in view of his express finding that these plots appertain to the defendant's *taluk*.

In second appeal, the contentions advanced before us, are as follows:—*First*, that the Subordinate Judge, whose judgment has been incorporated by the District Judge into his own, does not find, that the defendant's *taluk* existed from before the Permanent Settlement, so that the second exception to section 37 of Act XI of 1859 does not protect the tenure—and that, the mere finding in the year 1844, some lands of the original *taluks*, Jadab Roy and Srinarayan Roy, descended into, and became part of, the defendant's *taluk*, Ram Kinkar, does not sufficiently demonstrate that the defendant's *taluk* is a creation anterior to the Permanent Settlement; *secondly*, that, though the Subordinate Judge comments upon the absence of satisfactory rebutting evidence on the part of the plaintiff, he has not considered the various papers (some of which have been printed by the appellant in the appendix) as he should have done, and that these papers constitute rebutting evidence of a valuable kind; *thirdly*, (it has been somewhat faintly pressed) that the *chitta* of 844 is not admissible, inasmuch as it was not prepared for public purposes; and, *fourthly*, that even if the *chitta* is admissible, it can only be regarded as evidence in favour of the defendants in respect of the lands expressly shown as *mudafat* lands, that is to say, lands which descended from the old *taluks*, Jadab Roy and Srinarayan Roy.

Although this is a second appeal, we have gone somewhat minutely into the documentary evidence, with a view to understanding the judgment of the Subordinate Judge, and we have considered whether it is necessary to send back the case to the lower Appellate Court for re-consideration and an expression of his own views by the District Judge. It appears to us, however, that the case has been properly tried and that the conclusions of fact bind us at the present stage.

The case may be taken to come under the first and second provisos to section 37 of Act XI of 1859. The 4th issue, it is true, contemplates the first proviso only that is to say, the parties went to trial on the question whether the defendant's *taluk* is a *mokurari istemrari* tenure existing from before the Permanent Settlement. To that issue, the Subordinate Judge returns an affirmative answer. He says "I am, therefore, clearly of opinion that the present *taluk* has been carved out of *taluks*, Jadab and Srinarayan, which existed in 1199 with a ten rupee *jama* each. The successive additions and subtractions do not take away the integrity of a *taluk*, if the steps can be traced. The identity is not lost;" and again, "my finding, therefore, is that *taluk*, Ram Kinkar, is one of those tenures which had their origin from before the Permanent Settlement." But the Subordinate Judge appears to have gone further, and he records another conclusion that "*taluk*, Ram Kinkar, falls within the second exception to section 37 Act XI of 1859, and as such cannot

be avoided and annulled as an incumbrance." He has elaborated this part of the case on the *dowls*, returns and documents filed and, in fact, he has taken considerable trouble to show how the plaintiff's 4-anna estate was originally created. It appears that although a permanent *jama* was assessed upon the 16 anna *perganah*, including the plaintiff's 4-anna *bahali hissa*, an equitable adjustment of revenue was not made upon the latter estate until long after the defendant's *taluk* came into existence. We regard the creation of the defendant's *taluk* as having taken place in the year 1220 (Ex. F) although it existed from before the Permanent Settlement, if the history of the old *taluks* Jadab Roy and Srinarayan Roy, be traced up to the year 1220 (1813) when portions of these *taluks* were transferred to Ram Kinkar, a member of the same family, and held at proportionate *jamas*. The Subordinate Judge points out from Exhibit (C) how the descent into the *taluk* Ram Kinkar was affected and finally perfected by Exhibit F. It was unnecessary for the Subordinate Judge to go as far as he did. But we entertain no doubt that his conclusions are based on a consideration of the evidence which it was open to him to consider and those conclusions, in either view of the case, effectually bind the plaintiffs. They bring the *taluk* of the defendants within either of the exceptions, first or second, to section 37.

With these general observations, which show how the case has been dealt with in the lower Courts, we proceed to record our views on the four contentions raised.

With regard to the first contention, it is the finding of the Subordinate Judge, and certainly a very clear one that the *taluk* Ram Kinkar was derived and descended from two ancient *taluks* and, as such, must be deemed to have existed from before the Permanent Settlement. The test is, whether the original obligation to pay a certain quota of the land revenue assessed was destroyed at any subseqnent date. But it appears to us that when certain lands were transferred to *taluk* Ram Kinkar, the continuity of the original obligation was not in any way impaired. These lands of the original *taluks* which have been found by the lower Courts to appertain to the defendant's *taluk* must be deemed to be protected from annulment because its recognition by the landlords involves a recognition of the former status of the *taluk*.

With regard to the second contention although the Subordinate Judge has not discussed much of the evidence on the side of the plaintiffs in rebuttal of the case for the defendants, he has mentioned certain *chittas* of the year 1202. That appears to us sufficient for the purposes of this appeal. We are not deciding this case as a regular appeal but on the questions of law put forward.

The third contention, as we have said, is somewhat faintly pressed, and on the authorities, we entertain no doubt that the *chittas* of the year 1844 is admissible in evidence. The cases cited to us are not authorities to the contrary. The *chitta* was prepared at that time, as appears from the evidence, for the purpose of distributing in equal manner the public revenue on the separate *bahali hissa* which was sebsequently purchased by the plaintiffs. The record thus prepared is a document of a public nature, and evidence of the state of affairs then existing.

The last contention, namely, that the *mudafat* lands are the only lands recorded as having been derived from the old *taluks*, has in fact been disposed of by the observations we have already made.

We are now concerned with plots Nos. 1 to 24, and, that being so it is immaterial to inquire whether the other lands, not *mudafat*, were included in *taluk* Ram Kinkar, in the year 1220 (1813) or not. It has been found by the Subordinate Judge that the *jama* of *taluk* Ram Kinkar was practically the same as the *jama* on the *mudafat* lands which were included in and transferred from *taluks* Jadab Roy and Srinarayan Roy. That finding on the question of identity disposes of the case.

We accordingly dismiss this appeal with costs.

Appeal dismissed.

S. N. DAR, B. A. LL. B.,
Vakil High Court,
SRINAGAR (Kashmir)

EMPEROR *v.* KARNAN BENU PATNAIK.

(s. c. 9 M. L. T. 406.)

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 327 OF 1910.

(CRIMINAL REVISION PETITION No. 264 OF 1910.)

February 22, 1911.

Present:—Mr. Justice Wallis.

EMPEROR—COMPLAINANT

versus

KARNAN BENU PATNAIK AND OTHERS —ACCUSED.

Criminal Procedure Code (Act V of 1898), ss. 428, 537—Irregularity—No record of reasons for remanding case – Call for findings instead of for evidence – Curative effect of s. 537—Practice.

An irregularity committed by a Magistrate in omitting to state his reasons for ordering fresh evidence under section 428, Criminal Procedure Code, is cured by section 537. Section 428 empowers a Magistrate to only call for evidence and not for a finding. Where he calls for a finding instead of merely calling for evidence, his order should be set aside and he should be directed to restore the case to his file and dispose of it according to law.

Petition, under sections 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the judgment of the Deputy Magistrate of Gumsur, dated the 13th December 1909, in Criminal Appeal No. 64 of 1909 presented against the judgment of the Court of the 2nd Class Magistrate of Aska, in Calendar Case No. 171 of 1909.

FACTS.—The proceedings of the General Deputy Magistrate, Gumsur, dated 3rd November, in Appeal Case No. 64 of 1909 were as follows:—The case is remanded to the Sub-Magistrate, Aska, for findings on the following points – (1) What are the correct boundaries and extent of the land said to have been encroached upon by the appellants ? (2) What is the name of the land ? (3) If it is *dwari inam* land is there temple service *inam* adjoining it ? The record with the findings should be submitted within a fortnight. The Khond who mortgaged the land to the complainant should be examined.

ORDER.—I think the irregularity of the Deputy Magistrate in not stating his reasons for ordering fresh evidence under section 428 of the Code of Criminal Procedure is cured by section 537. The Magistrate has, however, disregarded the provisions of the section in another manner by calling for a finding, instead of merely calling for the evidence; and I shall think the proper order will be to set aside his judgment and direct him to take the case again on his file and dispose of it according to law.

Case remanded.

EMPEROR *v.* KALI UDAYAN.

(s. c. 9 M. L. T. 406.)

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 677 OF 1910.

(TAKEN UP No. 32 OF 1910.)

February 22, 1911.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Ayling.

EMPEROR—COMPLAINANT

versus

KALI UDAYAN—ACCUSED.

Penal Code (Act XLV of 1860), ss. 362, 366—Abducting with intent to cause defilement.

A person who compels a girl to go with him with intent to have sexual intercourse with her commits an offence punishable under sections 366 and 362 of the Indian Penal Code.

FACTS.—The facts alleged by the prosecution are that while the girl Periyammal (Prosecution 1st witness), her mother-in-law and two other women were cutting thorns at the foot of a hill, the accused came and asked them to go up higher. They refused and the accused then caught hold of Periyammal's cloth from behind and dragged her away. Both the girl and her mother-in-law protested, and the accused threatened them with his knife. The three women then ran away to the village and fetched some other men. They found the accused and Periyammal near the stream. Periyammal ran weeping to join the rescuers and the accused was arrested. The accused was sentenced under sections 396 and 506 of the Indian Penal Code to 6 months' rigorous imprisonment, and to pay a fine of Rs. 60 in default.

ORDER.—We think that the accused, having compelled the girl by force to go away from the place where her mother-in-law was, evidently with the intent to have sexual intercourse with her, his act amounted to an offence under section 366 of the Indian Penal Code read with section 362 of the Indian Penal Code. The sentence is not unduly severe. The record will be returned.

AYYALAMMAI SERVAIGARAR *v.* NALLASAWMAI PILLAI.

(s. c. 9 M. L. T. 407.)

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 208 OF 1907.

December 21, 1910.

Present:—Mr. Justice Krishnaswami Aiyar and Mr. Justice Ayling.

AYYALAMMAI SERVAIGARAR AND OTHERS—DEFENDANTS—APPELLANTS

versus

NALLASAWMAI PILLAI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Assignment—Sham transaction—Burden of proof—Consideration—Practice—Decision on issue of fact—No specific issue framed.

If the parties to a suit adduce evidence on a question of fact and a decision is arrived at thereon, that decision will be good, notwithstanding the question not being put in issue, provided neither party is prejudiced thereby.

The burden of proving the reality of the consideration in the case of an assignment lies on the assignee.

Appeal against the decree of the Subordinate Judge's Court of Trichinopoly, in Original Suit No. 24 of 1905.

JUDGMENT.—We think this is a clear case. Exhibit XV is a mortgage with possession in favour of one Inbanadha. It is found by the Subordinate Judge that this was the self-acquisition of Inbanadha. The mortgage-bond is dated the 23rd September 1893. On the 23rd December 1898 an assignment of this mortgage, which is Exhibit XVI, was executed in favour of the second defendant who was the brother-in-law of Inbanadha. The plaintiffs claim this assignment to be a sham and they sue to recover monies recovered by the second defendant under the mortgage Exhibit XV.

The learned Advocate-General who appears for the defendants argued that no question was raised in the case as to whether Exhibit XVI was a sham and that the Subordinate Judge was not justified in finding that it was a sham in the absence of an issue. Paragraph 7 of the plaint states that the assignment was made without any consideration. It is true paragraph 8 speaks of undue influence having been exercised by the second defendant in obtaining the assignment. But the Subordinate Judge in paragraph 12 of his judgment states that "plaintiffs have adduced evidence to show that Exhibit XVI represented a sham transaction and that the defendants have also adduced evidence to show that the recitals in Exhibit A as to debts due from them to Inbanadha were really false and were introduced for the purpose of satisfying the first defendant in respect of his unjust demands for an excessive share. The matter really then having been present to minds of both parties and evidence having been adduced on both sides we do not think either party has been prejudiced by the form of the issue. Under the circumstances, therefore, the Subordinate Judge was entitled to go into the question as to whether Exhibit XVI was a sham. He has discussed it in a long and exhaustive judgment and, as we agree substantially with the reasons given by him for the conclusion at which he has arrived, it is unnecessary for us to say more than a few words in expressing our concurrence with him. Exhibit XVI purports to have been executed in consideration of the principal and interest due on a sum of Rs. 1,500 contributed by the second defendant for the mortgage, Exhibit XV, a sum of Rs. 383 undertaken by the second defendant to be paid to one Muthumahali and a cash payment of Rs. 1,500 odd made before the Registering Officer. The Subordinate Judge has taken each of these items of consideration and dealt with them in his judgment. We agree with him in holding that they are all fictitious.

As regards the first item of Rs. 1,500 and interest thereon, the matter stands thus. The second defendant was obliged really to finance Inbanadha for the purpose of paying consideration for the mortgage. It was expected that sufficient funds would be forthcoming from Inbanadha's properties. But at the eleventh hour part of the consideration was not available and so the second defendant, the brother-in-law, raised the sum by means of a loan and contributed it towards the consideration for the mortgage. The question is, whether this item remained unpaid down to the date of the assignment, Exhibit XVI, or had practically been paid off by that time. The first argument urged by the learned Advocate-General in this connection is that there is nothing to show that Inbanadha paid off this sum in the shape of receipt or account proving such payment. This, no doubt, is true. But the second defendant had taken no voucher from Inbanadha for his contribution for the mortgage and, therefore, Inbandha's not taking

a receipt from the defendants for the re-payment of second defendant's contribution is not a matter worthy of any remark. They were close relations as observed by the Subordinate Judge, and the second defendant was in a sense *in loco, parentis.* He was senior in age and had been looking after Inbanadha's affairs during his minority. It is hardly likely that in dealing with such a person Inbanadha would have insisted upon a receipt for the payment of the money. The Subordinate Judge has given good reasons for holding that Inbanadha had a Government promissory-note of the face value of Rs. 1,000, and it was intended that that was to be converted into money and the money paid over to the second defendant. That this must have been done seems to be fairly clear from the documents to which the Subordinate Judge has referred. There is a letter, Exhibit G, written by Inbanadha which seems to corroborate the story that the amount of the Government promissory-note should have been appropriated towards the debt due to the second defendant.

We come next to the item of Rs. 383 said to have been due to Muthumahali, the alleged creditor of Inbanadha. There is no evidence of a documentary nature to show that Inbanadha was indebted to Muthumahali. The debt must have grown during the days of Inbanadha's minority in a period of six years. There is neither a promissory-note nor receipt nor any account in support of this indebtedness. The second defendant says that he discharged this debt but he does not produce any receipt for the payment of the amonnt and he produces no other document in support of his story that he paid off this Muthumahali. We must, therefore, regard this item of debt also as fictitious.

Then there is the third item of cash payment before the Sub-Registrar. There is no doubt that this sum was paid in the presence of the Sub-Registrar. But we think there is abundant reason to agree with the Subordinate Judge that the amount was in all probability taken back by the second defendant himself. The Subordinate Judge points out that the second defendant does not explain where he got the money from nor is there any evidence to show what became of this large sum in the hands of Inbanadha. We must, therefore, accept the Subordinate Judge's conclusion that this cash payment also was not a real payment to Inbanadha.

All the three items of consideration thus set out in Exhibit XVI prove on examination to be unreal. The second defendant himself appears to have been in possession of the property as admitted by him in his evidence. He remained in possession from 1893 to 1898 or even till later. He was undoubtedly in receipt of the income of the property. He states that he paid over this income on Inbanadha's demands in consequence of pecuniary needs and that he obtained no voucher for such payment of income to Inbanadha. We think it is much more likely that he took the income himself and appropriated it towards, as far as the income went, his own debt of Rs. 15,000 the amount of his contribution for the mortgage-bond—Exhibit XV. This income coupled with the amount realised by the sale of Government promissory-note would have been quite sufficient to discharge Inbanadha's liability to him in respect of the mortgage bond, Exhibit XV.

The learned Advocate-General then relied on Exhibit IX, which is a letter by Inbanadha to the second defendant within a few days of the execution of Exhibit XVI, wherein he says that the second defendant was to take the income of the lands for that year and to pay to Inbanadha a sum of Rs. 190.

This, the Advocate General argues, is evidence of the reality of the assignment. But we think the document is explicable on the hypothesis that the total amount of Rs. 1 ,500 with the interest thereon was probably discharged only by including the value of the crops then standing on the land on the date of Exhibit IX subject to the payment of Rs. 190 to Inbanadha. However this may be, a document like Exhibit IX coming into existence so soon after the date of the assignment itself would not be of any great value in showing that Exhibit XVI was not a sham. If there was any necessity to keep up certain appearances on the date of Exhibit XVI it must have certainly continued for some little time longer at all events. We, therefore, attach no significance to Exhibit IX.

One argument was addressed to us as regards the motive for sham assignment. It would be difficult, indeed, for us to accept the

evidence of the plaintiff's witnesses as regards the particular motive which they put forward. We think the Subordinate Judge has arrived at the real truth when he surmises that the motive was probably to put what was the self-acquired property of Inbanadha in the name of his brother-in-law lest a share in it should be claimed by his co-parceners who had really no interest in the property. But the crucial circumstances against the truth of the defendant's case is the statement in the partition deed that a sum of Rs. 4,800 odd was due to Inbanadha by the family. This debt falls to the share of the second defendant and it was treated as a real debt against which other debts fall to the share of the first defendant and the other co-parceners. If this sum was not really due by the family to Inbanadha and his heirs it is impossible to reconcile such a statement in the partition-deed with the actual facts. The second defendant attempts a very feeble explanation, and the first defendant who has gone into the box is quite unable to explain how he could have persuaded himself to accept this as a real debt due by the family. The first defendant was undoubtedly given what is called *jeshtabagam*, or an excess in the share, to be allowed to the eldest of the members of the family. It is pretended that the second defendant was not willing to allow this extra share to the first defendant and wanted to neutralise the concession by this fruadulent device or a false debt due by the family, as to the origin of which and as to the evidence in respect of which the first defendant has not told us that he made any inquiry. We cannot, therefore, accept the evidence of these two people—the first and second defendants—as regards how these debts due to Inbanadha came to be included as a family debt in the partition deed. This is almost fatal to the case set up by the defendants.

We agree, therefore, with the Subordinate Judge in holding that Exhibit XVI has been proved to be a sham and that the plaintiffs are entitled to recover the amount sued for which the second defendant has realised from the mortgagor Annasawmi Iyer. We dismiss this appeal with costs.

Appeal dismissed.

(s. c. 1 P. W. R. 1911, Rev.)

COURT OF THE FINANCIAL COMMISSIONERS, PUNJAB.

January 27, 1911.

REVENUE PETITION No. 21, 1910-11.

Present:—Hon'ble Mr. Meredith.

HUKAM SINGH AND OTHERS—APPLICANTS

versus

SHAM SINGH AND OTHERS—OPPOSITE PARTY.

Partition—Mode of partition of shamilat—*Maintenance of possession—Compensation for turning* barani *into* chahi—*Revision—Question of limitation.*

Where *shamilat* is being partitioned the possession of the share-holders therein should be preserved to the extent of their respective shares only. Where, however, a share-holder has sunk a well on his share of such land, thereby altering the nature of it from *barani* to *chahi*, he is, in equity, entitled, by way of compensation, to some portion of it.

A Court of revision can review a finding upon a question of limitation.

Petition for revision of the orders of the Commissioner of Jullundur, dated 4th April, 1910 and 21st June, 1910.

FACTS.—An application for partition of 209 *kanals* and 12 *marlas* of land *khewat* No. 40, *khatauni* Nos. 102 to 124 situated in *mauza* Mirpur, *Tahsil* Jullundur, was decided, in the first instance, by Mr. Sultan Ahmed Khan, Assistant Collector, 1st class of Jullundur, who proposed and sanctioned the mode of partition as laid down in his order dated 19th November, 1909.

Thereon Hukam Singh applied for review but his application was rejected on 28th February 1910.

Hukam Singh and Gulab Singh then appealed to the Commissioner of Jullundur who, on 4th April 1910 dismissed the appeal as time-barred. He was of opinion that the time spent in review could not be deducted in computing the period allowed for an appeal.

An application for review by Hukam Singh and Gulab Singh to the Commissioner of Jullundur, was also rejected on 21st June 1910.

The said Hukam Singh and Gulab Singh at last applied for revision to the Financial Commissioner.

In revision it was contended on behalf of the petitioners that the time spent in review ought to have been deducted in calculating the time allowed for the appeal, and that they were entitled by way of compensation to retain some portion of the land which has been changed into *chahi* from *barani* by

sinking therein a well.

Lala *Hukm Chand*, for the Petitioners.

Bakhshi *Gokal Chand*, for the Respondents.

JUDGMENT.—The question of limitation may be reviewed by this Court acting as a Court of revision. Applicants have been given possession up to their share, in the mode of partition. The only question is whether they should retain possession of more than their share by way of compensation for the well sunk by them which has changed 16 *kanals* 17 *marlas* into *chahi* from *barani*. I think they are equitably entitled to some compensation and that this should take the form of some small additional share of the joint holding. This will be determined by two arbitrators to be appointed by themselves who will appoint an umpire if they cannot agree.

Application accepted and order accordingly. Costs against respondents.

Application accepted.

(s. c. 3 P. W. R. Rev. 1911.)

COURT OF THE FINANCIAL COMMISSIONERS, PUNJAB.

EEVENUE REVISION CASE No. 148 OF 1909-10.

January 17, 1911.

Present:—The Hon'ble Mr. Douie, and
The Hon'ble Mr. Meredith.

WAZIRA AND OTHERS—PLAINTIFFS—APPLICANTS

versus

MANGAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Escheat—Heirless land in a village owned by heterogeneous proprietary body—Government entitled to succeed—Principles applicable in such cases—Proprietary body, right of.

The right of the Crown to claim escheat does not rest on customary law or on Hindu Law, but is based on grounds of general or universal law.

Such right arises only where there is no person entitled by law or by custom to inherit.

The right of the proprietary body as a whole to succeed in cases in which the right of escheat exists, is primarily based on real or assumed relationship to the holder of the land, or to the member of the proprietary body from whom his title was derived.

Such a right should be assumed in the case of homogeneous estates or sub-divisions of estates, where the owners are all or nearly all of the same tribe as the last holder of the land or the member of the proprietary body from whom he derived his title.

Such a right should not be assumed in the case of heterogeneous estates or sub-divisions of estates held by persons of different tribes or different *gots* of the same tribe. The presumption in such cases is that the State has a right of escheat.

When the property in the land was originally derived by gift from a member of the tribe of the original proprietary body, the right of that body should be recognized on failure of the donor's and donee's lines.

In any case in which the *wajib-ul-arz* declares the right of the proprietary body to succeed to the land of heirless owners, Government should set up no claim.

Bhupia v. *Jamna Das*, 80 P. R. 1885; *Lehna* v. *Kishan*, 78 P. R. 1888; *Kirpa Ram* v. *Ude Ram* 77 P. R. 1896; *Shaman* v. *Sardha*, 61 P. R. 1898; and *Harnam Singh* v. *Partab Singh*, 102 P. R. 1906; 129 P. L. R. 1906, relied upon.

Case reported by the Deputy Commissioner, Karnal, under section 16 of the Punjab Land Revenue Act XVII of 1887 with his letter No. 375G, dated 25th February, 1910.

ORDER OF RFFERENCE.

Under section 16 Land Revenue Act, I refer the folllowing case for orders, as there appears to be no definite law or ruling on the subject:—

"One *Musammat* Kishni, widow of Partapa, Jat of Kaliana, *Tahsil* Thanesar, has died and leaves no blood relations of her own or her husband. She owned 82 *bighas*, 4 *biswas* land.

"The tenure of this village is *patidari ghair mukammal*, and the *shamilat deh* is not divided among *pattis*; each owner has a share in the common land according to his holding.

"There is no provision in the *wajib-ul-arz* regarding disposal of land of a proprietor who dies without relations.

"The village was originally occupied by one Munia, Jat. He introduced persons of miscellaneous castes, and finally four *pattis* were created under *lambardars* Dhan Singh, Alman, Mohra and Noda and *shamilat deh* was set apart.

"The land in question was in 1848 owned by one Rai Singh, son of Ramdiya, Jat, and he or his son apparently married the sister of one Sahib Singh, an outsider. When her husband died, the three sons of Sahib Singh succeeded and are shown in Mr. Douie's Settlement as owners. They were Tulsi, Palsa and Partapa. The two latter died childless and *Musammat* Kishni succeeded to the estate when her husband, Partapa, died. She has now died and the question of mutation has arisen.

"There are four so-called *pattis*, *viz.*, Dhan Singh (Jats), Alman (Fakirs and Jat), Nada (Jats and Malis), and Mohra (Arains and Jats).

"The land in question is situate in the Mohra *patti*, and the *Tahsildar*, without any good reason, ordered that mutation should

take place in favour of the Jats of the Mohra *patti*. This is evidently wrong.

"The question is, whether the land should become *shamilat* of the *patti* Mohar, of the whole village, or whether it should be escheat to Government.

"Section 28 of Rattigan's Customary Law (Remark 1) tends to show that it should escheat to Government; but Roe and Rattigan's Tribal Law in the Punjab (page 87, Chapter III, paragraph 5) tends to show that it should pass to the *shamilat deh*. The owners of the *patti* Mohra have no special right as against the general proprietors of the village.

"As these cases are likely to become common, owing to the numerous deaths which have occurred by plague, and, as I believe in other instances, such land has been allowed to pass to the remaining proprietors as *shamilat deh* or *patti*, I refer the matter for orders."

The mutation proceedings are sent herewith.

Mr. *Khark Singh*, for Jats of *patti* Mohra.

R. S. Lala *Narinjan Das*, Government Pleader, for the Crown.

JUDGMENT.—This case relates to mutation of ownership in 82 *bighas* 4 *biswas* in *Mauza* Kaliana of the Thanesar *Tahsil* of the Karnal District. At the Regular Settlement, about 1850, the land was held by one Rai Singh, son of Ramdhiya. Apparently, before the end of that Settlement, Rai Singh died and was succeeded by his son Budha, tribe Jat, *got* Barthal (*khewat* No. 31). In making his reference for revision the Deputy Commissioner stated that Rai Singh or his son Budha married the sister of one Sahib Singh, whose sons became possessed of the holding. To-day it is stated that Budha's mother and Sahib Singh's wife were sisters, and that Sahib Singh belonged to a village in the Amballa District. All his sons died childless, but one left a widow, *Musammat* Kishni, who has now died. The land is in one of the four *pattis* into which the estate is, for revenue purposes, divided, namely, in *patti* Mohra, the owners of which are Jats and Arains. Th Settlement *Tahsildar* found that no one had proprietary possession. He treated as fraudulent a claim put forward by or on behalf of one Devatia, a Jat of a village in *Tahsil* Kaithal, and he ordered mutation in favour of the Jats of *patti* Mohra. The Arains of that *patti* appealed to the Collector on the ground that mutation should have been effected in the names of all the owners of *patti* Mohra irrespective of tribal distinctions. The Deputy Commissioner remarked that the question for decision was, whether the land should be recorded as *shamilat* of *patti* Mohra or should be entered as belonging to Government by escheat. Instead of deciding the appeal, he irregularly reported the original order for revision. The question being one of importance I transferred the case to my own file by an order under section 15 (1) of the Land Revenue Act. I have heard Counsel for the Jat owners and for the Crown.

A glance at the genealogical trees of the Settlements of 1885 and 1909 will show how utterly heterogeneous the proprietary body of this village is. The owners are of several tribes, and even the Jats are of very different *gots* both in the estate as a whole and in *patti* Mohra. In the *khewat* of the Regular Settlement (1855) Budha, from whom the late owners derived their title, was, as I have noted, shown as a Jat, *got* Barthal, and was probably the only landowner of that *got* in the village. Budha's successors had nothing to do with the proprietary body till they were brought into it on Budha's death without male heirs. The account of the founding of the estate given in the note attached to the genealogical tree of the 1885 Settlement is significant,—

"At first the whole area of the village was in the occupation of the Sikhs, and tenants belonging to neighbouring estates cultivated the land. About 125 years ago one Munia, Jat Gil, on account of inconvenience left the old *abadi* near the G. T. road and, with the permission of the authorities of the time came to settle in the village paying no *nazrana* or *malikana*. His pedigree table is not known to the owners (*silsila shajra nasb malikan bata nahin sakte*). He alone remained in possession for a considerable time. Failing to arrange for the cultivation of the whole area, he brought persons of different tribes from the old *abadi* and united them with him in the ownership of the land."

According to the *shajra nasb* of 1885, there are a few Gil Jats in each *patti*, but whether any of them are descendants of Munia we cannot say. Even if they were, it would be difficult to allege that the ancestor of Budha, *got* Barthal, derived his title from a gift by

Munia. The petty Sikh Sardars, who occupied the country after the sack of Sirhind in 1763, no doubt, welcomed any one who would settle and cultivate, and so increase their income.

About 1882 the Government of India made inquiries regarding escheat in the different Provinces of India. A reference was made to the Judges of the Chief Court and minutes by Mr. Justice Barkley and Mr. Justice W. H. Rattigan will be found reproduced in Punjab Government Consolidated Circular No. 9. Mr. Justice Barkely wrote,—

"Escheats are comparatively rare in the Punjab. One reason is that where the land is generally held by village communities, as is the case in this Province, it is the usual practice to recognise the succession of the proprietary body to the lands of proprietors dying without heirs, and this is often provided for in the village administration papers prepared at Settlement. In the southern Punjab under Sikh Rule, when wells rather than villages formed the proprietary units in direct relation with the Government, escheats were more strictly enforced than they are now, and the result was that wells or portions of wells with the lands attached to them often became the property of Government. Mr. O'Brien, while reporting that he can discover only two cases of escheat which have taken place (in the Muzaffargarh District) since British Rule, adds that the British Government at present owns numerous estates in the district which it received from the Sikh and Pathan Governments, to whom they had escheated for want of heirs. A similar state of things exists in the neighbouring district of Multan, though in that district also escheats are now rare, it being stated that no escheats of immoveable property have taken place within the last ten years."

Mr. Barkley then discussed the law on the subject, pointed out that escheat was not one of the matters in regard to which the personal law of the parties is made applicable by section 5 of the Punjab Laws Act and referred to a leading Madras case in which the Privy Council held that the title of the State rested not on the Hindu law of escheat but "on grounds of general or universal law."

Mr. Justice Rattigan quoted further cases, and concluded that "when there is a total failure of heirs the Crown takes by escheat under a general or universal law as paramount power."

In a letter No. 692, dated 28th July 1862, addressed to the Government of India, the Punjab Government remarked,—

"The right of the Crown to succeed by escheat upon a total failure of heirs to all moveable and immoveable property left by Hindus and Muhammadans has always been recognized and asserted in the Punjab." (It then noted what the law as laid down by the Privy Council was.) "Cases of the kind, however, have been comparatively rare. A total failure of heirs is necessarily uncommon under Hindu law and the principle upon which the Revenue Settlement has been made in this Province, renders an escheat of landed property belonging to the agricultural population almost impossible, the general village proprietary body succeeding, as a matter of right, to the estate of any proprietor dying without natural heirs."

Two Delhi, two Rohtak and two Muzaffargarh escheats were noted, the Rohtak cases probably did not relate to land.

The only district in the Punjab in which escheats have been at all common is Kangra. The description of the origin of the tenures of that district given in paragraphs Nos. 150 — 152 of the Settlement Manual shows clearly why this should be the case. A quotation may be given from paragraph No. 2 of Financial Commissioner's No. 6521, dated 30th October, 1906,—

"It is the policy of Government to assert its claim to an escheat only in cases where it is clearly established that there is an entire failure by any person to establish a claim to the succession. In that correspondence it was also established that there was, as a general rule at least no such community of interest between proprietors of a village (in Kangra) as would entitle them to succeed to heirless land as a body, while as regards the proprietors of a *tika* any claim they might have, would be founded on the presumption that they are distant relatives of the last owner, and not on the fact of their being proprietors in the *tika*." With the above may be compared *Shaman* v. *Sardha* (1)

I will now refer to certain cases of escheat elsewhere. In 1892 one of the four *tarafs* of

(2) 61 P. R. 1898.

Mauza Bachewind in Amritsar was supposed to have been left heirless and escheat was enforced, the claim of the headmen to have the land declared to belong to the whole village community being overruled by the Deputy Commissioner [Rev. Pro. (Genl.) No. 18 of August 1892]. The *tarafs* which escheated, were owned by Jats of the Khaira *got*, and the other three *taraf*, by Jats of the Sohal *got*. The case was reported to Government in order that sale might be sanctioned. Meanwhile, however, the Deputy Commissioner discovered heirs of the last owner, and the case was dropped [Rev. Pro. (Genl.) Nos. 1-4 of December 1892]. Here, then, Government claimed an escheat as against the claim of the general proprietary body. In 1897 the Deputy Commissioner of Sialkot ordered escheat of one-fourth of the village of Jhang in the Sialkot District. The village was founded by Rukwal Rajputs, who came from Pahladpur in Jammu. Lala, Rukwal Rajput, was sole owner in 1852, when he sold one-fourth to Mahajans, and one-half to Rukwal Rajputs. The escheat occurred through the failure of heirs to Lala. The claims of certain Rukwal Rajputs of Pahladpur, of the representatives of the Rukwal vendees of one-half the estate (*Tarafs* Shaman and Jholan) of the representatives of the Mahajan vendees of one-fourth (*Taraf* Diwana), and of the *ala malik* of the land, were all disallowed. The facts connected with the escheat were carefully considered by the Financial Commissioner, who held escheat to be proper, and when proposing sale submitted the correspondence to Government. Sale was sanctioned by Punjab Government No. 331, dated 5th June 1897. In 1901 the Deputy Commissioner of Lahore proposed to sell certain land which had escheated in *Mauza* Bath. The Government asked whether the Government title was clear with reference to Consolidated Circular No. 9. The Commissioner replied: "The possession of the land was taken over in 1896-7. Since then no one has come forward and represented his claims to the land. The fact is, that neither *Musammat* Dhanwanti nor her husband had any collateral relatives in the village or its vicinity." The area was small, 42 *kanals*, 5 *marlas*. The order was that the land should be offered to the proprietors of *Mauza* Bath at the estimated value. (Punjab Government No. 1156, dated 23rd November 1901).

An important case bearing on the question is *Kirpa Ram* v. *Ude Ram* (2). A widow of a Kalal having a life interest in land in *Mauza* Amballa executed a deed of gift in favour of her brother's son. After her death the other proprietors in the *thula* claimed to succeed, but the Court held they had no *locus standi*. Two of the cases which the Counsel for the Jats has referred to, *Musammat Rhupia* v. *Jamna Das* (3) and *Lehna* v. *Kishen* (4), were considered. The decision in both was held to be irrelevant, as the claim upheld was in each case based on relationship. Mr. Justice Chatterjee remarked (1),—

"There is also a passage in Mr. Justice Roe's well-known work, "Tribal Law in the Punjab," page 87, in which it is stated that 'when one group of proprietors in a village community becomes extinct their rights pass to the surviving groups, there must always be heirs as long as any member of the community survives.' This is the strongest authority in plaintiffs' favour, but the principle stated in it, is controverted by the learned author of the "Digest of Customary Law." *See* Remarks 1, Section 28, 5th Edition.

On the whole, we do not think that it has ever been definitely decided by this Court that the members of a village community are the ultimate heirs of any co-sharer among them, who dies without heirs, in every instance without regard to the constitution of the village or the facts of the particular case which comes up for decision.

* * * * * *

"Amballa is a town with a heterogeneous class of inhabitants and the owners of *Patti* Kalalan are also a mixed body. One *thula* consists of Jat proprietors of four different *gots*. The three Kalal *thulas* have owners belonging to six *gots*, and the division into *thulas* appears to have been made for revenue purposes, and is not based on ancestral connection among the land-holder.

* * * * * *

"The tenure of the village is stated in the *Wajib-ul-arz* of 1852-53 as *kabzawar* and it is recited that there is nothing held in common

(2) 77 P. R. 1896.
(3) 80 P. R. 1885.
(4) 78 P. R. 1883.

in the entire *patti* but 54 *bighas* of *shamilat* land. In our opinion it would be difficult to hold that the owners of *Patti* Kalalan of the city of Amballa are such a compact and homogeneous community that the rule of succession set up by the plaintiffs must be presumed among them in the absence of affirmative evidence on the present record.

* * * * * *

"The defendant Ude Ram is in possession and plaintiffs in order to recover the land from him must show a superior right. This they have failed to do."

In this case, therefore, it was held that the *thuladars* had no title to contest a gift which was *prima facie* invalid. It follows clearly, that if the State had claimed escheat, the *thuladars* could not have contested the claim.

Shaman v. *Sardha* (1) is a similar case relating to the Kangra District. It was maintained that "under circumstances like the present the proprietary body of the village or of the sub-division in which the land is situate are by the general custom of the Punjab entitled to succeed on the death of the widow, and that they have in consequence a sufficient *locus standi* to contest the widow's alienation." As to this Mr. Justice Chatterjee remarked,—

"With reference to the first point we are unable to accede to the contention that there is a universal custom of the kind mentioned in the Punjab. The authorities on the subject are conflicting. They are all collected and reviewed in *Kirpa Ram* v. *Ude Ram* (2) and the conclusion arrived at was that no such general rule could be laid down. Counsel insists that this is an error, but we are unable to agree with him. Admittedly, the authorities are not agreed on the point and opinions in support of appellant's view are opposed by others entitled to equal weight affirming the contrary. It appears to us difficult to lay down a rule of general application in a matter of this kind merely upon *a priori* grounds. Much would depend upon the facts of each case and the constitution of the village. In a village held on a strictly tribal tenure, or in which the community is a compact one, the probability is that heirless land would be taken possession of by the tribesmen or the community, and that strangers would be excluded. It would, perhaps, be reasonable to presume even in the absence of actual instances that in the past, and particularly in unsettled times, they were able to assert and enforce this right with the support of public opinion, and if necessary by physical force. The right of escheat would have an historical foundation in such communities. But no such inference can be drawn where the proprietors are a heterogeneous body, and where possession is essentially the measure of right. Here the right of escheat ought to be affirmatively established by cogent evidence. It would not always be safe to assume the existence of such right merely because under the existing revenue system there is a joint liability for revenue, or where such land exists, because there is some common waste land for pasture and other purposes. In many cases, as shown in *Kirpa Ram* v. *Ude Ram* (2), it was found on actual inquiry that the right did not exist. Considering the diverse character of village tenures in this Province, it is obviously unsafe to formulate a general rule on the subject of escheats to village proprietors. We, therefore, see no good reason to differ from the view taken in the case above cited."

In *Harnam Singh* v. *Partab Singh* (5) the principle laid down in *Kirpa Ram* v. *Ude Ram* (2) was applied. Mr. Justice Lal Chand remarked,—

"In the present case the tenure of the village concerned is *bhaiachara*, the proprietary rights are held by a heterogeneous body of miscellaneous tribes, and the plaintiffs are Rors by caste, while Nanna, whose property is in dispute, was a Jat. There is, therefore, no reason for holding that the constitution of the village or the facts of the case raise any sort of initial presumption to support plaintiff's allegation of succession by reversion." It follows that, assuming Nanna really to have left no relations having a right to claim his land, Government was entitled to his land by escheat.

The following propositions may, I think, be laid down on the subject of escheats to the Crown:—

(1) The right of the Crown to claim escheat rests not on Customary or Hindu Law, though Hindu Law recognizes escheats, but on grounds of general or universal law.

(2) The right can only arise in the

(5) 102 P. R. 1906; 129 P. L. R. 1906.

absence of relations entitled by law or custom to inherit.

(3) The right of the proprietary body as a whole to succeed in cases, in which it exists, is primarily based on real or assumed relationship to the holder of the land, or to the member of the proprietary body from whom his title was derived.

(4) Such a right should be assumed in the case of homogeneous estates or sub-divisions of estates, where the owners are all or nearly all of the same tribe as the last holder of the land or the member of the proprietary body from whom he derived his title.

(5) It should not be assumed in the case of heterogeneous estates or sub-divisions of estates held by persons of different tribes or different *gots* of the same tribe. The presumption in such cases is that the State has a right of escheat.

(6) When the property in the land was originally derived by gift from a member of the tribe of the original proprietary body, the right of that body should be recognized on failure of the donor's and donee's lines.

(7) In any case in which the *wajib-ul-arz* declares the right of the proprietary body to succeed to the land of heirless owners, Government should set up no claim.

It should be assumed in dealing with all such cases that Government will recognize the right of the proprietary body to succeed, where it can set up any sort of probable title. Where escheat is clearly claimable it should be enforced. But in that case it will usually be right to propose sale of the land at its market-value to a member of the proprietary body or to the proprietary body as a whole. In the present case escheat was certainly claimable and the land will be recorded as Government property.

Question referred; answered accordingly.

(s. c. 4 P. W. R. Rev. 1911.)

COURT OF THE FINANCIAL COMMISSIONERS, PUNJAB.

REVENUE PETITION No. 40 OF 1909-10.

November 9, 1910.

Present:—The Hon'ble Mr. Douie.

BODHA RAM AND OTHERS—PLAINTIFFS—APPLICANTS

versus

NET RAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Khudi kamini—*Right of* Brahmans *of* mauza *Sangal*, tahsil *Kaithal*, *to* $\frac{1}{4}$*th of* khudi kamini *or hearth tax*—*Revision*—*Punjab Land Revenue Act* (*XVII of* 1887), *s.* 16.

Brahmans of *mauza* Sangal, *tahsil* Kaithal, are entitled to receive from the *Lambardars* of that place $\frac{1}{4}$th of the *khudi kamini* or hearth tax collected by them.

An order of a Revenue Court re-opening a question which is *res judicata* between the parties is liable to be set aside on revision under section 16 of Act XVII of 1887.

Petition for revision from the order of the Collector, Karnal, dated 23rd April, 1909, confirming the order of the Assistant Collector, 1st Grade, Kaithal, dated 11th November, 1908.

FACTS.—This claim was for Rs. 27-8 on account of *khudi kamini* and grazing dues, being the amount of $\frac{1}{4}$th share in the *shamilat* profits for the years 1906-1907 and, on 11th November 1908, was decided in the first instance by C. C. Garbett, Esquire, Assistant Collector, 1st grade, of Kaithal, who ordered that the claim be dismissed with costs. On 23rd April 1909 plaintiffs' appeal to the Collector of Karnal was also dismissed with costs.

Thereon Bodha Ram, and others, plaintiffs, applied to the Commissioner of Delhi for revision of the Collector's order, dated 23rd April 1909, who, on 8th December 1909, accepted the application and sent this file to the Financial Commissioner, Punjab, recommending revision of the Collector's order.

Mr. *Daulat Ram*, for the Petitioners.

Mr. *Harris*, for the Respondents.

JUDGMENT.—This case has been reported by the Commissioner of Delhi with a recommendation that I should revise the order of Mr. Garbett dismissing the claim made by the *Brahmans*, owners of *mauza* Sangal, to a share in the *khudi kamini* dues. Mr. Garbett's order makes no allusion to the case decided in 1907 on appeal by the Deputy Commissioner, Mr. Henriques, in which the

same question was in issue. The decision was in favour of the *Brahmans*. The *Brahmans* ought specifically to have called the attention of the Court to that judgment. If the proceedings before Mr. Garbett had been more formal and deliberate the real facts would probably have come out. The whole case is *res judicata* and Mr. Garbett's order cannot stand. I note that the question of the right to *khudi kamini* was alluded to in the inquiry which took place in 1856 as to the extent of the rights of the *Brahmans*. Several witnesses, including one who had been *patwari* for 12 years, said they shared in the *khudi kamini*, and the Deputy Collector referred in his report to their right to take a share in the hearth tax. I cancel the order of the Assistant Collector, Mr. Garbett, hold that the question of the *Brahmans'* right to $\frac{1}{4}$th of the *khudi kamini* is *res judicata*, and remand the case for decision as to what $\frac{1}{4}$th of the *khudi kamini*, to which the *Brahmans* are entitled amounted to. Respondents will pay appellants' costs which I fix at Rs. 10, having regard to the petty nature of the claim and the facts that the case is not an appeal but one reported by the Commissioner.

Revision allowed.

(s. c. 2 M. W. N. 303.)

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 549 OF 1909.

February 2, 1911.

Present:—Mr. Justice Wallis and Mr. Justice Sankaran Nair.

MUTHU KUMARA MUDALIAR AND OTHERS—DEFENDANTS—APPELLANTS

versus

PALANIAPPA CHETTIAR AND OTHERS—PLAINTIFFS—RESPONDENTS.

Trust—Hereditary trusteeship—Removal of present trustees—Minor successor—Appointment till minority.

The dismissal of a trustee for the time being on account of gross neglect and violation of the trust does not entail a forfeiture of the hereditary office which descends to the next heir, if of full age. If the next heir is a minor, some other trustee will be appointed until the minor attains majority.

Samasundara Mudaliar v. *Vythilinga Mudaliar*, 19 M. 285, referred to.

Second appeal against the decree of the District Court of Tanjore in Appeal Suit No. 132 of 1907, presented against the decree of the Court of the District Munsif of Tiruturaipundi in Original Suit No. 19 of 1907.

FACTS.—The plaintiffs, as the trustees of the Thiruwangur temple, which is under the management of the *Negapatam Devasthanam* Committee, brought the suit for the removal of the defendants Nos. 1 to 5 from the trusteeship of an endowment for certain specific religious purpose on the ground that they had neglected to carry out, and otherwise violated, the trust. The endowment was made by one Suppa Mundali by a Will which declared that one Arunachala, the father of defendants Nos. 1 and 2, and grandfather of defendants Nos. 3 to 5, and his heirs should cultivate the land, and after deducting for *varam* and other expenses 32 *kalams* out of every 100 *kalams* of outturn, and paying off the Government dues, should carry out the trust along with the 11th defendant. The charge against the defendants was neglect of duty and treating the trust property as their own and diverting the income thereof for their private use. It was admitted by the defendants that, after plaintiffs became the trustees of the plaint temple, they have not carried out the trusts. Defendants Nos. 1 to 5, 10 and 12 pleaded that the plaintiffs had no right or interest to maintain the suit; that section 539 of the Civil Procedure Code was a bar to the maintainability of the suit that they were not liable to be ejected under the terms of the Will; that they were conducting the charities mentioned in the Will till plaintiffs were appointed trustees and that plaintiffs obstructed them from performing certain trusts. The District Munsif found that defendants Nos. 1 and 2 have grossly violated the trusts and decreed that defendants Nos. 1 to 5 be removed, and that the plaintiffs and 11th defendant be appointed trustees. Defendants Nos. 1 to 3 appealed to the District Judge.

The District Judge on appeal modified the decree of the lower Court by appointing a guardian, other than defendants Nos. 1 and 2, of the 3rd defendant also a trustee along with the others. The defendants Nos. 1 to 5 appealed to the High Court.

Mr. *S. Muthia Mudaliar*, for the Appellants.

VENKATACHALA PILLAI *v.* TALUK BOARD, SAIDAPET.

Mr. *C. V. Anantakrishna Iyer*, for the Respondents.

JUDGMENT.—We are not prepared to interfere with the dismissal of the first and second defendants. That dismissal, however, does not work a forfeiture of the hereditary office which descends to the next heir, if of full age. In this case the defendants Nos. 3 to 5 are minors, and following the decision in *Samsundara Mudaliar* v. *Vythilinga Mudaliar* (1), we appoint the plaintiffs trustees until one of the defendants Nos. 3 to 5 attains majority when he will become the trustee. The defendants are now divided into two branches and when there is an adult in each branch the two branches will be entitled to share the trusteeship as they may arrange or in turns of a year each as held in O. S. No. 52 of 1907. In other respects, we confirm the decree of the lower Appellate Court. The respondent's costs will be paid out of the trust estate.

Decree modified.

(1) 19 M. 285.

(S. C. 2 M. W. N. 304; 21 M. L. J. 305.)

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 13 OF 1908.

February 9, 1911.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Sundara Nair.

T. VENKATACHALA PILLAI AND ANOTHER—DEFENDANTS—APPELLANTS

versus

THE TALUK BOARD, SAIDAPET, REPRESENTED BY THE PRESIDENT—PLAINTIFF—RESPONDENT.

Trust—Religious trust, what constitutes—Madras Local Boards Act (V of 1884), s. 51—Power of Board of Revenue to make over management to Local Board—Power to dismiss trustee—Management made over without dismissing trustee—Validity—Regulation VII of 1817—Powers of Board of Revenue under that Regulation—Transfer to Taluk *Board of the charity properties—Rights of the Local Board under the order of transfer.*

A., a female, constituted three properties, one a *chattram* and two houses, as endowments for carrying out certain charities, *viz.*, (1) to feed 12 Brahmans on *Dwadasi* day in the *chattram* building, (2) to perform *archana* to the goddess in a temple at the cost of one rupee every Friday and (3) to supply *neer moru*, etc., to persons attending the festival of *Molugadi servari* in Tirnvottiyur. She appointed the 1st defendant as trustee along with two others. On his failure to carry out the trust and on his alienating the property to defendants Nos. 2 and 3, the Board of Revenue, acting under Regulation VII of 1817, vested the management of the properties in the *Taluk* Board, Saidapet, without passing an order removing the 1st defendant from office:

Held, that the trust was not of a religious character. The distribution, no doubt, was to be amongst those who attended the festival in the temple but it was not to be an offering to the deity, and it was not any ceremony which was part of the temple festival itself. The small provision for making *archana* would not make the trust a religious one.

Regulation VII of 1817 and Act XX of 1863 are applicable to endowments made both before and after the said enactments.

Sivayya v. *Rami Reddi*, 22 M. 223, followed.

The Board of Revenue had no power to transfer the management of the trust without first dismissing the trustee then in office.

Ganapati Ayyar v. *Sri Vedavyasa Alagasinga Bhattar*, 29 M. 534; 16 M. L. J. 435; 1 M. L. T. 127, *Sheik Davud Saiba* v. *Husain Saiba*, 17 M. 212, followed.

Venkatesa Nayadu v. *Shirman Shatagopa Shri Shata-Jopa Swami*, 7 M. H. C. R. 77, referred to.

Under section 51 of Act V of 1884, the Board of Revenue has the power of making over the management of a trust to a Local Board in exercise of its right of superintendence. The Board of Revenue is empowered to make over to a local body both the management and superintendence.

The Chairman Municipal Council, Rajamundry v. *Susurla Venkateswarulu*, 31 M. 111; 3 M. L. T. 241, *Nilaythakshi Ammal* v. *Taluk Board of Mayuvaram*, 20 M. L. J. 885; 1 M. W. N. 12; 8 M. L. T. 341; 8 Ind. Cas. 488, relied upon.

The Board of Revenue can dismiss a trustee for misconduct.

Appeal against the decree of the District Court of Chingleput in O. S. No. 3 of 1905.

FACTS.—The Taluk Board, Saidapet, sued to recover form defendants Nos. 2 and 3 certain properties, *viz.*, two houses and the *chattram* forming endowment of a *chattram* in the following circumstances. One Kanagammal executed a Will by which she constituted three properties, one the *chattram* and two houses as endowments for carrying out certain charities, *viz.*, (1) to feed 12 Brahmins on *Dwadasi* day in the *chattram* building, (2) to perform *archana* to the goddess in a temple, (3) to supply *neer moru*, etc., to persons attending the Mohlugadi Servai at Tiruvottiyur and appointed the first defendant, one Paupiah Chetty, and two others as trustees to carry out the charities. For some time first defendant managed the properties. Subsequently, he mismanaged and was also convicted of an offence. On his alienating the endowments to defendants Nos. 2 and 3, the Board of Revenue interfered, and on inquiry passed an order vesting the properties in the Taluk Board, Saidapet, under sec-

tion 51 of Act V of 1884, without *passing an order removing the 1st defendant from office.* On the strength of that order, the Taluq Board now sued to recover from defendants Nos. 2 and 3, the charity properties in their possession. The District Judge gave a decree for the plaintiff. The 2nd defendant now appeals to the High Court.

Mr. *T. R. Venkatarama Sastriar*, for the Appellants.

Mr. *C. F. Napier*, for the Respondent.

JUDGMENT.—In this case the Taluq Board of Saidapet sues for recovering possession from the defendants of three items of property, alleging that they are trust properties, the first item being a *chattram*, and items Nos. 2 and 3 being two houses endowed for the use of the *chattram*. One Kanagammal by her Will dated the 25th February 1885 directed that twelve Brahmins should be fed on every *Dwadasi* day in the *chattram* building, item No. 1, by means of the proceeds of the properties, items Nos. 2 and 3. She also directed that a sum of one rupee should be spent on every Friday for performing *Archana* to the goddess in a temple. The balance, after deducting the expenses of feeding, was to be devoted under the provisions of the Will to defray the expenses of giving *neer moru* or butter milk, *Tambulam* or betel and nuts, fans and sugar to people attending the festival of *Molugadi Servai* in Tiruvottiyur. She appointed three executors to her Will but directed that Paupiah Chetty, who was the first defendant in the suit and with whom she was living either as wife or as a concubine, should conduct the charities, the other executors being given a right of interference in case Paupiah should be guilty of mismanagement. The second and third defendants in the suit are persons to whom Paupiah alienated by mortgage and sale the two houses, items Nos. 2 and 3 in August and June 1889. The plaint alleges that Paupiah although he accepted the trust under the Will, and "discharged it faithfully for some years," afterwards grossly abused his trust and alienated the properties as mentioned above, and that he was prosecuted for criminal breach of trust and convicted of that offence. In August 1899 he executed a power-of-attorney in favour of the 2nd defendant. Although in the power-of-attorney he treated item No. 1, choultry, as his own property, he directed the second defendant to conduct the charity therein. Complaints of misappropriation having been made by some members of the public in 1900 to the Collector of Chinglepet, an inquiry was held and it resulted in the Board of Revenue resolving to take proceedings for the proper management of the trust. The plaint alleges (paragrah No. 12) "that the Board of Revenue, with the written consent of the Governor in Council transferred to the Taluq Board the management of item No. 1 together with its endowments with power to file suits against the alienees of the trust properties and recover possession of the same." Paupiah, the first defendant, died after the institution of the suit and the 4th and 5th defendants were brought on the record in the suit as his legal representatives. They did not, however, put in an appearance and the suit was tried *ex parte* as against them. The second and third defendants resisted the suit and raised various pleas. They contended that there was no real trust at all, and that the properties really belonged to Paupiah and not to Kanagammal, and that they were purchased in her name in order to screen them from Paupiah's creditors. They also contended that they were *bona fide* purchasers for valuable consideration from Paupiah without notice of the trust, and that the alienations could not, therefore, be disputed by the plaintiff. They denied that the Board of Revenue had any right to make over the management of the charity to the Taluk Board. And they contended, further, that the charities, if any, were of a private character and not public. It is unnecessary to refer to other pleas raised by them, as we have not got to deal with them in this appeal.

The first issue framed in the case was, "whether the plaintiff has any *locus standi* to maintain the suit." The District Judge decided it in the affirmative. On the merits the District Judge held that Kanagammal was the owner of the properties and negatived the contention that the properties were purchased in her name to screen them from the creditors of Paupiah. Although the point was raised again before us at the hearing of the appeal, we have no hesitation in agreeing with the lower Court in its finding that the properties belonged to Kanagammal and that the trust was a genuine and valid one. No serious attempt was

made to refute the arguments urged by the lower Court in its elaborate judgment on this point. The finding of the Judge that neither the second nor the third defendant was a *bona fide* purchaser for valuable consideration was not controverted at the hearing and it is clearly correct.

The main question argued at the hearing was that raised by the first issue, whether the Revenue Board's order making over the management of the choultry to the plaintiff was legal and valid. Mr. Venkatrama Sastriar contended that the trust must be regarded mainly as a religious one, and that the Board had, therefore, no jurisdiction over it. He urged that the distribution of *neer moru*, etc., to people attending the festival at Tiruvottiyur should be regarded as a religious charity. We are clearly of opinion that this contention is not correct. The distribution, no doubt, is to be amongst those who attend the festival in the temple, but it is not to be an offering to the deity and it is not any ceremony which is part of the temple festival itself. The learned Vakil did not contend that the small provision for making *archana* every Friday to the goddess would make the trust a religious one. We, therefore, confirm the finding of the lower Court that the trust is not religious in its character.

The next ground of objection is that, as the endowment in this case was not one made before the coming into operation of Regulation VII of 1817, its provisions are not applicable and the Board of Revenue had no jurisdiction over the endowment. Reliance is placed mainly on the preamble to the Regulation and sections 2, 3 and 4. The preamble sets out the reasons for the enactment of the Regulation and states that considerable endowments *have been* granted both by the past and present Governments of the country and by individuals for the support of mosques, temples, &c., that there are grounds to believe that the produce of *such* endowments is in many instances being misappropriated, and that it is the duty of the Government to prevent such misappropriation. It is contended that the use of the expressions "have been" and "such endowments" shows that the Regulation was intended to be applicable only to endowments already existing. We do not think so. No reasons has been suggested for restricting the Regulation to existing endowments. It is admitted that the mischief intended to be rectified would equally apply to future endowments. The preamble merely states the reasons which induced the Legislature to enact the Regulation. No inference can be drawn therefrom that it is intended to confine the enactment, without any apparent reason, to existing endowments. Moreover, we are of opinion that the enacting portion of the statute is sufficiently clear to cover future endowments. Section 2 vests the general superintendence of all endowments in land or money *granted* for the support of *mosques*, etc., in the Board of Revenue. We can see nothing in the use of the word "granted" to justify the interpretation of it as applicable only to what had already been granted before the passing of the Regulation. Section 3 directs the Board of Revenue to take measures "to ensure that all endowment made.....are duly appropriated to the purpose for which they *were* destined by Government or the individuals by whom such endowments *were* made." The use of the past tense "were" is much relied on by the appellant's Vakil as well as the reference in the section to "public edifices which *have been* erected." We are of opinion that these words were used as applicable at the time when the Board of Revenue would be called upon to take action. Happier language might, perhaps, have been used to denote the intended meaning regarding which we entertain no doubt; but we have to construe an old statute, and it is clear to us that it would not be reasonable to place on it the restricted interpretation suggested for the appellant. Our opinion is in accordance with the view expressed by Subrahmania Aiyar, J., in *Sivayya* v. *Rami Reddi* (1) with reference to the construction of Act XX of 1863, although the point was not decided in that case. It is admitted that in several reported cases it was assumed that Regulation VII of 1817 and Act XX of 1863 are applicable to endowments made after the Regulation as well as to prior endowments. We overrule this contention.

The next point urged was that, assuming that the trust is not a religious one and that the Regulation is applicable to prior endowments, the Board of Revenue had still no jurisdiction to make over the management

(1) 22 M, 223.

to the Taluk Board on two other grounds. It was first urged that under Regulation VII of 1817 the Revenue Board possesses only a right of superintendence and that it has no right of management itself and could not, therefore, make over the right of management to the Taluk Board. It was further argued that the trusteeship would descend to the heirs of the deceased first defendant, and that, if it would not, the heirs of the founder Kanagammal would be entitled to appoint a fresh trustee. We do not think that these latter contentions are well-founded; but we do not think it necessary to decide these questions as we have come to the conclusion that the appellant is entitled to succeed on another ground, *viz.*, because the Board of Revenue had no power to transfer the management of the trust without first dismissing the trustee then in office.

It is admitted in the plaint (paragraph No. 4) that the "first defendant accepted the trust and " discharged it faithfully for some years" and Exhibit J, the power-of-attorney executed by him to the second defendant in 1899, enjoined him to conduct the charity in the *chattram*. It is true that the second and third defendants have contended in the suit that there was no real trust, but the first defendant having accepted the trust would remain, in our opinion, trustee until he was dismissed by a competent authority. The Board's order was passed under section 51 of the Madras Local Boards Act V of 1884. That section empowers the Board of Revenue "with the written consent of the Governor in Council and of the Local Board concerned to make over to such Local Board *the management and superintendence* of any such endowment and thereupon all powers and duties that attach to the Board of Revenue in respect thereof shall attach to such Local Board as if such Board had been specifically named in the said Regulation," *i. e.*, under Regulation VII of 1817. The Board of Revenue under the provisions of Regulation VII of 1817 undoubtedly had power to appoint trustees for charitable endowments in certain cases. Section 13 of the Regulation invests the Board with power to make the appointment in the cases referred to in sections 11 and 12. Section 11 provides that the local agents appointed under the Regulation shall report to the Board all vacancies and casualties which may occur and are required to furnish the Board with the information necessary to enable it to determine the rule of succession applicable to each case. Section 12 provides that in cases in which the nomination has usually rested with the Government or with a public officer or in which no private person may be competent and entitled to make sufficient provision for the succession to the trust and management, the local agents are to propose proper persons for the office of trustee, manager, or superintendent for the approval and confirmation of the Board, and the Board, according to section 13, is then entitled either to appoint the person or persons nominated for their approval or to make such other provision for the trust, management or superintendence as may seem to them right and fit with reference to the nature and conditions of "the endowment etc." It, however, seems to us clear that the Board has no power to ignore the rights of a person lawfully in office as trustee and to appoint another person in his place without dismissing him. In *Venkatesa Nayadu* v. *Shirman Shatagopa Shri Shatagopa Swami* (2) it was, no doubt, recognised that "section 13 gives the Board of Revenne the largest power of making any arrangement which the Board may consider best adapted to secure the purposes which the Regulation had in view in cases of vacancy." In *Ganapati Ayyar* v. *Sri Vedavyasa Alagasinga Bhattar* (3) Subrahmania Aiyar and Benson, JJ., held that the Board of Revenue had power to appoint a hereditary trustee where such appointment would not interfere with the rights of any existing trustee but had no power to subsequently appoint additional trustees so as to affect his rights of management without good and sufficient ground for so doing." In *Sheik Davud Saiba* v. *Hussain Saiba* (4), referred to in the above case, it was laid down that a committee appointed under Act XX of 1863 whose powers of superintendence are similar to those of the Board of Revenue under Regulation VII of 1817, cannot appoint additional trustees where there is a hereditary trustee. These cases recognise the

(2) 7 M. H. C. R. 77.
(3) 29 M. 534; 16 M. L. J. 435; 1 M. L. T. 127.
(4) 17 M. 212.

principle that the Board cannot ignore the rights of existing trustees, and in this respect, we think there is no difference between a hereditary and a non-hereditary trustee who is equally entitled to a freehold office. It appears, therefore, to be clear that the power of the Board of Revenue to appoint trustees cannot be exercised to the prejudice of one who is in possession of the office under the instrument creating the trust. It is unnecessary to consider the argument urged by the learned Vakil for the appellant that the Board had no power to manage the charity itself, for it is clear that, even if that were so, it is entitled under section 51 of Act V of 1884 to make over to a Local body not only its power of superintendence but also the management of any endowment. This power of making over the management to a Local Board would only be an exercise of the Board's right of superintendence, and the section apparently empowers the Board to make over to a Local Board both the management, in virtue of its right of superintendence and its own right of superintendence. This was expressly decided in *The Chairman, Municipal Council, Rajamundry* v. *Susurla Venkateswarulu* (5) by Miller and Munro, JJ., with reference to a similar provision in the District Municipalities Act IV of 1884, section 26, and by Benson and Krishnasawmi Aiyar, JJ., in *Nilaythakshi Ammal* v. *Taluk Board of Mayavaram* (6), where the question arose with respect to section 51 of Act V of 1884. The order of the Board of Revenue in this case would clearly have been valid if the first defendant, Paupiah, had been dismissed by the Board. They had the power to dismiss him and there can be no doubt that Paupiah's misconduct would have fully justified his dismissal. But, as stated above, we are unable to hold that it had the right to pass orders transferring the management under section 51 of Act V of 1884 while the first defendant was still trustee and there was no vacancy with respect to the office. The first defendant, the trustee, having died since the institution of the suit and his representatives the 4th and 5th defendants, having no right under the Will to succeed to his right of management, it will, no doubt, now be open to the Board of Revenue to transfer the management to the Local Board under section 51 of the Act.

But, for the reasons we have given above, we are constrained to hold that the *Taluk* Board obtained no valid rights under Exhibit C series which would entitle it to sue for the recovery of the properties, and we must reverse the judgment of the lower Court and dismiss the suit but without costs in the circumstances of the case.

Appeal allowed.

(5) 31 M. 111; 3 M. L. T. 241.

(6) 20 M. L. J. 885; 1 M. W. N. 12; 8 M. L. T. 331; 8 Ind. Cas. 488.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 200 OF 1910.

February 17, 1911.

Present:—Mr. Justice Mookerjee and Mr. Justice Teunon.

BASIRAM MALO—PETITIONER—APPELLANT

versus

KATYANI DEBI—OPPOSITE PARTY—RESPONDENT.

Attachment before judgment—Objection on ground that property not saleable, if to be taken when attachment is made—If not taken then, whether investigation of question is barred—Civil Procedure Code (Act XIV of 1882), ss. 266, 483, 487.

When an application is made for attachment before judgment, a defendant is not, at that time, obliged to take exception to the validity of the attachment on the ground that the property is not transferable. If he takes that objection after a decree is passed, the investigation of the question is not barred for the reason that he omitted to take it before.

Mungul Pershad v. *Grija Kant*, 8 I A. 123; 8 C. 51; 11 C. L. R. 113; *Durga Charan* v. *Kali Prosonna*, 26 C. 727; 3 C. W. N. 586; *Sheikh Murulla* v. *Sheikh Burulla*, 9 C. W. N. 972; *Coventry* v. *Tulsi Prasad*, 8 C. W. N. 672 and *Dwarkanath* v *Tarini Sankar*, 34 C. 199; 11 C. W. N. 513; 5 C. L. J. 294, distinguished.

Appeal from the order of the District Judge of Dacca, dated February 5th, 1910, affirming that of the Munsif of Naraingunge, dated October 6th, 1909.

Babu *Rajendra Chandra Guha*, for the Appellant.

Dr. *Sarat Chandra Basak*, for the Respondent.

JUDGMENT.—This is an appeal against an order by which the Court below, in concurrence with the Court of first instance, has overruled without any investigation an objection by the judgment-debtors that the property sought to be sold in execution of a

BASIRAM MALO v. KATYANI DEBI.

decree for money obtained against them is not transferable. The learned Judge has held that an investigation of this question is barred by the omission of the judgment-debtors to urge the objection when the property in question was attached before judgment. The question is one of some novelty; but upon an examination of the provisions of the Code we feel no doubt as to the manner in which it ought to be answered. The contention of the decree-holder is to the effect that when an application is made by a plaintiff for attachment of the property of the defendant before judgment, it is the duty of the defendant to take exception to the attachment on the ground that the property is not saleable within the meaning of section 266 of the Code of 1882. It has been argued, on the other hand, on behalf of the judgment-debtors that the only question before the Court at this stage is, whether circumstances have been established such as would justify the grant of attachment before judgment, and that the question of the true character of the property sought to be attached need not be investigated till a decree has been obtained by the plaintiff by virtue of which he becomes entitled to proceed with execution on the basis of the attachment before judgment. In our opinion, the scope of the investigation by the Court when an application is made for attachment before judgment is defined by section 483 of the Code of 1882. The plaintiff, before he can obtain an order for attachment before judgment, must satisfy the Court that the defendant is about to dispose of the whole or any part of his property or to remove the same from the jurisdiction of the Court in which the suit is pending or has quitted the jurisdiction of the Court leaving therein property belonging to him. If the Court is satisfied that these elements exist, the defendant is to be called upon to furnish security, and upon his failure to furnish the security demanded, his properties are to be attached at the instance of the plaintiff. That attachment, however, is of no assistance to the plaintiff till he obtains his decree. If he is ultimately unsuccessful, under section 488 the attachment has to be withdrawn. If he is successful, section 490 provides that re-attachment is unnecessary in execution of the decree obtained by him. But there is no foundation for the contention of the respondent that an attachment before judgment and an attachment in execution stand precisely on the same footing for all purposes. The destinction between attachments of these two descriptions was lucidly explained by Mr. Justice Dwarkanath Mitter in the case of *Sri Rammonik* v. *Tincouri Rai* (1). The learned Judge pointed out that the object for which the two kinds of attachment are made are entirely different. An attachment prior to decree is not an attachment for the enforcement of the decree, but it is a step taken merely for the purpose of preventing the debtor from delaying or obstructing such enforcement when the decree subsequently passed shall be subject to be executed. An attachment after decree is, on the other hand, an attachment made for the immediate purpose of carrying the decree into execution and it presupposes an application on the part of the decree-holder to have his decree executed. The learned Vakil for the respondent has, however, contended on the authority of the decision of the Judicial Committee in the case of *Mungul Pershad Dichit* v. *Grija Kant Lahiri* (2), and upon the decision of this Court in the cases of *Durga Charan* v. *Kali Prasanna* (3), *Sheikh Murulla* v. *Sheikh Burulla* (4), *Coventry* v. *Tulsi Prasad* (5) and *Dwarka Nath* v. *Tarini Sankar* (6), that the omission of the defendant to take exception to the validity of the attachment on the ground that the property sought to be attached is not transferable at the time when the application is made for attachment before judgment, operates as a bar to the investigation of the objection when an application has been made for execution of the decree made in the suit. The cases relied upon are clearly distinguishable. They are cases in which applications have been made for execution of subsisting and enforceable decrees, and it has been held that when, in proceedings in execution of such a decree, an order for attachment has been made without any objection its validity cannot subsequently be questioned by the judgment-debtor. In this class of cases, it is obvious that. if exception is not taken to the attachment, the next step in execution must necessarily follow; that is, an order for sale of the property

(1) 4 B. L. R. 63 at p. 67 (F. B.)
(2) 8 I. A. 123; 8 C. 51; 11 C. L. R. 113.
(3) 26 C. 727; 3 C. W. N. 586.
(4) 9 C. W. N. 972.
(5) 8 C. W. N. 672.
(6) 34 C. 199; 11 C. W. N. 513; 5 C. L. J. 294.

attached must be made. Consequenty, if the judgment-debtor contends that the property is incapable of attachment because it is not transferable, the proper stage at which the objection can be urged is when the application for attachment is made. In the case before us, however, no steps could possibly be taken on the basis of the attachment before judgment till a decree had been made in favour of the plaintiff. In our opinion, it would be a needless hardship on the judgment-debtor if he was obliged, at the stage when an application was made for attachment before judgment, to take exception to the validity of the attachment on the ground that the property was not transferable. It has not been disputed that if this contention prevailed and an investigation was made as to the character of the property attached at this stage, the order would be final, because the Code does not provide for any appeal against such an order. On the other hand, if it is held that such an objection may be taken as soon as an application for execution has been made after the decree, the investigation would be one under section 244 of the Code of 1882 and the propriety of the order could, consequenty, be tested by appeal upon questions of fact as well as law. Much reliance was placed by the learned Vakil for the appellant upon the provisions of section 487 of the Code of 1882 which lays down that if any claim be preferred to the property attached before judgment, such claim shall be investigated in the manner provided for the investigation of claims to property attached in execution of a decree for money. This provision, in our opinion, shows that the contention of the respondent cannot be supported, because if an attachment before judgment stands for all purposes on precisely the same footing as an attachment in an execution proceeding, section 487 would be entirely superfluous. The Legislature intended that investigations of claims to property attached before judgment should be determined at that stage, when such claims are preferred by persons who are strangers to the suit. If the Legislature had also intended that an objection of the description taken before us should be investigated at that stage, an appropriate provision in that behalf would have been made in that Code. It follows, therefore, that an attachment before judgment does not for all purposes stand on the same footing as an attachment in execution proceedings. This, indeed, is obvious from first principles. The attachment does not of necessity ensure the property to the person who attaches it. He becomes entitled to proceed against it only if he eventually gets a decree. The plaintiff must not only wait until he has obtained a decree, it is not competent to him to proceed against the property attached until he has also taken the preliminary steps which the law requires for its enforcement; in other words, he must apply for execution just like any other creditor [*Aga Mahomed Ali Sheraji* v. *Judah* (7); *Pallonji Shapurji* v. *Edward Vaughan Jordan* (8); *Sewdut Roy* v. *Sree Canto Maity* (9) and *Bhagwan* v. *Chandra Mala* (10)].

The result, therefore, is that this appeal must be allowed and the order of the Court below discharged. The case will be remitted to the Court of first instance in order that the objection taken by the judgment-debtors may be investigated upon evidence to be adduced by the parties. The appellants are entitled to their costs both here and in the Court of appeal below. The costs in the Court of first instance will abide the result. We assess the hearing fee in this Court at two gold *mohurs*.

Appeal allowed.

(7) 7 B. L. R. 593; 17 W. R. 234*n*.
(8) 12 B. 400.
(9) 33 C. 639; 10 C. W. N. 634.
(10) 1 C. L. J. 97.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1008 OF 1909.

April 27, 1911.

Present:—Mr. Justice Holmwood and Mr. Justice D. Chatterjee.

ISSUR BEHARA—DEFENDANT—APPELLANT

versus

KASHI NATH PANDA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Landlord and Tenant—Surrender—Holding under mortgage—Landlord's right to redeem.

The defendant No. 2 was a tenant with a right of occupancy-holding land under the plaintiffs. He mortgaged his holding to defendant No. 1 with possession and afterwards surrendered it in favour of the plaintiffs who sued to redeem the mortgage and recover possession:

Held, that surrender in law was a matter of contract between the landlord and the tenant, that

there was nothing in the law to prevent a landlord from accepting the surrender of a holding under mortgage, and that he was quite within his rights in bringing the present suit.

Appeal from the decree of the Sub-Judge of Sambalpur, dated April 19th, 1909, reversing that of the Munsif of Sambalpur, dated January 28, 1909.

Babus *Ram Chandra Majumdar* and *Chandra Sekhar Banerjee*, for the Appellant.

Babu *Satish Chandra Gosh*, for the Respondents.

JUDGMENT.—The defendant No. 2 was a tenant with a right of occupancy holding land under the plaintiff who was the *gauntia* of the 16 annas of the village. He mortgaged his holding to the defendant No. 1 with possession and subsequent thereto made a surrender of his holding in favour of the plaintiff. The plaintiff brought a suit for ejectment of the defendant No. 1. He was, however, told by the Judicial Commissioner of the Central Provinces trying the case as the Court of the last resort that he was not entitled to ejectment, but that he was entitled to redeem, as the mortgage by defendant No. 2 was still subsisting.

The plaintiffs have now brought this suit for the redemption of the mortgage and recovery of possession of the land. The objection taken by the defendant No. 1 is that the surrender was bad and that it did not pass such rights to the plaintiff as would enable him to bring a suit for redemption. It is contended that surrender in order to be effective must be of the entire interests of the tenant that had passed from the landlord, and that if it is of anything less the surrender has no effect at all. Surrender in law is a matter of contract between the landlord and the tenant; and it is certainly the right of the landlord to insist upon having back the entire interest that had passed to the tenant. But there is nothing in the law to prevent him from accepting anything less; and in this case if he accepted the surrender of the holding, encumbered as it then was, he did it at his risk, and the result of the suit for ejectment was that he was held liable to pay the burden which had been imposed upon the land by the tenant. We think that in bringing his present suit the plaintiff is, both according to the decision of the learned Judicial Commissioner which was *inter partes* and also according to general principles, quite within his right, and the judgment of the lower Appellate Court is, therefore, correct and will stand.

The appeal is dismissed with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

CIVIL RULE NO. 5011 OF 1910.

April 10, 1911.

Present:—Mr. Justice Woodroffe and Mr. Justice Carnduff.

CHANDI ROY—PLAINTIFF—PETITIONER

versus

KIRPAL ROY AND OTHERS—DEFENDANTS—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 115—Charter Act (24 and 25 Vict. C. 104), s. 15—High Court—Revisional or superintending power—Where another remedy open—Interlocutory order.

Where there is another and an adequate remedy which is open to an applicant, the High Court will not have recourse, ordinarily at least, to its revisional or superintending powers under section 115 of the Civil Procedure Code or section 15 of the Charter Act.

Where a Court below refused to amend the pleadings upon an application made to it, the High Court refused to interfere, because there was another and adequate remedy secured for the petitioner in the right of appeal which he would have, should the judgment given in the Court below be eventually against him.

Obiter dictum:—Interlocutory orders do not fall within the purview of section 115 of the Civil Procedure Code, and it has been the general practice of the High Court not to interfere under that section in the case of such orders.

Rule against the judgment of the Sub-Judge of Deoghar, dated November 15th, 1910, disallowing the application of the plaintiff for the amendment of the plaint in the suit.

Babus *Umakali Mukherjee* and *Surendra Nath Ghoshal*, for the Petitioner.

Dr. *Rash Behary Ghosh* and Babu *Khetra Mohan Sen*, for the Opposite Party.

JUDGMENT.

WOODROFFE, J.—In this case the Judge in the Court below refused to amend the pleadings upon an application made to him; and the first question that has been argued before us is whether, that being an interlocutory order, it comes within the terms of section 115 of the Code; the determination of this question depends upon another, *viz.*, whe-

ther the word "case", which is used in that section, is wide enough to include an interlocutory order.

The view which has been taken by other High Courts is in the negative. There is, however, one decision of this Court, namely, *Dhapi* v. *Ram Pershad* (1), in which the opinion was expressed that the section did cover the case of interlocutory orders. That decision, however, was a decision of one alone of the learned Judges who took part in it. The other Judge (Mr. Justice Tottenham) reserved his opinion on the point, but assented to the order upon other grounds which are stated in his judgment.

So far as I am aware, it has not been the general practice to interfere under this section in the case of interlocutory orders. In one of the recent cases reported in *Gobinda Mohan Das* v. *Kunja Behary Das* (2) where the point was raised, the Court stated that, under the circumstances, it was not necessary to consider whether the case of *Dhapi* v. *Ram Pershad* (1) was rightly decided, or to investigate the precise extent of the revisional powers of this Court under section 115 of the Code of Civil Procedure. Speaking for myself. I should have thought that interlocutory orders did not come within the scope of this section. It is unnecessary, however, to decide this point for reasons with which I shall proceed to deal. It has, however, been contended, upon the authority of the decision of Mookerjee and Vincent, JJ., [*Gobinda Mohan Das* v. *Kunja Behary Das* (2)], that this Court has power, at any rate, to interfere under section 15 of the Charter Act, and there are other cases in which that decision appears to have been followed and which are recorded in *Amjad Ali* v. *Ali Hossain* (3) and *Khirode Chunder* v. *Saroda Prasad* (4). In the case of *Manilal* v. *Harendra Lal* (5) the Rule was discharged, the case having been disposed of on the merits. This Court has generally been disinclined to limit the powers which it possesses under the Charter Act. I do not propose to lay down any rule in this regard. But, whether or not the revisional section of the Code applies, and whether or not this Court has the power to act under the Charter, there is one common principle which, in my opinion, governs its interference in both cases, and that is this, that this Court will not have recourse, ordinarily at least, to its revisional or superintending powers where there is another and an adequate remedy which is open to the applicant. The Court usually exercises these special powers in order to do justice. because without recourse to such powers a remedy would not be open to the applicant.

Now, in the present case, it appears to me to be quite plain that there is another and a proper and adequate remedy open to the applicant. The learned District Judge in this case has refused to amend the pleadings. If he has wrongly refused to do so, the applicant will have a right to appeal; and if the order which has been passed is erroneous, we must assume that justice will be done and that the erroneous order will be corrected upon appeal. This, therefore, is not such a case as is referred to in *Gobinda Mohan Das* v *Kunta Behary Das* (2) where the learned Judges speak of the power of the Court to interfere under the Charter where the circumstances are such that they are likely to cause irreparable injury.

On this ground, therefore, I would discharge this Rule with costs, assessing the hearing fee at three gold *mohurs*.

CARNDUFF, J.—I agree, but as I was one of the Judges who decided the case of *Khirode Chunder* v. *Saroda Prasad* (4), I desire to add a few words. That was a case in which an erroneous order, directing a partition was set aside by Mr. Justice Mookerjee and myself in the exercise of the powers conferred by section 15 of the Charter. If that order had been allowed to stand, there would have followed protracted and costly proceedings, which in the end would, as we felt convinced, most certainly have been set aside. The case was, therefore, an extreme one, and I would also point out that apparently it was not then disputed before us that the Court had jurisdiction under section 15 of the Charter to set aside the order. The general question, therefore, was not then considered. I agree that in this case, assuming that we could, we ought not

(1) 14 C. 768.
(2) 10 C. L. J. 407; 14 C. W. N. 147; 4 Ind. Cas. 364.
(3) 12 C. L. J. 519; 6 Ind. Cas. 574.
(4) 12 C. L. J. 525; 7 Ind. Cas. 436.
(5) 8 Ind. Cas. 79.

to interfere under either section 15 of the Charter or under section 115 of the Code of Civil Procedure; for there is another and adequate remedy secured for the petitioner in the right of appeal which he will have, should the judgment eventually given in the Court below be against him.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL NO. 2968 OF 1910.
April 25, 1911.
Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice Coxe.
BARADA PRASAD ROY CHOWDHURY —PLAINTIFF—APPELLANT
versus
THE CORPORATION OF CALCUTTA— DEFENDANT—RESPONDENT.

Calcutta Municipal Act (III B. C. of 1899), s. 341—Verandah existing for 60 years—Fixture attached to building.

A *verandah* which has been in existence as part of the original building for more than 60 years and does no one any harm, is not a *fixture* attached to a building and, therefore, does not come within section 341 of the Calcutta Municipal Act.

Appeal from the decree of the District Judge of 24-Pergannahs, dated June 2nd, 1910, modifying that of the Munsif of Alipur, dated November 30th, 1909.

FACTS.—The suit was for an injunction restraining the defendant, the Corporation of Calcutta, from demolishing a *verandah* of a house belonging to the plaintiff, under section 341 of the Calcutta Municipal Act, upon declaration that the *verandah* hangs over plaintiff's land and it is not liable to be demolished. The case of the plaintiff is that the house with the *verandah* has been in existence for 100 years, that it has been repaired from time to time, but there has been no erection in it, and the last repair was made in January 1908, that he was served with a notice under section 341 of the Calcutta Municipal Act, on the allegation that the *verandah* was an encroachment on the public road; that the notice was followed by an order by the Municipal Magistrate to remove the *verandah*; that the *verandah* is no fixture, nor is it any encroachment on the public street for it hangs over plaintiff's own land, and that the order of the Magistrate is bad. The defence is the *verandah* encroaches on a part of the public street called Jeliaparah Road and the General Committee of the Corporation took legal and valid steps for its removal, and that the order of the Magistrate is valid.

The first Court said: "The premises and the *verandah* have been in existence from before 1863 and for a considerably long time. Plaintiff's case is that the land underneath the *verandah* is his land and forms a part of the holding * * upon oral evidence for the defence it appears that it is used as a part of the road and a recent map of the Corporation shows that the road line and the building line coincide. On the other hand, there is evidence for the plaintiff that the strip of land was formerly used by plaintiff as a flower garden. So it seems probable that the strip was at one time used as plaintiff's garden and that in later years it is being used as a public road. This latter user does not extinguish plaintiff's right to the soil. The *verandah* rests on beams which form the beams of the adjoining room. In the ordinary course of events, such a *verandah* is not made to overhang on the land of another. * * It is very doubtful whether the *verandah* as it is constructed would be a fixture under section 341 of the Municipal Act. It seems more a part of the original building than a fixture added to it." The Court found that the *verandah* was not a fixture under section 341, nor was it an encroachment or obstruction or projection on a public road under the section, and that the order of the Magistrate was *ultra vires*. The suit was accordingly decreed.

On appeal, the Court of appeal below found that the *verandah* was in existence as long as the house itself, that is, for more than sixty years, and that it did harm to no one. The Court held that the Corporation was entitled to remove it as it overhangs a public road, but the plaintiff will receive a decree that his projection was in existence prior to 1863 and that under section 341, when it has been removed, he will be entitled to a decree from the Small Cause Court for its value.

From this decree the plaintiff appealed to the High Court.

Babu *Harendra Narain Mitra*, for the Appellant.

Babu *Baranashibashi Mukherjee*, for the Respondent.

JUDGMENT.

JENKINS, C. J.—This case comes before us

by way of second appeal, and the suit out of which it arises is one brought by a house owner within the town and suburbs of Calcutta against the Municipal Corporation to restrain the Corporation in effect from proceeding under a notice given under section 341 of the Calcutta Municipal Act of 1899. The facts are very briefly these: The alleged projection in respect of which an action is said to have been taken under section 341 is an integral part of a house, and for the Corporation it is said that this projection is over a public street. The plaintiff maintains that, whether the land which this projection overhangs is or is not at the present time a public street, at the time when the projection came into being and a considerable time afterwards it was his own private land. He further maintains that this projection is not such a structure as comes within the operation of section 341. The Munsif decided both points in the plaintiff's favour, and granted the relief sought, but on appeal the District Judge who viewed the premises came to a different conclusion though he says his visit to the spot satisfied him that the Corporation was somewhat unreasonable. In the view I take of the facts of the case, the particular projection of which complaint is made cannot, on the facts found, be said to be a *fixture* attached to a building so as to form a part of the building, and, therefore, it does not, in my opinion, come within section 341 of the Act, and on this ground, without negativing the other conclusion of the plaintiff, I think the plaintiff is entitled to succeed. It is true that an objection has been urged before us that the suit is misconceived in so far as it was brought against the Corporation, and it was contended that it should have been brought against the General Committee. The point is not noticed by either of the lower Courts, and it is not a view to which I am disposed to give effect.

The proper decree in the circumstances appears to me to be that we should reverse the decree of the lower Appellate Court and grant an injunction restraining the Corporation from taking any proceedings under section 341 and under the order of the Magistrate passed on the 4th of December 1908.

The defendant must pay the costs of the plaintiff in all the Courts including the costs in this appeal.

COXE, J.- I agree.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 534 OF 1910.

April 12, 1911.

Present:—Sir John Stanley, KT., Chief Justice, and Mr. Justice Banerji.

BHAGWAN RAI AND OTHERS—DEFENDANTS APPELLANTS

versus

GOPI RAI—PLAINTIFF—RESPONDENT.

Regulation XI of 1825, *s.* 4—*Alluvion—Submersion of land under water—Re-appearance on its old site—Sufficient identification—Ownership.*

Land belonging to the plaintiff which had submerged under a river re-appeared on its old site and was sufficiently identified to be the plaintiff's land. It had not come out by gradual accretion nor by sudden cutting off by the action of the river:

Held, that the plaintiff was entitled to the land, that section 4 of Regulation XI of 1825 did not apply to the case.

Lopez v. *Madan Mohan Thakur*, 5 B. L. R. 521, 14 W. R. (P.C.) 11; 13 M. I. A. 467 referred to.

Second appeal from the decision of the Judge of Ghazipur, dated 21st April 1910.

JUDGMENT.—The plaintiff-respondent is the owner of the village Pirakpur and the defendants-appellants own the village Zitidand. Between the two villages flows the river Surju. The plaintiff claimed certain lands which he alleged belonged to him but which had been submerged by the river and have now reappeared. As regards one plot $1\frac{1}{2}$ *bighas* in area he stated that it was an accretion to his land No. 148. The Court of first instance dismissed the suit and the lower Appellate Court has decreed it except as regards the $1\frac{1}{2}$ *bighas* referred to above. The law on the subject is laid down in the case of *Lopez* v. *Madan Mohan Thakur* (1) and has been explained in many subsequent cases to which reference has been made in the argument. We do not deem it necessary to refer to them, inasmuch as the Court below has found that the lands in question are the *sir* lands of the plaintiff and have re-appeared on their old sites. This is, therefore, not a case of gradual accretion or of sudden cutting off of land by the action of the river. Section 4 of Regulation XI of 1825 has, therefore, no application to a case like this. As the land has been found to be the plaintiff's land and has been identified as his land as it has re-appeared on its old site, the plaintiff is entitled to it. The appeal, therefore, has no force and we dismiss it with costs.

There is an objection on behalf of the

(1) 5 B. L. R. 521; 14 W. R. (P. C.) 11; 13 M. I. A. 467

respondent in regard to the $1\frac{1}{2}$ *bighas* of land in respect of which the claim has been dismissed. In view of the finding of the Court below this objection is untenable. We dismiss it with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 37 OF 1910.

December 9, 1910.

Present:—Mr. Justice Mookerjee and Mr. Justice Coxe.

KAMINI KUMAR RAI—JUDGMENT-DEBTOR —APPELLANT

versus

KRISHNA CHANDRA SAHA—DECREE-HOLDER—RESPONDENT.

Execution of decree—Mesne profits—Godown—Letting value—Profits of business carried therein—Correct principle for assessment of mesne profits—Measure of damages—Special damage—Claim in suit.

The measure of compensation which a decree-holder can claim as mesne profits in respect of a godown is the annual income from the property during the time the judgment-debtor withheld possession, and the income is to be measured by the value of the use of the property, that is, the letting value of the godown as a whole, and not by what the judgment-debtor received or might have obtained by the business he carried on in the premises.

Appeal from the order of the District Judge of 24-Pergannahs, dated November 23rd, 1909, reversing that of the Sub-Judge of that District, dated August 2nd, 1909.

Dr. *Rash Behari Ghose* and Babu *Debendra Nath Bagchi*, for the Appellant.

Babu *Baikuntha Nath Das*, for the Respondent.

JUDGMENT.—This appeal is directed against an order by which mesne profits have been assessed in execution of a decree. The subject-matter of the dispute was a godown of which the plaintiffs-respondents took a lease from the owners. They were, however, kept out of possession by the defendants who claimed under a lease which, it was subsequently found, was not entitled to prevail over the lease of the plaintiffs. The plaintiffs sued to recover possession and mesne profits and obtained a decree. They now seek to realise mesne profits in execution proceedings. The Courts below have on different occasions expressed divergent views upon the question of the principle upon which these profits ought to be assessed, but no detailed reference to these discussions is necessary for our present purposes.

Two points have been argued before us on behalf of the judgment-debtors-appellants, namely, *first*, what is the correct principle upon which mesne profits ought to be assessed, and *secondly*, what is the period of time for which profits ought to be allowed.

In so far as the first of these questions is concerned, it has been argued on behalf of the decree-holders that they are entitled to the profits received by the judgment-debtor from occupation of property, that is, as the judgment-debtors were in occupation of the property by allowing dealers to store jute in the godown, they ought to be made to pay to the plaintiffs the profits they have actually realised. On behalf of the judgment-debtors it has been contended, on the other hand, that the true basis upon which mesne-profits ought to be assessed is the letting value of the godown as a whole. In our opinion, neither the circumstance that the decree-holders were obliged to hire another godown for the purpose of their business at a higher rental nor the circumstances that the judgment-debtor managed to obtain considerable profits by allowing debtors to store their goods in the godown, is an element to be taken into consideration in the assessment of mesne profits. The test to be applied is to determine, what are the profits which have been or might have been received by the judgment-debtors by the use of the premises. If they have received any profits by carrying on a trade in the premises, the decree-holders cannot be allowed to claim their profits as mesne profits. It may be conceded that if the plaintiffs had suffered any loss by reason of interference with their business by the defendants they might have claimed such damages as special damages in the suit, but this they did not do [see *Dunn* v. *Large* (1) which shows that if any consequential damage is sought to be recovered, for instance, the loss which the plaintiff has suffered by the defendants shutting up an inn, which was the subject of the ejectment, and destroying the custom, such damage must be specifically laid in the suit itself. See also *Jaques* v. *Millar* (2)]. We are of opinion that they are not now entitled to claim as mesne-profits the profits of

(1) 3 Douglos 335.
(2) 6 Ch. D. 153.

the business carried on by their occupation of the premises. The measure of compensation they can claim as mesne profits is the annual income from the property during the time the defendant withheld possession; and the income is to be measured by the value of the use of the property, not by what the defendant received or might have obtained by the business he carried on in the premises. We have now to determine the precise amount of profits which the decree-holders are entitled to recover on the footing. It is clear that Rs. 300, which was the rent payable by the plaintiffs to the superior landlord, was nearly the maximum rent payable for the property. At the same time, there is evidence to show that the defendants were willing to pay Rs. 300 a month for the property. It may be assumed, therefore, that the godown might have been sublet by the plaintiffs, if they had been in possession, for at least Rs. 350. Under these circumstances, if we assess the letting value at Rs. 400 the plaintiffs will be sufficiently indemnified. We, therefore, assess the mesne profits at Rs. 400 a month.

The second point for consideration is, what is the period for which these profits may be recovered. It is clear from the facts found by the Court below that the judgment-debtors relinquished possession of the property after the lapse of eight months from the date of the decree and that they notified the fact of relinquishment of possession to the decree-holders. The decree-holders, clearly, are not entitled to ask for mesne profits for a long period merely because they themselves delayed to apply for delivering of possession. The total mesne profits will thus amount to Rs. 3,200.

The appeal is, therefore, allowed in part, and the order of the Court below modified.

There will be a decree for Rs. 3,200 only. There will be no order for costs in any of the Courts in these proceedings.

Appeal allowed.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL FROM ORDER NO. 46 OF 1910.

April 13, 1911.

Present:—Sir George Knox, KT., Judge, Mr. Justice Banerji and Mr. Justice Karamat Husain.

DEBI SAHAI CHOUDHRI—PLAINTIFF—APPELLANT

versus

Musammat SARASWATI AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act XIV of 1882), ss. 102, 103 *—Date fixed for the appointment of a guardian* ad litem *for a deceased defendant—Another date fixed for the hearing of the suit—Non-appearance of plaintiff on the former date—Dismissal of suit—Restoration—Sufficient cause.*

The hearing of a suit was fixed for 25th July and an application by the plaintiff to appoint a guardian *ad litem* for a defendant, who had died, was fixed for the 16th July. The plaintiff and his Pleader failed to appear on the latter date, and the Court dismissed the suit for want of prosecution and subsequently rejected the plaintiff's application for restoration of the case:

Held, that, as the date on which the plaintiff did not appear was not the date fixed for the hearing of the suit itself, the order dismissing the suit was illegal and the case ought to have been restored as all that was before the Court on the 16th July was the plaintiff's application for the appointment of a guardian *ad litem*.

First appeal from order of the Subordinate Judge of Bareilly, dated the 6th February 1909.

The Hon'ble Mr. *Sunder Lal* (with him the Hon'ble Mr. *Madan Mohan Malavya*), for the Appellant.

Mr. *Ryves* (with him Mr. *O'Conor*, Dr. *Satish Chandra Banerji*, Messrs. *Govind Prashad*, *Gokul Pershad*, *Sital Prashad Ghose*, *Surendra Nath Sen* and *Purushottam Das Tandan*), for the Respondents.

JUDGMENT.—This suit in which the order was passed from which this appeal has been filed was a suit for recovery of property of considerable value. The number of persons arrayed as defendant was originally 245. Upon the institution of the suit the Court decided to fix a date for settlement of issues. Owing to the great number of defendants the date originally fixed for settlement of issues expired before the parties had been served. While the case was thus pending one of the defendants Dularia died. In lieu of the date originally fixed for the settlement of issues the Court fixed the 25th of July 1907 for

the same purpose. In consequence of the death of Dularia an application was made to bring her heirs on the record. It so happened that one of the heirs was a minor and it was necessary to appoint a guardian for the suit. The plaintiff thereupon suggested that the minor's brother, a co-defendant in the suit, should be made guardian. Upon notices going to the said brother he appears to have noted on the summons that he did not want to act as guardian. This fact of his refusing to be guardian was brought before the Court on the 12th of July 1907 and the Court then ordered the plaintiff to suggest some one as a guardian. It granted three days for the plaintiff to decide what course to take and directed the case to be put up for this purpose on the 16th of July 1907. On the 16th of July 1907 neither the plaintiff nor any Pleader on his behalf appeared in Court and the learned Judge, apparently overlooking the fact that the only matter which he had before him on that day was the appointment of a guardian, treated the absence of the plaintiff as absence on the day fixed for the hearing of the case and although that day had not arrived, the Court dismissed the case for want of prosecution on behalf of the plaintiff. The same day the plaintiff's Pleader filed an application asking that the order passed might be re-considered and the case re-admitted under its original number. This application was supported by two so-called affidavits. Neither of the so-called affidavits deserve the name of an affidavit. They are mere pieces of waste paper. Be that as it may, the Court dismissed the application on the ground that the applicant had failed to show any sufficient cause for his non-appearance. From this order the present appeal has been filed. While it is true that neither the application nor the affidavit disclosed any sufficient cause, sufficient cause was amply manifest on the face of the record and the Court should have taken note of it. The date on which the plaintiff did not appear was not the date for the hearing of the suit itself, and the furthest the Court could go was to decide the application which had been put before the Court and for the hearing of which the 16th of July 1907 had been fixed. It is contended that the application was not an application under section 103 of Act XIV of 1882. The order of the learned Subordinate Judge answers that contention fully. He evidently considered it, as his judgment shows, a case to be dealt with under section 102. We allow the appeal, set aside the order passed on the 6th of February 1909, allow the application for restoration of the case and direct the Court below to restore the suit under its original number and proceed to hear it according to law. The costs will abide the event, and will in this Court include fees on the higher scale.

Appeal allowed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 956 OF 1910.

April 11, 1911.

Present:—Mr. Justice Griffin.

Musammat INTAZAM FATIMA—PLAINTIFF—APPELLANT

versus

ALI BAKHSH—DEFENDANT—RESPONDENT.

Registration Act (III of 1877), *ss.* 17, 47—*Registration Act (XX of* 1866), *s.* 17—Kabuliat, *whether registration compulsory—Evidence—Admissibility.*

A *kabuliat* was executed in 1871 while Act XX of 1866 was in force. In it the executant stated that he had taken a certain house from the owner upon a yearly rental of Rs. 30. No term was fixed, but there was a further stipulation that if called upon he (executant) would yield such services to the *Zemindar* as the *Zemindar* required, and that in the event of his (executant's) either failing to pay the rent or yeilding such services, he would be liable to ejectment:

Held, that registration of the document was compulsory and that it was not admissible in evidence.

Desai Motilal Mungalji v. *Desai Parshotam Nandlal*, 18 B. 92, *Ram Koomar Singh* v. *Kishori*, 9 C. 68, 11 C. L. R. 318, referred to.

Second appeal from the decision of the District Judge of Aligarh, dated 29th July 1910.

Mr. *Ghulam Mujtaba*, for the Appellant.

Mr. *Ramakant Malviya*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit for arrears of rent of a house and for possession thereof. The defendants denied the tenancy and pleaded adverse possession. In proof of the alleged tenancy the plaintiff relies upon an unregistered lease dated 2nd January 1871. The Registration Act XX of 1866 was then in force. The

lower Appellate Court in dismissing the plaintiff's claim held that the document, which was the sole evidence of the alleged tenancy, was inadmissible in evidence, as it was not registered. The learned Judge was of opinion that sections 17 and 47 of the Registration Act made the document absolutely inadmissible in evidence. The document is in the form of a *kabuliat*. In it the executant states that he had taken a certain house from the owner upon a yearly rental of Rs. 3. No term is fixed, but there is a further stipulation that if called upon he will yield such services to the *zemindar* as the *zemindar* requires and that in the event of his either failing to pay the rent or yielding such services, he will be liable to ejectment.

It is contended on behalf of the plaintiff-appellant that under section 17 (*b*) of the Registration Act XX of 1866, the document is not one the registration of which is compulsory. But that section a lease of immoveable property for any term exceeding one year would have to be registered. Under the *kabuliat* in suit the lessee was liable to be ejected at any time even within the period of one year from its execution if he failed to fulfil the terms of the lease. I am of opinion, therefore, that the lease is not one for a term exceeding one year the registration of which, under the section mentioned above, would be compulsory. It is pointed out on behalf of the appellant that there has been a change in the later Registration Acts and that the present section 17 (*d*) runs as follows:—

"Leases of immoveable property from year to year or for any term exceeding one year or reserving a yearly rent shall be registered."

It would appear that the *kabuliat* in suit did not require registration under the Registration Act of 1866. The document, therefore, was admissible in evidence, unless the provisions of section 17 of the present Act renders it inadmissible; section 17 (1) is as follows—The following document shall be registered if the property to which they relate is situate in a district in which, and if they have been executed on or after the date on which Act No. XVI of 1864 or the Indian Registration Act 1866, or the Indian Registration Act 1871, or this Act came or comes into force,

The corresponding section of the previous Act was considered by the Bombay High Court in *Desai Moti Lal Mungalji* v. *Desai Parshotamnandlal* (1), and by the Calcutta High Court in *Ram Koomar Singh* v. *Kishori* (2), both these High Courts have held that a document which did not require registration under the Act of 1866, was not inadmissible in evidence by reason of the provisions in the later Act. The learned Chief Justice of Bombay remarks at page 96 of the report "It is plain that if it be so regarded as the Act provides, no means of registering such a document (unless, perhaps, it was executed within 3 months before the Act of 1877 came into force) the section will have the retrospective effect of invalidating for all practical purposes documents which when they were executed were free from defects according to the existing law. The presumption is, of course, against the Legislative having such intention. Under the provision of part IV of the present Act the document could not be presented for registration. The Legislature could not have intended the registration of a document which is incapable of registration.

It appears to me, moreover, that the general provisions of section 6 of the General Clauses Act would have to be read along with the present section 17 of the Registration Act.

I would hold, therefore, that the document was admissible in evidence if there was no other legal objection to its admissibility.

This being the case, I must allow the appeal set aside the decree of the Court below dismissing the plaintiff's suit and remand the case to the lower Appellate Court for disposal on the merits.

Appeal allowed.

(1) 18 B. 92.

(2) 9 C. 68; 11 C. L. R. 318.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 210 OF 1909.

May 6, 1911.

Present:—Mr. Justice Rattigan and Mr. Justice Shah Din.

Lala KISHORE CHAND AND OTHERS—PLAINTIFFS—APPELLANTS

versus

GURDITTA MAL—DEFENDANT—RESPONDENT.

Negotiable Instruments Act (XXVI of 1881), s. 80—

KISHORE CHAND *v.* GURDITTA MAL.

Evidence Act (I of 1872), s. 92, proviso 2—Negotiable instrument silent as to interest—Separate oral *agreement as to interest, whether can be proved—Separate entry as to interest, in* sahukar's *or broker's book, whether proof of written agreement—Rate of interest, when instrument silent—Remand for fresh evidence, when not to be allowed.*

Where a suit is based on a negotiable instrument, which is a document of a formal character, the existence of a separate *oral* agreement as to any matter on which the instrument is silent, cannot be proved under section 92 of the Evidence Act, as proviso 2 to the section would not apply to the case.

Fathuma Bibi v. *Ammal Hanumanta Row*, 17 M. L. J. 296, followed.

Ghansham Lalji v. *Ram Narain*, 29 A. 33 (P. C.); 4 A. L. J. 29; 5 C. L. J. 7; 11 C. W. N. 105; 9 Bom. L. R. 1; 1 M. L. T. 427; 17 M. L. J. 35, distinguished.

A *Shah Jog Hundi* is an instrument of a formal character and where it is silent as to interest, a separate oral agreement for payment of interest cannot be proved in virtue of proviso 2 to section 92 of the Evidence Act. But interest at 6 per cent. per annum will be allowed under section 80 of the Negotiable Instruments Act.

Where a *hundi* does not contain the rate of interest but such rate is entered separately in the books of the *sahukar* and the broker, this entry by itself would not be sufficient evidence of a written agreement between the parties to pay interest at the rate therein mentioned.

Where it would be dangerous, in the opinion of an Appellate Court, to allow the production of fresh evidence on a point in respect to which the necessary proof ought to have been adduced in the lower Court, and a remand, if allowed, would open the door to the production of false evidence, the request for a remand should be refused.

First appeal from the order of the District Judge, Firozepore, dated 9th November 1908, decreeing plaintiff's claim.

Mr. *Beni Pershad Khosla*, for the Appellant.

Lala *Sangam Lal*, for the Respondent.

JUDGMENT.—This is a suit brought by the plaintiffs-appellants, Kishore Chand and Kanshi Ram, against the defendant-respondent Gurditta Mal, to recover Rs. 18,178-11-3 principal and interest due on four *hundis* and a note of hand executed by the latter in favour of the former in September 1904. The consideration-money entered in the *hundis* and the note of hand in question was Rs. 11,250 and the amount sued for consisted of this sum and the sum of Rs. 6,928-11-3 alleged to be due by way of interest on the principal amount at the rate of Re. 1-4 per cent. per mensem. The plaintiff's suit was resisted by the defendant on various grounds which need not be noticed at this stage of the proceedings, except the plea that no interest was agreed upon between the parties, and that in any case the plaintiffs were not entitled to charge on the amount of the *hundis* interest at a higher rate than Rs. 6 per cent. per annum (pages 26 and 28 of the record). The plaintiffs in replication stated that interest at the rate of Re. 1-4 per cent. per mensen had been agreed upon and that they were entitled to charge interest at that rate upon the amount due on both the *hundis* and the note of hand. Upon the pleadings of the parties eight issues were framed by the lower Court the 7th issue being what rate of interest ought to be allowed on the *hundis*. On this issue the Court found as follows:—

The *hundis* are silent as to the rate of interest to be charged. Plantiff No. 2 deposed that interest had always been charged by them at Re. 1-4 per cent. per mensem of previous *hundis*. This may have been so, but there is no proof that defendant had agreed to pay interest on the *hundis* sued on at Re. 1-4 per cent. per mensem. I, therefore, only allow interest at Rs. 6 per cent. per mensem under section 80 of the Negotiable Instruments Act.

On the amount of the note of hand, *viz.*, Rs. 1,250 the Court allowed interest at the rate of 12 per cent. per annum and thus passed a decree in favour of the plaintiffs against the defendant for Rs. 14,440 which sum consists of Rs. 11,250 principal and Rs. 3,190 interest calculated at the above mentioned rates on the amount due on the *hundis* and the note of hand, respectively.

The defendant has accepted this decree but the plaintiffs have appealed therefrom to this Court, and on their behalf it has been urged by their Counsel that the lower Court ought to have decreed interest on the amount sued for at the rate of Re. 1-4 per cent. per mensem, which rate, it is contended, was agreed upon between the parties. With reference to the additional ground of appeal filed by the appellant's Counsel, it has further been urged that the Court below ought to have inquired into the existence of a usage of trade prevailing in the locality according to which *hundis* such as those sued upon do not contain the rate of interest, it being entered only in the books of the *sahukar* and the broker.

The *hundis* sued upon are admittedly silent as to interest. But the appellants' Counsel has argued that interest at the rate of Re. 1-4 per cent. per mensem was agreed to

be paid by the defendant on the principal amount of the *hundis* and that as section 80 of the Negotiable Instruments Act, XXVI of 1881, applies only in cases in which no intrest had been expressly agreed upon by the parties, the District Judge was in error in reducing the rate of interest from Re. 1-4 to annas 8 per cent. per mensem. In support of this contention the learned Counsel has relied upon the decision of their Lordships of the Privy Council in *Ghansham Lalji* v. *Ram Narain* (1); that was a suit brought on certain *hundis* which were silent as to interest but as to which there was a collateral written agreement that they should bear interest at 30 per cent. per annum, and it was found that this mode of dealing with interest by a collateral agreement, and not on the face of the *hundis* was in accordance with the custom prevailing in the district and amongst the class effected by the suit. For the defendant it was contended in that suit that, notwithstanding the agreement of the parties, the plaintiff's right to interest was restricted to 6 per cent. per annum by section 80 of Act XXVI of 1881. Their Lordships held that interest was recoverable at the rate agreed upon by the parties, and that section 80 afcresaid was not applicable to the case.

"Section 80 of the Negotiable Instruments Act," observed their Lordships, "does not purport to deprive those dealing with such instruments of the freedom of contract possessed by other contracting parties. It purports to confer a right to interest not to take away such a right otherwise existing. When a plaintiff has to rely upon the section as the ground of his claim to interest no doubt the terms of the section must be followed. But to read the section as depriving him of a contractual right of interest would be to read into it something which it does not say and which cannot reasonably be implied from its language."

Relying on the above authority, the appellant's Counsel has urged that section 80 aforesaid would apply to the present case only in the absence of proof of an agreement between the parties to pay interest at a higher rate than Rs. 6 per cent. per annum and his contention is that an agreement by the respondent to pay interest at the rate of Re. 1-4 per cent, per mensem must be held to have been proved by the statement on oath of plaintiff-appellant Kanshi Ram on this point, and by the fact that this rate was charged in the account between the parties on the various *hundis* executed and renewed by the respondent from time to time the last series of the *hundis* being those sued upon in this case. In this connection reference has been made to pages 7 to 15, transliteration of the book account, and to pages 32 to 33 of the record. Conceding, however, the truth of the appellant Kanshi Ram's statement and the correctness of the accounts produced by him, all that can be said to have been proved is that at the time of the execution of the *hundis* a separate oral agreement was made between the parties as to the rate of interests to be charged on the money advanced to the respondent and the question for consideration is, whether having regard to the terms of section 92 of the Evidence Act, the existence of this alleged contemporaneous oral agreement between the parties can be proved. The appellant's Counsel has contended that section 92 of the Evidence Act does not apply to this case at all, and in support of his contention he again relies on the above mentined decision of their Lordships of the Privy Council, urging that, so long as the fact of a separate agreement between the parties as to payment of interest is proved, no matter whether that agreement is in writing or not it must be enforced according to its terms. In the Privy Council case, however, it will be observed, there was a collateral written agreement between the parties as to the rate of interest to be charged on the amount of the *hundis*, the *hundis* themselves being silent on the point.

The question, therefore, whether in that case the existence of the separate agreement as to interest could or could not be proved in view of section 92 of the Evidence Act did not arise; and the sole question for decision was whether or not the rate of interest agreed upon by the parties in the collateral written agreement could be allowed when the *hundis* themselves were silent as to interest. Their Lordships answered that question in the affirmative; their decision, therefore, is an authority only in support of the position that section 80 of the Negotiable Instruments Act does not preclude the grant-

(1) 29 A. 33 (P. C.); 4 A. L. J. 29; 5 C. L. J. 7; 11 C. W. N. 105; 9 Bom. L. R. 1; 1 M. L. T. 427; 17 M. L. J. 35.

ing of a decree for interest in cases in which no rate of interest is specified in the *hundis* sued upon but in which a valid contract, apart from the *hundis* as to payment of interest exists, between the parties.

The question whether in cases like the present the existence of a contemporaneous oral agreement as to interest can or cannot be proved under section 92 of the Indian Evidence Act came up for decision before the Madras High Court in the case of *Fathuma Bibi* v. *Ammal Hanumanta Row* (2) and it was held by the learned Judges of that Court that, where a promissory note is silent as to interest, oral evidence is not admissible in proof of a contemporaneous agreement, to pay a certain rate of interest but that in such cases interest at the rate of Rs. 6 per cent. should be awarded under section 80 of the Negotiable Instruments Act. We entirely agree with the learned Judges of the Madras High Court that in a case in which a suit is based on the negotiable instrument, which is a document of a formal character, the existence of a separate oral agreement as to any matter on which the instrument is silent cannot be proved under section 92 of the Evidence Act, proviso 2 to the section not being applicable to such a case. The instrument sued upon in the present case are *Shah Jog huudis*, drawn with the utmost formality in a peculiarly technical language, and they cannot be cashed except through a respectable banker and we are quite clear that to these *hundis* proviso 2 to section 92 aforesaid does not apply. The concluding words of the proviso in question, *viz.*, "In considering whether or not this proviso applies, the Court shall have regard to the degree of formality of the document", are very material; and as we consider that the *hundis* with which we are dealing in this suit cannot but be regarded as documents of a very formal nature. The alleged agreement as to interest on which the *hundis* are silent is not saved by the 2nd proviso to section 92 of the Evidence Act. We hold, therefore, that even if the respondent entered into a separate oral agreement with the appellants to pay interest at the alleged rate of Re. 1-4 per cent. per mensem on the *hundis* executed by him in their favour that agreement cannot be proved by them; and it follows that the *hundis* themselves being silent as to interest, we must fall back upon section 80 of the Negotiable Instruments Act, and under that section interest at the rate of 6 per cent. per annum only can be allowed to the appellants.

The additional ground of appeal does not in any way help the appellants; for, conceding for the sake of argument, that according to the usage of trade affecting the parties' *hundis*, such as those sued upon, do not contain the rate of interest and that it is entered separately in the books of the *sahukar* and the broker, the alleged entry of the rate of interest in the books in question would not of itself be sufficient evidence of a written agreement between the parties as to payment of interest at the rate of Re. 1-4 per cent. per mensem. At the best, such entry would be a mere memorandum of an oral agreement between the parties as to payment of interest or as to rate of interest chargeable according to a mercantile usage in such transactions. The appellant's Counsel concluded his argument in reply to the respondent's Pleader by a request that we should remand the case to enable his clients to prove a separate written agreement between them and the respondent as to interest by producing the broker through whom the loans in question were raised. We cannot see our way to accede to the request as we think that it would be dangerous to allow the appellants now to produce fresh evidence on a point as to which they ought to have adduced the necessary proof in the lower Court, before; the remand asked for would open the door to the production of false evidence and we must, therefore, decline to grant the request. We note that the appellant's Counsel has not addressed us as to the rate of interest that should have been allowed on the note of hand for Rs. 1,250 on which the lower Court has allowed interest at the rate of 12 per cent. per mensem.

For the foregoing reasons we maintain the decree of the lower Court and dismiss the appeal with costs.

Appeal dismissed.

(2) 17 M. L. J. 296.

RAHIM BAKHSH *v.* MUHAMMAD HAFIZ.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 713 OF 1910.

April 5, 1911.

Present:—Mr. Justice Tudball.

RAHIM BAKHSH—PLAINTIFF—APPELLANT

versus

MUHAMMAD HAFIZ—DEFENDANT—RESPONDENT.

Limitation—Decree-holder given formal possession—Actual possession remaining with judgment-debtor—Decree-holder's right to bring fresh suit within 12 *years.*

Where in execution of a decree for possession the decree-holder is given formal possession, the judgment-debtor remaining in actual possession, the possession of the decree-holder is deemed actual or legal possession in the eye of the law and he can bring a fresh suit for possession within 12 years.

Mangli Prasad v. *Debi Din*, 19 A. 499, applied.

Second appeal from the decision of the Additional District Judge of Aligarh, dated the 20th April 1910.

Mr. *Gulzari Lal*, for the Appellant.

Mr. *Durga Charan Banerji*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff-appellant to recover possession of plot No. 2785 in the *Khasra Abadi* of *Qasba* Siyari in the Bulandshahr District. It appears that in the year 1896 the plaintiff came into Court with a suit for possession of this very same property. He gave to it *Khasra Abadi* No. 2785 and it was known by the name of *Imambara*. In addition to this, he also gave certain boundaries. The first Court granted him a decree for possession and entered in the decree the *Khasra* number, name and boundaries as set forth in the plaint. The opposite party appealed. On appeal, on the 28th September 1896, the Appellate Court maintained the decree for possession, but as it held that the boundaries set forth in the plaint were not correct it removed these boundaries from the decree and gave a decree for possession of plot No. 2785 known as *Imambara*. Meanwhile, on the 10th of August 1896, the plaintiff had in execution of the first Court's decree been placed in possession of the property. On the 14th of May 1898 the defendant applied to the Munsif for restoration of possession. He pleaded that possession had been given to the plaintiff under the decree of the first Court and according to the boundaries set forth in that decree. He further pleaded that the decree had been set aside or modified and that possession given under the first decree being wrong he should be restored to possession. Now, it is quite clear that if in execution of the first Court's decree the plaintiff had been put in possession of any area over and above that of plot No. 2785, his possession of that excess area was improper and the defendant was entitled to be restored to possession of such excess. The Munsif, however, seemed to think that the defendant was entitled to be restored to possession of the whole area and accordingly passed an order on the 14th of May 1898 restoring him to possession. Accordingly, on the 6th of July 1898, the plaintiff decree-holder was dispossessed and the defendant was put into possession. The decree-holder came into Court again and asked the Court in execution of the Appellate Court's decree to put him in possession of plot No. 2785 in the *Khasra Abadi* known as *Imambara*. Objections were filed by the opposite party and rejected by the Court and on the 18th October 1898 possession was formally delivered to the decree-holder. In November 1898 the plaintiff decree-holder asked the Munsif to actually eject the defendant and to give him actual possession in place of formal possession. The Munsif seemed to think that this would be going beyond the decree of the Appellate Court as there was no boundary set forth in the decree and he, accordingly, refused the application. On a fresh cause of action, the plaintiff has now again instituted a second suit for possession of the same property, to wit, plot No. 2785 of the *Khasra Abadi* of the same village. No plea of limitation was raised by the opposite party. The first Court decreed the claim. On appeal the lower Court remitted certain issues for decision. On return of the findings the case came up for hearing before the same Court but before a different presiding Officer. That Judge took up the question of limitation. Before he could decide the point he was succeeded by another Officer. The latter held that the plaintiff's possession from the year 1896 to the year 1898 was not a legal and valid possession, because the first Court's decree in the suit of 1896 had been set aside by the Appellate Court. He further held that the formal delivery of possession on the 18th October 1898 as between the parties was not actual possession, that, therefore,

the plaintiff had not been in possession of the property within twelve years and that the suit was, therefore, barred by limitation. On this ground he reversed the decree of the first Court and dismissed the suit *in toto*, without entering into the merits of the case. It is this decision which is now challenged on appeal. It is quite clear to me that the decision of the lower Court cannot for a moment stand. The first Court's decree in the suit of 1896 was never set aside by the Appellate Court. The Appellate Court maintained the decree for possession of plot No. 2785 in the *Khasra Abadi* known as *Imambara*. It is quite true that the boundaries set forth in the plaint and the decree of the first Court were incorrect and the Appellate Court removed them from the decree, but maintained the plaintiff's right and title in plot No. 2785 as set out in the plaint. Therefore it is quite clear that in so far as the plaintiff was in possession from 1896 to 1898 of plot No. 2785 in the *Khasra Abadi* known as *Imambara*, that possession was in pursuance of a decree, which has not been set aside even up to the present date. The defendant was not entitled really to dispossess the plaintiff in the year 1898 except in regard to any excess land outside the true boundary of plot No. 2785. It cannot, therefore, be pleaded that the possession of the plaintiff from 1896 to 1898 was invalid or illegal or that it was in furtherance of a decree, which was set aside on appeal. Over and above this, formal delivery of possession on the 18th of October 1898 was equally good between the parties to give the plaintiff a fresh starting point for calculation of the period of limitation. In this respect I call attention to the ruling of this Court in *Mangli Prasad* v. *Debi Din* (1). That case, it is true, was one between an auction-purchaser and a judgment-debtor, but the principle of it applies equally to a case between decree-holder and judgment-debtor. Mr. Justice Banerji remarked as follows:—"In my opinion this contention must prevail. If possession was delivered to the auction-purchaser through the Court in the manner required by section 318 or 319 of the Code of Civil Procedure, that delivery of possession gave to the auction-purchaser, as against the judgment-debtor, whose rights were purchased by him, a conclusive title, and must, as observed by the Calcutta High Court in the case of *Juggobundhu Mukerji* v. *Ram Chander Bysack* (2), be deemed to be equivalent to actual possession. On the date of delivery of possession the auction-purchaser must be held to have obtained actual possession as against the judgment-debtor, and it is only during the period following that date that the possession of the judgment-debtor, if he continued in possession, could be regarded as adverse." These remarks apply with all their force to the circumstances of the present case, where both parties to this suit were parties to the formal delivery of possession on 18th October 1898. In holding that these two instances of possession did not amount to legal possession or actual possession within the meaning of the law, the lower Court committed an error in law which has clearly led it to hold that the plaintiff has not been in possession within twelve years. The possession which has been established by the plaintiff in this case is actual possession in the eye of the law. The suit is, therefore, not barred by limitation. I admit this appeal and set aside the decree of the lower Appellate Court. As that Court decided the appeal on a preliminary point, I remand the case to it for trial of the appeal on the merits. Costs of this appeal will be costs in the case and will abide the result.

Appeal allowed.

(1) 19 A. 499.

(2) 5 C. 584; 5 C. L. R 548.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 133 OF 1907.

April 11, 1911.

Present:—Sir Arnold White, KT., Chief Justice, and Mr. Justice Sankaran Nair.

A. GOPALA AIYAR—APPELLANT

versus

RAMASWAMI SASTRIGAL—RESPONDENT.

Transfer of Property Act (IV of 1882), *s.* 6 (e)—*Breach of contract—Right to sue for damages, whether assignable—Contract for payment of debts—Breach of contract—Repudiation of liability by promisor—Cause of action—Right of promisee to sue promisor—Limitation—Promisee to wait for a reasonable time—Contract Act (IX of* 1872), *ss.* 39, 49.

GOPALA A'YAR *v.* RAMASWAMI SASTRIGAL.

A mere right to sue for damages for breach of contract is not assignable under the Transfer of Property Act.

Abu Mahomed v. *S. C. Chunder*, 36 C. 345; 13 C. W. N. 384; 1 Ind. Cas. 827, followed.

Such a right was not assignable even under the Common Law.

Where there was a personal agreement by the defendant with the plaintiff on 15th January 1898 to pay a certain debt owing by the plaintiff, and on defendant's failure to discharge the debt plaintiff paid the same himself and sued defendant for its recovery on 5th December 1904:

Held, (1) that the cause of action for plaintiff's right of suit did not arise on the repudiation of his liability under the contract by the defendant, nor did time begin to run against the plaintiff from the date of such repudiation;

Hochster v. *De La Tour*, 2 E. & B. 678; 22 L. J. Q. B. 455; 17 Jur. 972; 1 W. R. 469 and *Frost* v. *Knight*, L. R. 7 Exch. 111; 41 L. J. Ex. 78; 26 L. T. 77; 20 W. R. 471; *Subraya Reddi* v. *Manikka Koundan*, 2 M. W. N. 265; 9 M. L. T. 479; 10 Ind. Cas. 258 referred to.

(2) that the fact of payment of the debt by the plaintiff did not give him a cause of action, but that the plaintiff should show a breach of contract by the defendant to enforce his right of suit;

(3) that the plaintiff should have waited for a reasonable time, after the expiry of which the defendant may be taken to have broken his contract and plaintiff was entitled to sue as for such breach;

Doraisinga Tevar v. *Arunachellam Chetti*, 23 M. 441, referred to.

Kumar Nath Bhattacharjee v. *Nobo Kumar Bhattacharjee*, 26 C. 241, distinguished.

(4) that the question as to what is reasonable time is a question of fact in each case, and that the reasonable time in this case for plaintiff to wait for performance of the contract by defendant was three years;

(5) that plaintiff's suit was barred.

Second appeal against the decree of the District Court of Tanjore, in Appeal Suit No. 150 of 1906, presented against the decree of the Court of the District Munsif of Tiruvalur, in Original Suit No. 429 of 1904.

JUDGMENT.—Exhibit E purports to be a transfer by Sundari Ammal to the plaintiff of a right to sue for damages for breach of a contract between Sundari Ammal and the defendant (Exhibit A), the breach of the contract having occurred prior to the execution of Exhibit E. It seems to us that this is a mere right to sue within the meaning of section 6 (*e*) of the Transfer of Property Act and consequently could not be transferred. On this point we agree with the decision of the Calcutta High Court in *Abu Mohomed* v. *S. C. Chunder* (1). We are of apinion that even prior to the amendment of the Transfer of Property Act a mere right to sue for damages for breach of contract was not assignable under the Common Law. The Advocate-General has contended that the fact that the debts which the defendant contracted under Exhibit A to discharge were debts owing by the plaintiff and that the plaintiff has in fact paid these debts, gives the plaintiff a right to sue the defendant under Exhibit E. We know of no principle of law or equity which gives any such right. The plaintiff, however, alleges in his plaint (paragraphs Nos. 4 and 10) a personal promise by the defendant to the plaintiff to pay the bebts in question. As to this there was no issue and there has been no finding. In view of the fact that the point now taken before us was not raised in the Courts below we think the plaintiff should have an opportunity of showing, if he can, that the personal agreement by the defendant with the plaintiff, which is alleged in the plaint, was in fact made.

The case will go back to the District Judge for a finding on this question. Further evidence may be taken. The finding should be submitted within two months, and ten days will be allowed for filing objections. This order is without prejudice to the right of the appellant to rely on his other grounds of appeal.

In compliance with the above order, the District Judge Tanjore submitted the following.

FINDING.—1. A finding is called for on the following issue "whether the personal agreement by the defendant with the plaintiff to pay the debts in question, as alleged in paragraphs Nos. 4 and 10 of the plaint, was made."

2. The plaintiff's 1st, 2nd, 5th witnesses have been re-called and two fresh witnesses have been examined, plaintiff's 7th and 8th witnesses. The defendant went into the box again and repeated his denial of any undertaking to discharge the plaint debts and re-asserted the fraudulent character of Exhibit A.

3. The promise relied on by the plaintiff is said to have been made at the time Exhibit A was executed. The existence of an agreement of the kind was asserted in previous suit (*vide* Exhibits H and F) and the existence of the promise was deposed to by plain-

(1) 36 C. 345; 13 C. W. N. 384; 1 Ind. Cas. 827.

tiff and plaintiff's 2nd witness at the hearing of this suit before the District Munsif. Plaintiff's 2nd, 7th, 8th witnesses are the attestors of Exhibit A. It has been suggested that they are interested; but it is difficult to see what better evidence could have been produced as to what took place at the time of execution. The story told is that after Exhibit A had been written a conversation took place between plaintiff and defendant as to the position of the former in the event of the debt not being discharged. The defendant is said to have promised to pay and to make good any loss which plaintiff might incur owing to defendant's failure to discharge the liabilities. Some discrepancies are pointed out in the evidence, the chief of which is that plaintiff alleges that the promise was made in the presence of some creditors who were pressing for settlement of their claims, but the other witnesses do not corrobrate him. This statement of the plaintiff is probably untrue, but beyond this I find no material variance in the accounts given. It is urged that an agreement to pay is alleged to have been made when the settlement subsequently evidenced by Exbibit A was arranged (*vide* plaintiff's 1st witness and paragraph 4 of plaint) and that this being so, a reference to the undertaking as far as plaintiff is concerned would have appeared in Exhibit A, had the agreement been a fact. The absence of any *Varthamanam*, or other writing to evidence the agreement, is also commented on. There is no doubt some force in these arguments. On the other hand, however, there is no question that plaintiff had been managing the affairs of his sister, had contracted debts in his own name on her behalf and that the plaint debts are some of these. The main object of the settlement under Exhibit A was the discharge of the liabilities which has been thus incurred by plaintiff. It was the plaintiff himself who was mainly instrumental in effecting the settlement. Under these circumstances, it seems to me that all the probabilities are in favour of his having obtained a promise from the defendant as deposed to by the witnesses. Plaintiff must have been well aware that his position was insecure as the documents stood in his name and looked at in this light it is only natural that he should have challenged the defendant on the point.

4 For the above reasons, I answer the question referred to me in the affirmative.

Mr. *T. R. Ramachandra Aiyar* and Mr. *T. R. Krishnaswamy Aiyar*, for the Appellant.

The Hon'ble Mr. *P. S. Sivaswamy Aiyar*, (Advocate-General), for the Respondent.

This second appeal coming on for final hearing on Monday, the 20th March 1911, after the return of the finding of the lower Court and the case having stood over for consideration till this day, the Court delivered the following

JUDGMENT.—The District Judge has found a personal agreement by the defendant with the plaintiff to pay certain debts owing by the plaintiff. The plaintiff has paid these debts. The date of the agreement was January 15th, 1898, and the suit was instituted on December 5th, 1904. The question is, is the plaintiff's claim to recover under the agreement in respect of the debts paid within three years from the institution of the suit barred by the law of limitation.

The contention on behalf of the plaintiff was that his cause of action arose on the dates of payment of the several debts which the defendant had agreed to pay. The defendant's contention was that the plaintiff's cause of action arose on the repudiation to his liability under the contract by the defendant or on the breach of the contract by the defendant, the breach to be deemed to have occurred on the expiry of a reasonable time from the date of the contract (section 49 of the Indian Contract Act).

The District Judge finds against the fact of the alleged repudiation, but assuming the defendant repudiated his agreement more than three years before the institution of this suit, we are of opinion that time would not begin to run as against the plaintiff from the date of the repudiation of the agreement by the defendant.

Under section 39 of the Indian Contract Act which embodies the principle of law enunciated in *Hochster* v. *De La Tour* (2) and *Frost* v. *Knight* (3), the promisee *may* put an end to the contract. He is not bound to. If he is entitled to treat the contract as subsisting, and he does treat it as subsisting, it is clear that no cause of action arises on the repudiation of the

(2) 2 E. and B. 678; 22 L. J. Q. B. 455; 17 Jur. 972 1 W. R. 469.

(3) L. R. 7 Exch. 111; 41 L. J. Ex. 78; 26 L. T. 77; 20 W. R. 471.

contract by the promisor. See *Subbraya Reddi* v. *Manikka Koundan* (4).

The plaintiff's answer to the defendant second contention is, that his cause of action was not the defendant's failure to fulfil his contract, but the fact that he had discharged a liability which the defendant had agreed to discharge. The allegation in the plaint is that the creditors pressed the plaintiff, and some of them sued him. This does not seem to be denied in written statement but there was no issue on the question and there is no finding that the payment was otherwise than voluntary.

If the payment was voluntary we do not think the case comes within the principle of the decision in *Kumar Nath Bhuttacharjee* v. *Nobo Kumar Bhuttacharjee* (5) where the suit was for contribution under an agreement in respect of a debt which had been realized by the sale of the plaintiff's property. In *Dorasinga Tevar* v. *Arunachalam Chetti* (6) the defendant agreed to discharge a debt due by the plaintiff to a third party and to pay the plaintiff any damage he might sustain if the defendant failed to discharge the debt. No time was fixed for the performance of the contract. The defendant having failed to discharge the debt for nearly three years, it was held he was bound to do so within a reasonable time, and that his failure to do so during the three years was a breach of his contract notwithstanding that the third party had not enforced his claim against the plaintiff.

In the present case the plaintiff must show a breach of contract by the defendant. The fact that he himself paid the debts in itself, in our opinion, gives him no cause of action. If he paid them before the expiry of a reasonable time after the agreement, the defence would have been open to the defendant that he had not had a reasonable time to fulfil his contract, and that he had consequently not broken his contract. If the plaintiff waited till the expiry of a reasonable time the defendant's breach of contract would give him a cause of action whether he himself paid the debts or not [see *Dorasinga Tevar* v. *Arunchalm Chetti* (6)].The question as to what is a reasonable time is a question of fact, Contract Act section 46. In *Dorasinga Tevar* v. *Arunachalam Chetti* (6), the Court held a defendant who had failed to fulfil a contract similar to this for nearly three years had failed to do so within a reasonable time.

We do not think it can be put more favourably to the plaintiff than to say that the reasonable time in the case is three years. We hold, therefore, that the defendant's contract was broken on the expiry of three years from the date of the agreement, *i. e.*, January 15th, 1898, and that the plaintiff's right to recover became time-barred on the expiry of three years from January 15th, 1901, *i. e.*, on January 15th, 1904.

The result is the appeal is allowed and the plaintiff's suit dismissed with costs throughout.

Appeal allowed.

(4) 2 M. W. N. 265; 9 M. L. T. 479; 10 Ind. Cas 258.
(5) 26 C. 241. (6) 23 M. 441.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 924 OF 1910.

April 4, 1911.

Present:—Mr. Justice Banerji.

CHHOTKAI CHOUDHRI—DEFENDANT—APPELLANT

versus

RUDRA PRASAD TEWARI AND OTHERS—DEFENDANTS—RESPONDENTS.

Pre-emption—Wajib-ul-araiz—*Presumption as to custom or contract*—Kaifiat sarishta nizamat—*Rebutting evidence, sufficiency of.*

In a suit for pre-emption the plaintiff produced two *Wajib-ul-araiz* of 1833 and 1860 respectively, which *prima facie* raised a presumption in favour of the custom of pre-emption. The defendant to rebut that presumption produced a *kaifiat sarishta nizamat* which showed that prior to the preparation of the *Wajib-ul-arz* of 1833, the village was owned by a single proprietor. It, however, contained no entry as regards the Settlements of 1210 and 1213 *F.* The columns were blank and there was nothing to show whether there was any proprietor in those two years:

Held, that the information contained in *kaifiat sarishta nizamat* was not such as to enable the Court to hold that it rebutted the *prima facie* evidence as to custom afforded by the *Wajib-ul-arz.*

Second appeal from the decision of the Additional Judge of Gorakhphur, dated the 16th August 1910.

Mr. *Iswar Saran*, for the Appellants.

JUDGMENT.—This appeal arises out of a suit for pre-emption based upon an alleged custom. In proof of the custom the plaintiff relied upon the *wajib-ul-arz* of 1860. According to that *wajib-ul-arz* the plaintiff has

a right of pre-emption, and as there is nothing to indicate in that *wajib-ul-arz* that the record it contains is the record of a contract the presumption is, according to the rulings of this Court, that it contained an entry of a right arising by custom. There was an earlier *wajib-ul-arz* of 1833 which, it is said, contained the record of a contract. As regards both the *wajib-ul-araiz* this case is similar to that of *Rituraji Dubain* v. *Pahlwan Bhagat* (1). Following the ruling of the majority of the Full Bench in that case. I am bound to hold that the *wajib-ul-araiz* contained the record of a custom. The learned Vakil for the appellant-vendee contends that the entries in the two *wajib-ul-araiz* mentioned above were rebutted by a *kaifiat sarishta nizamat* which showed that prior to the preparation of the *wajib-ul-arz* of 1833 the village was owned by a single proprietor. As regards this document the Court below has found that it is a most inaccurate paper and no reliance can be placed upon it. The document has been read to me and I must say that it does not give such information as would enable the Court to hold that it rebuts the *prima facie* evidence afforded by the *wajil-ul-arz*. It contains no entry as regards the Settlements of 1210 and 1213 *faslis*. The columns are blank, and there is nothing to show whether there was any proprietor in those two years. It only shows that at the Settlements which took place in 1216 and 1220 *faslis* there was a single proprietor a Rani. This covers a period of 4 years only. It is possible that there was a large number of proprietors prior to 1219 *fasli*. But as I have said above there is no information on the point. In 1240 *fasli*, *i. e.*, 1833 there were five owners who were parties to the *wajib-ul-arz* prepared in that year. Having regard to these circumstances, it cannot be held, that this document rebuts the entry in the *wajib-ul-arz*, which according to the Full Bench ruling must be deemed to be the entry of a custom.

The Court below was right. I dismiss the appeal with costs.

Appeal dismissed.

(1) 7 A. L. J. 1040; 33 A. 196; 7 Ind. Cas. 680.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 898 OF 1910.

April 5, 1911.

Present:—Mr. Justice Banerji.

GOLAB SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

NET SINGH—PLAINTIFF—RESPONDENT.

Res judicata *between co-defendants—Issue affecting defendant necessary to be decided for giving relief to the plaintiff—Civil Procedure Code (Act V of* 1908*)*, *s.* 11.

Where it is necessary to determine a certain issue for the purpose of granting relief to the plaintiff, and the Court, as a matter of fact, decides that issue, and the decision affects the defendants *inter se*, the decision will operate as *res judicata* between the co-defendants.

Second appeal from the decision of the District Judge of Shahjahanpur dated 14th May 1910.

Mr. *Haribans Sahai*, for the Appellants.

Mr. *Gulzari Lal*, for the Respondent.

JUDGMENT.—This was a suit for possession of a house and certain moveable property which belonged to one Bhikam Singh, on the ground that the plaintiff was the next heir to the said Bhikam Singh who died in 1909. Bhikam Singh was the son of Nehchal Singh who had four brothers one of whom was Bhola Singh. The plaintiff Net Singh claims to be the son of Bhola Singh. The defendants are the grandsons of two other brothers of Bhara Singh, namely, Todi Singh and Munna Singh. If the plaintiff Net Singh is the legitimate son of Bhola Singh, he would succeed to the estate of Bhikam Singh in preference to the defendants who are the grandsons of Bhola Singh's brothers. The defendants alleged that the plaintiff Net Singh was illegitimate; they set up a gift by Bhikam Singh made in their favour orally before his death, and they also alleged in their written statement that Bhikam Singh messed jointly with them. It appears that in 1905 a suit was brought by a transferee from Net Singh against Bhikam Singh and all the defendants with the exception of Sujan Singh defendant for recovery of certain property sold by Net Songh. In that case also Net Singh's legitimacy was denied. But it was found that he was legitimate. The decision which contains this finding is dated the 23rd March 1905. The Court of first instance, re-

lying on this decision, held that Net Singh was legitimate. But it was of opinion that Bhikam Singh used to live with the defendants, and that he made an oral gift of his property in their favour, and accordingly dismissed the plaintiff's suit. The plaintiff appealed. The lower Appellate Court found in his favour on all the points and decreed the claim in part. This second appeal has been preferred by two of the defendants, namely, Gulab Singh and Sujan Singh. It is contended that on the question of the legitimacy of Net Singh the decision in the former suit is not conclusive, inasmuch as Sujan Singh was not a party to it. The Court below is wrong in saying that all the defendants were parties to the former suit. It is clear that Sujan Singh was not a party. However, as Bhikam Singh was a defendant to that suit, and as Sujan Singh claims through him, the judgment in that case is binding upon Sujan Singh. It is true that Net Singh and Bhikam Singh were arrayed as defendants. But it was necessary for the purpose of granting relief to the plaintiff to determine the issue as to Net Singh's legitimacy. Therefore, the decision operates as *res judicata* as between Net Singh and Bhikam Singh, and as the defendants claim through Bhikam Singh, it is binding on them. Gulab Singh, appellant, was a party to the former suit, and he cannot say that that decision is not binding. I am of opinion that on the question of the plaintiff's legitimacy the Court below was right.

It is next urged that the lower Appellate Court ought to have found whether Bhikam Singh and the defendants were joint or not. It was not the defendants' case that they and Bhikam Singh formed a joint family and that the property left by Bhikam Singh was joint family property which passed to them by right of survivorship. Their plea that Bhikam Singh made a gift in their favour is consistent with any allegation, of the property being joint family property and is only consistent with the property being the separate property of Bhikam Singh. Indeed, it is nowhere alleged or even suggested that the property claimed, most of which is moveable property, was not the separate property of Bhikam Singh. That being so, it is not necessary to find whether Bhikam Singh messed with the defendants or not. It was not alleged that there was a re-union of the family. Under these circumstances, in view of the findings of the Court below, this appeal must fail. I accordingly dismiss it with costs.

Appeal dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 1049 OF 1908.

March 2, 1911.

Present:—Mr. Justice Mookerjee and Mr. Justice Teunon.

Moulvi BUZLUL KARIM—DEFENDANT—APPELLANT

versus

SATISH CHANDRA GIRI MOHANT—PLAINTIFF—RESPONDENT.

Bengal Tenancy Act (VIII of 1885*), s.* 50*—Presumption of permanency—Suit or proceeding under Act—Ejectment suit on ground of transfer of non-transferable holding, if suit under Act—Second appeal—Misconstruction of document—Mistake as to meaning of portion of evidence which is documentary—Civil Procedure Code (Act V of* 1908*), s.* 100*—Usage or custom of transferability—Ingredients, what are, to prove the custom—Growing usage, if binding upon landlord.*

Although the presumption mentioned in section 50 of the Bengal Tenancy Act applies only to cases which may be called suits or proceedings under the Act, yet even in cases where that section is not directly applicable, the Court may act on a similar presumption if the facts justify the necessary inference.

Dulhin Golab Koer v. *Bolla Kurim*, 25 C. 744; 2 C. W. N. 580, *Dinendar Narain* v. *Titu Ram*, 30 C. 801 and *Nanda Lal* v. *Atarmoni Dasee*, 35 C. 763; 12 C. W. N. 432, relied upon.

A suit for ejectment on the allegation that the tenant of a non-transferable holding has sold it to the defendant and has abandoned the land, is not a suit or proceeding under the Bengal Tenancy Act.

Sarat Chandra Ghose v. *Shyama Chand*, 10 C. W. N. 930, followed.

Though the misconstruction of a document which is the foundation of a suit or which is in the nature of a contract or a document of title, is a ground for second appeal, a second appeal does not lie because some portion of the evidence is in writing and the Judge in the Court of Appeal below makes a mistake as to the meaning of it.

Noubut Singh v. *Chutterdharee*, 19 W. R. 222; *Shib Chandra* v. *Chandra Narain*, 1 C. L. J. 232; 32 C. 719; *Ananda Chandra* v. *Parbati Nath*, 4 C. L. J. 198; and *Braja Mohan* v. *Thakur Das*, 4 Ind. Cas. 732; 10 C. L. J. 59[illegible], followed.

In a suit for ejectment on the ground that the tenant of a non-transferable holding has sold it to

the defendant, the only circumstance that the tenancy has been held for about 25 years before the date of transfer at a uniform rate of rent is by itself insufficient to justify the inference that the rent was fixed in perpetuity.

In order to prove a custom or usage of transferability, what is necessery to prove is that such transfers have been made to the knowledge and without the consent of the landlord and that they have been recognised by him either without the payment of *nazar* or upon payment of a *nazar* also fixed by custom.

Sibo Sundari v. *Raj Mohun Guho*, 8 C. W. N. 214; and *Radha Kishore*, v. *Ananda Pria*, 8 C. W. N. 235, relied upon.

It is not necessary to prove that the landlord has actually made an objection to a transfer and has been unsuccessful.

A growing usage of transferability is of no avail against the landlord; the usage to be effective must have already grown up.

Ambika v. *Dya Gazi*, 10 C. W. N. 497; *Rasik Lall Dutt* v. *Bidhu Mukhi*, 10 C. W. N. 719; 4 C. L. J. 306; 33 C. 1094 and *Rajendra Kishore* v. *Chandranath*, 12 C. W. N. 878, followed.

But a usage of transferability after it has grown up, affects not merely tenancies created thereafter, but also existing tenancies to which the benefit of the usage attaches

Appeal from the decree of the Sub-Judge of Hooghly dated March 31st, 1908, reversing that of the Munsif of Serampur, dated September 24th, 1907.

Mr. *S. P. Sinha*, Counsel, and Babu *Ram Charan Mitra*, Senior Government Pleader, and Moulvis *Sarajul Islam*, *Shamsul Huda* and *Sowgat Ali*, for the Appellant.

Dr. *Rash Behary Ghose*, Babus *Dwarka Nath Chakravarti* and *Nagendra Nath Mitra*, for the Respondent.

JUDGMENT.—This is an appeal on behalf of the defendant in an action for ejectment and mesne profits. The subject matter of the litigation is a parcel of land, about 18 *bighas* in area, which originally belonged to a tenant by name Ram Mohan Mallik. On the 8th December 1901, the representatives-in-interest of the original tenant executed a conveyance in favour of the appellant, and delivered possession to him. The result was that on the 4th September 1905, the landlord, now respondent before us, commenced the present action for ejectment of the transferee on the ground that the holding was non-transferable, and that consequently the purchaser had not acquired any valid interest in the land. The defendant resisted the claim substantially on two grounds, namely, *first*, that the tenancy constituted a holding held at a rent fixed in perpetuity, and was consequently transferable in the same manner as a permanent tenure, and *secondly*, that if the tenancy constituted an ordinary occupancy-holding, it was transferable by custom or local usage. The Court of first instance decided in favour of the defendant upon both these points, and dismissed the suit. Upon appeal, the Subordinate Judge has overruled both the contentions of the transferee and decreed the suit. The defendant has now appealed to this Court, and on his behalf the decision of the Subordinate Judge upon both the points has been assailed as erroneous in law.

In so far as the first question raised by the defendant is concerned, namely whether the tenancy constitutes a holding held at a rate of rent fixed in perpetuity, the decision of the Subordinate Judge has been impugned mainly on the ground that he has misunderstood the effect of the rent receipts produced on behalf of the transferee. In answer to this contention, it has been strenuously argued on behalf of the plaintiff-respondent that the judgment of the Subordinate Judge upon this part of the case cannot be successfully challenged in second appeal as it does not involve any error which may properly be deemed an error of law. Before we proceed to examine this question, it is necessary to point out that section 50 of the Bengal Tenancy Act has no direct application to the present case. It has been repeatedly pointed out that the presumption mentioned in that section applies only to cases which may be called suits or proceedings under the Bengal Tenancy Act. *Nilmoni* v. *Mothura Nath* (1); *Gouri Kanta* v. *Ram Gopal* (2); *Rasamoy* v. *Srinath* (3); *Mahabir Prasad* v. *Charles Fox* (4). Now, a suit for ejectment on the allegation that the tenant of a non-transferable holding has sold it to the defendant and has abandoned the land is obviously not a suit or proceeding under the Bengal Tenancy Act [*Sarat Chandra* v. *Sham Chand* (5)] though it must be conceded that this aspect of the matter was overlooked in *Dino Nath* v. *Nobin Chander* (6), which cannot consequently be treated as a binding authority upon this point, and in this

(1) 5 C. L. J. 413.
(2) 2 C. L. J. 379.
(3) 7 C. W. N. 132.
(4) 9 C. L. J. 467; 1 Ind. Cas. 112.
(5) 10 C. W. N. 930.
(6) 6 C. W. N. 181.

latter case, the point was not allowed to be raised when the matter came up again after remand [*Dina Nath* v. *Nobin Chandra*(7)].Consequently, we must proceed on the assumption that section 50 of the Bengal Tenancy Act has no application in the present case. But it has sometimes been held that even in cases where section 50 is not directly applicable, the Court may act on a similar presumption if the facts justify the necessary inference *Dulhin Golab* v. *Balla Kurmi* (8) *Dinendra Narain* v. *Titu Ram* (9); *Natya Nundo* v. *Nunda Kumar* (10) and *Nanda Lal* v. *Atar Moni* (11). The question, therefore, arises whether the case has been properly considered by the the Subordinate Judge from this latter point of view. His findings, it may be conceded, are not very explicit and there is some reason for the criticism ot the appellant that he has misunderstood the effect of two rent receipts and the inference which may legitimately be drawn therefrom; but we are unable to hold that the mere circumstance that the Subordinate Judge has misunderstood the effect of two pieces of documentary evidence constitutes an error in law. As was pointed out by Sir Richard Couch in *Nowbut Singh* v. *Chutter Dharee* (12) though the misconstruction of a document which is the foundation of the suit or which is in the nature of a contract or a document of title is a ground for second appeal, a second appeal does not lie, because some portion of the evidence is in writing and the Judge in the Court of appeal below makes a mistake as to the meaning of it. This view has been frequently reaffirmed in this Court. *Shib Chander* v. *Chandra Narain* (13); *Ananda Chandra* v. *Parbati Nath* (14) and *Brojo Mohan* v. *Thakur Das* (15). The same view is also supported by the decisions of the Judicial Committee in *Protap Chundera* v. *Mohendra Nath* (16); *Durga Chowdhrani* v. *Jewahir Singh* (17); *Ram Ratan* v. *Nandu* (18); *Lachhman Lal* v. *Kanaya Lal* (19); *Shiva Basava* v. *Sangappa* (20) and *Hari Mohan* v. *Surendra Narayan* (21);this last case possibly represents the extreme limits of strictness with which the law relating to second appeals has been construed. In view of the principle so firmly established and widely recognised we are unable to hold that the decision of the Subordinate Judge is liable to be reversed, because he has misunderstood the meaning and effect of the rent receipts. The only other question which remains for consideration on this part of the case is, whether upon the facts found by him the inference may legitimately be drawn that the holding in its inception was intended to be a *ryoti*-tenancy at a fixed rent. Now,the only circumstance found by the Subordinate Judge is that the tenancey has been held for about 25 years before the date of transfer at a uniform rate of rent. This by itself is clearly insufficient to justify the inference that the rent was fixed in perpetuity. The elements which were found to exist in the case of *Watson and Co.*, v. *Radha Nath Singh* (22) where a tenure was found to be permanent, are all, except one, absent in this case, nor can the case be brought within the principle recognised by the Judicial Committee in the cases of *Ram Chunder* v. *Jugesh Chunder* (23); *Sutto Surrun* v. *Mohesh* (24); *Upendra Krishna* v. *Ismail Khan* (25); *Nil Ratan* v. *Ismail Khan*(26) and *Naba Kumari* v. *Behari Lal* (27) or by this Court in the cases of *Dinendra Narain* v. *Tituram* (9); *Winterscale* v. *Sarat Chander* (23) and *Nabu Mondal* v. *Cholim Mullik* (29). It is not shown that improvements have been effected or transfers recognised such as would justify an inference of permanency. We must consequently hold that the holding has not been proved to be a tenancy at a fixed rent, and, therefore, transferable as a permanent tenure.

In so far as the second ground urged by the defendant-appellant is concerned, the

(7) (1904) S. A. 2354 of 1901 (unreported).
(8) 25 C. 744; 2 C. W. N. 580.
(9) 30 C. 801.
(10) 13 C. L. J. 415; 10 Ind. Cas. 163.
(11) 35 C. 763; 12 C. W. N. 432.
(12) 19 W. R. 222.
(13) 1 C. L. J. 232; 32 C. 719.
(14) 4 C. L. J. 198.
(15) 10 C. L. J. 593; 4 Ind. Cas. 732.
(16) 16 I. A. 233; 17 C. 291.
(17) 17 I. A. 122; 18 C. 23.
(18) 19 I. A. 1; 19 C. 249.
(19) 22 I. A. 51; 22 C. 609.
(20) 31 I. A. 154; 29 B. 1.
(21) 34 C. 718; 34 I. A. 133; 2 M. L. T. 399; 11 C. W. N. 794; 6 C. L. J. 19; 9 Bom. L. R. 750; 17 M. L. J. 361 (P. C.)
(22) 1 C. L. J. 572.
(23) 12 B L. R. 229; 19 W. R. 353 (P. C.)
(24) 12 M. I. A. 263.
(25) 32 C. 41; 8 C. W. N. 889.
(26) 32 C. 51; 8 C. W. N. 895.
(27) 34 C. 902; 2 M. L. T. 433; 6 C. L. J. 122; 11 C. W. N. 865; 4 A. L. J. 570; 9 Bom. L. R. 346; 17 M. L. J. 307 (P. C.)
(28) 8 C. W. N. 155.
(29) 2 5 C, 896.

judgment of the Subordinate Judge cannot, in our opinion, be supported. The Subordinate Judge has held that in order to establish that the tenancy is transferable by custom or local usage, it is necessary for the defendant to prove that transfers of similar holdings have been made in the locality to the knowledge of, but without the consent of, the landlord, that such transfers have been recognised by him, and that the landlord has made unsuccessful objection to the transfers. The last element introduced by the learned Subordinate Judge is obviously one not supported by principle or authority. It has been laid down in numerous decisiors of this Court, amongst which may be mentioned *Palakdhari Rai* v. *Manners* (30); *Dalglish* v. *Guzuffur Hassain* (31); *Dulglish* v. *Gozoffor Hossein* (32); *Ram Huri* v. *Jubbar Ali* (33); *Dinonath* v. *Nobin Chander* (6); *Jagun Prashad* v. *Posun Sahoo* (34); *Peary Mohan* v. *Jote Kumar* (35); *Sreemuthy Kurani Dassi* v. *Sajani Kant Singh* (36) *Rajendra Kishore* v. *Chandra Nath* (37) and *Kailash Chundra* v. *Hari Mohan* (38), that in order to prove a custom or usage of transferability what is necessary to prove is that such transfers have been made to the knowledge and without the consent of the landlord and that they have been recognised by him either without the payment of *nazar* or upon payment of a *nazar* also fixed by custom. *Sibo Sundari* v. *Raj Mohan Guho* (39) and *Radha Kishore* v. *Ananda Priya* (40). It is not necesary to prove that the landlord has actually made an objection to a transfer and has been unsuccessful; in facts. if such a test were imposed, a usage of transferability could never grow up, so long as the landlord did not choose to take any objection. It may be observed, however, that as pointed out in the cases of *Ambika* v. *Dya Gazi* (41); *Rasik* v. *Bidhu* (42) and *Rajendra* v. *Chandra Nath* (37), a growing usage of transferability is of no avail against the landlord, the usage to be effective must have already grown up. This is based on the elementary principle that the usage or custom must be obligatory otherwise it cannot be said to have acquired the imperative character of law [(see *Adams* v. *Otterback* (43) and a learned discussion on the nature and obligatory effect of customary law by Mr.Justice Holloway in *Tara Chand* v. *Reeb Ram* (44)]. It is clear from an examination of the judgment of the learned Subordinate Judge that he has applied an entirely erroneous test to determine whether the evidence is sufficient to establish the existence of a custom or usage of transferability in the case before us. The case must, consequently, be re-considered from the point of view indicated. It is here necessary to advert for a moment to an argument which was advanced by the learned Vakil for the respondent. He contended that the defendant has to establish that the usage of transferability existed at the date of the creation of the tenancy, and that it is not sufficient for him to prove that such usage was in existence at the date of the transfer. This contention was sought to be based on the ground that a usage becomes obligatory upon parties to a contract on the assumption that the contract merely expressed what was peculiar to the bargain between the parties who are assumed to have contracted with reference to the local usage. *Juggomohun* v. *Manik Chand* (45); *Tucker* v. *Linger* (46) and *Prodyoto Kumar* v. *Gopi Krishna* (47). The questiou raised is one of great importance and appears to have been suggested in the case of *Dina Nath* v. *Nobin Chund* (6) but left undecided. After careful consideration of the argument which has been addressed to us, we are unable to accept it as well-founded. No doubt, the principle upon which contractual obligations are allowed to be modified by custom or usage is that such custom or usage may enter into the body of a contract without being expressly inserted, as both parties are supposed to know it and to intend

(30) 23 C. 179.
(31) 23 C 427.
(32) 3 C. W. N. 21.
(33) 6 C. W. N. 861.
(34) 8 C. W. N. 172.
(35) 11 C. W. N. 83.
(36) 12 C. W. N. 539.
(37) 12 C. W. N. 878.
(38) 13 C. W, N. 541; 10 C. L. J. 110; 1 Ind. Cas. 362.
(39) 8 C. W. N. 214.
(40) 8 C. W. N. 235.
(41) 10 C. W. N. 497.
(42) 10 C. W. N. 719; 4 C. L. J. 306; 33 C. 1094.
(43) 15 Howard 539; 14 Law Ed. 805.
(44) 3 M. H. C. R. 50.
(45) 7 M. I. A. 263; 4 W. R. 8 (P. C.).
(46) 8 A. C. 508; 49 L. T. 373; 32 W. R. 40; 48 J. P. 4; 52 L. J. Ch. 941.
(47) 11 C. L. J. 209; 5 Ind. Cas. 243; 14 C. W. N. 487; 37 C, 312,

to be bound by it. But although this may be the theory upon which usages or customs are treated as incorporated into contracts, it does not necessarily follow that a usage may not grow up so as to affect pre-existing contracts or incidents of tenancies under the Bengal Tenancy Act. It will be observed that in the case of usages of transferability of holdings, they can grow up only by the acquiescence in the first intance of the landlord himself; they are at first matters of choice with him, but may acquire an obligatory element or a binding force after he has acquiesced in the conduct of his tenants for a sufficient length of time. In this view, it may rightly be held that a usage of transferability after it has grown up affects not merely tenancies created thereafter but also existing tenancies. If we were to adopt the view suggested by the learned Vakil for the respondent, the usage in most instances would be inoperative. The origin of the tenancy might be unknown, and evidence would generally be not available as to the existence of a usage at the precise moment of the inception of the tenancy. Again, a tenancy in its inception may be a nom-occupancy-holding and may acquire the character of an occupancy-holding after the tenant has been in possession for 12 years. In such an event, assuming that there is no custom or usage of transferability in respect of non-occupancy-holdings in the locality, according to the view put forward by the respondent, the tenant could never have the advantage of the local usage,—not in the inception of the tenancy, because he has no occupancy-holding at the time, nor after the lapse of 12 years from the inception of the tenancy, because at that time no new term could be incorporated into the pre existing tenancy. In our opinion, there is nothing illogical in the view that when a landlord has allowed a usage of transferability to grow up on his estate, the benefit of it attaches to existing tenancies and is also incorporated into subsequent contracts of tenancy. Consequently, when the Subordinate Judge re-considers the evidence he will determine whether there was a custom or usage of transferability of occupancy-holdings at the time when the transfer under which the defendant claims took place. We may add that it was suggested before us that the plaintiff had recognised the purchase of the defendant. This part of the case has not been properly considered by the Subordinate Judge and it must be re-considered.

The result, therefore, is that this appeal must be allowed, the decree of the Subordinate Judge set aside and the case remitted to him for consideration of two points, namely, *first*, whether the purchase by the defendant was recognised by the plaintiff; and *secondly*, if not, whether occupancy holdings in the locality were transferable by custom or local usage at the time when the defendant made his purchase. If either question is answered in favour of the defendant, the suit will stand dismissed: if both are answered against him the suit will be decreed. The costs of this appeal will abide the result.

Appeal allowed; Case remanded.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 580 OF 1910.

April 10, 1911.

Present:—Mr. Justice Griffin.

TOTA RAM—DEFENDANT—APPELLANT

versus

MAN SINGH AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Landlord and tenant—Distraint—Evidence—Tenancy in one year—No proof of tenancy in another year—Res judicata.

Before a landlord can be held entitled to distrain he must show that the relation of landlord and tenant existed between him and the opposite party during the years in respect of the rent of which the distraint was made.

The fact that a person was a tenant in one year would not, as a matter of course, show that he was also tenant in another year.

Second appeal from the decision of the District Judge of Aligarh, dated 31st March 1910.

Mr. *Benoy Kumar Mukerji*, for the Appellant.

Mr. *Sital Prashad Ghose*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit contesting a distraint made upon the crops of the plaintiffs. It appears that after the passing of the Tenacy Act, the plaintiffs made a usufructuary mortgage of their occupancy-holding in favour of the defendant. The defendant obtained a decree for arrears of rent against the plaintiffs for 1311 *fasli*. In respect of the years 1315 and 1316 *faslis* one-half. The defendant has distrained the crops of the plaintiffs.

DURGA DEVI *v.* RAMZAN.

The Courts below have decreed the plaintiff's suit holding that the mortgage of the occupancy-holding was invalid and, therefore, the defendant was not the landlord of the plaintiffs. On behalf of the defendant in second appeal, it is contended that the question whether plaintiffs are the defendants' tenants is *res judicata* by reason of the decree for arrears of rent for 1311 *fasli*.

I have been referred to various rulings including the recent decision of the Bombay High Court reported in *Chhaganlal* v. *Bai Harkha* (1). The facts of that case are, no doubt, similar to the facts of the case before me. There is, however, in this case one matter which must not be left out of consideration. Before the defendant can be entitled to distrain, he has to show that he was the landlord of the plaintiffs during the years in respect of the rent of which the distraint was made. I find from the judgment of the Court below, that the *zemindars* have in fact obtained a decree for rent for 1315 and 1316 *faslis* against the plaintiffs. The Courts below had to decide whether or not the plaintiffs were the tenants of the defendant during the year in suit. The decree for arrears of rent for 1311 *fasli* was evidence that the defendant was a tenant in that year. But when we have a decree against the plaintiffs obtained by the *zemindars*, it seems to me that the Court below was right in holding that no tenancy did, as a matter of fact, subsist between the parties in 1315 *fasli* and 1316 *fasli*. I, therefore, dismiss the appeal with costs.

Appeal dismissed.

(1) 33 B. 479; 2 Ind. Cas. 530; 11 Bom. L. R. 345.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 910 OF 1909.

May 2, 1911.

Present:—Mr. Justice Rattigan and Mr. Justice Shah Din.

Musammat DURGA DEVI—PLAINTIFF—APPELLANT

versus

RAMZAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Punjab Pre-emption Act (II of 1905*), s.* 6—*Custom of pre-emption*—Mohalla *Acharjian, Gumti* Bazar, *Lahore city*—*Relative value of instances in which custom is admitted or found to be established and in which custom is denied but the dispute is compromised.*

The custom of pre-emption does not obtain in *Mohalla* Acharjian which is part of the recognised sub-division of *Bazar* Gumti, in Lahore City.

Cases in which vendees admit the existence of a custom of pre-emption are as valuable as cases in which the Court finds the existence of such custom established. But between such cases and those in which the vendee after denying the existence of the custom eventually is induced to come to terms with the pre-emptor and to compromise the dispute there is a very substantial distinction. A litigant may be confident that he is in the right and that the other party has no just claim against him but he may nevertheless think it prudent to accept an amicable settlement of the dispute.

Second appeal from the order of the Divisional Judge, Lahore Division, dated 29th April 1909, reversing that of the Sub-Judge, Lahore District, dated 8th July 1907, decreeing plaintiff's claim.

Lala *Hukam Chand*, for the Appellant.

Mr. *Pestonji Dadabhai*, for the Respondents.

JUDGMENT.—The sole question before us upon this appeal is, whether the plaintiff has proved that the custom of pre-emption prevails in *Mohalla* Acharjian, which is part of the recognised sub-division of *bazar* Gumti in Lahore city. The learned Divisional Judge was of opinion that no such custom has been established and after hearing Mr. Hukam Chand, on behalf of the appellant, we saw no reason to differ from that conclusion. Plaintiff has adduced documentary evidence in support of two instances of alleged pre-emption in this sub division but we are not impressed with either instance. In 1877 a Munsif appears to have decided in favour of one Sukh Dial, who claimed to pre empt a house sold to one Sher Singh. This claim was decreed and the house was situate in this sub-division. *Prima facie* this would seem to be a good instance in support of plaintiff's allegation, but on further consideration we cannot attach much value to it as a precedent. From the materials before us, it would appear that the case was decided very summarily and that no attempt was made to inquire into the existence of the custom. The defendant in the case seems to have been quite content with receiving the value of the property from the plaintiff and there was no thorough investigation into the existence of the custom. The very fact that the decree of the Munsif was accepted by the vendee suggests that the latter had no wish to contest the case, and allowed the plaintiff to take the house without any real fight.

The other instance to which we have referred is of no value whatever. Mr. Gobind Ram claimed to pre-empt a certain house and his claim was resisted by the vendee. During the course of the case the parties came to him and the plaintiff by amicable arrangement with the vendee, was allowed to purchase the property for the latter. *Per se*, this instance proves nothing, as it is quite possible that the plaintiff made it well worth the while of the vendee to settle litigation.

These are the only so-called instances in support of which documentary evidence has been produced, and in our opinion they are at least, inconclusive.

In addition to these, we have certain instances referred to very slightly by witnesses who have deposed on plaintiffs' behalf, these persons were very clear and definite when giving evidence, that on such and such occasions certain persons had preferred claims to pre-emption and that on every such occasion the claim had been recognised by the Courts and decrees passed in favour of the pre-emptors. The plaintiff was very rightly asked to substantiate this evidence by production of the records of the cases referred to, or of certified copies of the orders and judgments in these cases. He was given ample time for this purpose but his Pleader was eventually forced to admit that *owing to lack of particulars* no such documentary evidence was forthcoming. This confusion is in itself a sufficient commentary upon the value of the oral evidence. In making these remarks, however, we do not wish to impugn the veracity or *bona fides* of Mr. Dharm Das Suri who is known to us as a highly respected and upright Pleader of this Court. He gave evidence on behalf of plaintiff, and we accept his statement that he obtained possession of half of a certain house by pre-emption. But he admits that he sued for the whole of the house; that his claim was resisted by the vendee, and that it was only by a compromise that, he eventually succeeded in obtaining half of the house. The witness further admits that subsequently, when the vendee sold the other half of this house, he preferred no claim for pre-emption, as he had no need for that half. It may be that Mr. Dharm Das is of opinion that the custom of pre-emption prevails in this quarter of Lahore City but his opinion may well be erroneous, and so far as we can gather from the materials now before us it is founded on sound basis. Apart from the old case in 1877, plaintiff has not been able to point a single authenticated case in which the custom has either been admitted or been proved to exist. We certainly agree with the learned Pleader for appellant that cases in which vendees admit the existence of the custom of pre-emption are as valuable as cases in which the Court finds the existence of the custom established. But between such cases and those cases in which the vendee after denying the existence of the custom, eventually is induced to come to terms with the pre-emptor and to compromise the dispute, there is a very substantial distinction. A litigant may be confident that he is in the right and that the other party has no just claim against him, and he may nevertheless think it prudent to accept an amicable settlement of the dispute. In the case before us, there is no good proof of the existence of the custom set up by plaintiff and we agree with the Divisional Judge that the claim must be dismissed. We accordingly reject this appeal with costs

Appeal rejected.

PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 208 OF 1911.

May 6, 1911.

Present:—Mr. Justice Chevis.

MAHBUB ALI—CONVICT—APPELLANT

versus

EMPEROR - RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 234, 239—Two accused tried jointly for three offences—Validity of trial.

Section 234, Criminal Procedure Code, refers only to the case of a single accused and is not applicable where more persons than one are tried jointly under section 239 of the Code. *Budhai Sheikh* v. *Emperor*, 33 C. 292; 10 C. W. N. 32; 3 Cr. L. J. 129, followed.

Section 239, Criminal Procedure Code, is not inapplicable to a case in which each of two accused persons, tried jointly, throws the blame and responsibility on the other.

The Hon'ble Mr. *Muhammad Shafi*, for Mahbub Ali Appellant.

Chaudhri *Shahab-ud-din*, for Abdul Alim.

Lala *Kalu Ram*, Inspector of Post Offices, for the Respondent.

JUDGMENT.—Abdul Alim is a postal official. He has been tried and convicted of four offences under section 52, Post Office Act, and Mahbub Ali has been tried and convicted of having abetted the same four offences. The

two men have been tried together (see section 239, Criminal Procedure Code) and three of the offences have been inquired into in one trial (*vide* section 234, Criminal Procedure Code). The result is that in one trial Abdul Alim has been sentenced to five years' rigorous imprisonment for each of three charges and Mahbub Ali to seven years' rigorous imprisonment for each of three charges, while in the other case each of the two men gets similar sentence on a fourth charge. But as the sentences are all to run concurrently, Abdul Alim is to be imprisoned for five years, and Mahbub Ali for seven years.

Each man has appealed separately in each of the two cases, so I have four appeals before me. This judgment will dispose of all four appeals.

The first ground of Mahbub Ali's appeal contests the legality of a conviction for abetment of an offence under the Post Office Act. This overlooks section 70 of the Act which provides for abetments and attempts. Even if section 70 of the Post Office Act did not exist the objection would fail as abetment of an offence punishable under a special law is punishable *vide* sections 40 and 41 and 109 of the Indian Penal Code. Counsel frankly owns that this ground of appeal is untenable.

In Abdul Alim's appeal the procedure which has been adopted is challenged as illegal and in support of this contention *Budhai Sheikh* v. *Emperor* (1) is quoted which lays down clearly that section 234, Criminal Procedure Code, refers only to the case of a single accused and is not applicable where more persons than one are tried jointly under section 239. This decision seems to me a sound one and I can find no ruling of any High Court or of this Court to the contrary. I, therefore, following this ruling must hold the course adopted to be illegal. It might be argued that the second trial in which two appellants have only been convicted of one offence might be allowed to stand, but I see that the defence evidence was by consent recorded in one case only, so practically the two trials have been united and the proper course seems to me to be set aside both trials. Accordingly, I accept all four appeals, set aside convictions and sentences and direct that the appellants be tried again.

The District Magistrate can at the re-trial decide whether he will make use of section 234 or of section 239, Criminal Procedure Code, but he must not use the two in combination. It has been urged before me that in cases where each of two persons accused is throwing blame on the other there should not be a joint trial, but I am unable to see any good ground for holding that section 239 is inapplicable to such cases.

Tne appellants will be removed to the under-trial lock-up pending further orders by the District Magistrate.

(1) 33 C. 292; 10 C. W. N. 32; 3 Cr. L. J 126.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEALS NOS. 108 AND 109 OF 1910.

February 27, 1911.

Present:—Mr. Justice Mookerjee and Mr. Justice Teunon.

Maharani JANKI KOER—PLAINTIFF—APPELLANT

versus

LAL MAN ROY—DEFENDANT—RESPONDENT.

Additional evidence on appeal—Power of Appellate Court—Legitimate occasion for taking additional evidence.

The legitimate occasion for the admission of additional evidence by an Appellate Court arises when, on examining the evidence as it stands, some inherent defect becomes apparent.

Where a Sub-Judge on appeal did not examine the evidence and come to any conclusion that a fresh local investigation was needed to enable him to pronounce judgment, but remanded the case for further investigation: *Held*, that the order of the Sub-Judge was wholly without jurisdiction.

Kessowji Issur v. *G. I. P. Ry. Co.*, 31 B. 381; 11 C. W. N. 721; 6 C. L. J. 5; 4 A. L. J. 461; 2 M. L. T. 435; 9 Bom. L. R. 671; 17 M. L. J. 347 (P. C.) and *Krishnama Chariar* v. *Narasimha Chariar*, 31 M. 114; 3 M. L. T. 308, relied upon

Appeal from the order of the Sub-Judge of Mozaffarpur, dated December 18th, 1909, reversing the decree of the Munsif of Motihari, dated June 30th, 1909.

Babu *Ram Charan Mitra*, Senior Government Pleader, and Babu *Dwarka Nath Mitter*, for the Appellant.

Babus *Jogesh Chandra Roy* and *Akshay Kumar Banerjee*, for the Respondent.

JUDGMENT.

MISCELLANEOUS APPEAL No. 108 OF 1910.

This appeal is directed against an order of remand made by the Court below ostensibly under rule 23 of Order XLI of the Code of 1908. The plaintiff-appellant sued the defendant for recovery of a sum of money

awarded as compensation under the Land Acquisition Act and alleged to have been wrongfully taken away by the defendant. The substantial question in controversy between the parties was, whether the land in respect of which compensation had been allowed was included within *mauzah* Kuria as alleged by the plaintiff or within *mauzah* Phulwarani as alleged by the defendant. In the Court of first instance a Commissioner was appointed for local investigation. That Court accepted the report of the Commissioner and made a decree in favour of the plaintiff. The defendant was absent when the Commissioner held the investigation and there are two passages in the judgment of the original Court in which his conduct is described in these terms: "The defendant did not wilfully appear before the Commissioner and allowed his inquiry to proceed *ex parte*; I disbelieve the defendant's story that he did not know of the Commissioner's investigation. I accept his report and believe his finding to be correct." The defendant then appealed to the Subordinate Judge. The Subordinate Judge has not found that the conduct of the defendant was otherwise than what was described by the Court of the first instance, but solely on the ground that the defendant offered to bear the costs of a fresh commission, he has set aside the decree of the original Court and remanded the case for further investigation.

The plaintiff has now appealed to this Court and has contended, *first*, that the order was made wholly without jurisdiction and, *secondly*, that upon the facts stated in the judgment of the original Court and not controverted in the judgment of the Subordinate Judge, the order for further investigation ought not to have been made. On behalf of the respondent it has been argued that it is not competent to this Court to interfere, as the ground taken is not one of those mentioned in section 100 of the Code and further that this Court ought not to interfere with the exercise of discretion by the Court of appeal below.

In our opinion, there can be no doubt that the order of the Subordinate Judge was wholly without jurisdiction and must be set aside. It is not disputed that rule 23 of Order XLI has no application to the case because the decision of the Court of first instance was not upon a preliminary point. But it has been suggested by the learned Vakil for the respondent that the order might be treated as one made under rule 27 which entitles the Appellate Court to receive additional evidence under certain circumstances. It is impossible, however, to treat the order as it stands, as one substantially within the scope of rule 37. That rule entitles the Appellate Court to receive additional evidence, if the Court requires any document to be produced or any witnesses to be examined to enable it to pronounce judgment or for any other substantial cause. Now, as was pointed out by their Lordships of the Judicial Committee in the case of *Kessowji Issur* v. *Great Indian Peninsular Railway Company* (1), in order that a Court may act under this provision, it must first hear the appeal on the merits and examine the evidence as it stands. The legitimate occasion for the application of the rule arises when on examining the evidence as it stands some inherent *locuna* or defect becomes apparent [see also the case of *Krishnama Chariar* v. *Narasimha Chariar* (2)]. In the case before us, the learned Subordinate Judge has not examined the evidence and has not come to any conclusion that a fresh investigation is needed to enable him to pronounce judgment. The other suggestion made by the learned Vakil for the respondent that this Court ought not to interfere with the exercise of discretion by the Court of appeal below is not of much force. It is perfectly true that this Court is, as a rule reluctant to interfere with the exercise of discretion by subordinate Courts. Such discretion, however, must be exercised not arbitrarily but judicially. In the case before us the learned Subordinate Judge has acted clearly in contravention of the provisions of the Code, and it is consequently our duty to interfere.

The result, therefore, is that this appeal must be allowed and the order of the Court below set aside. The case will be remitted to the Subordinate Judge in order that he may deal with it in accordance with law. If any legitimate grounds are made out for action under rule 27, the Subordinate Judge before he gives any direction must satisfy himself that the elements mentioned in that

(1) 31 B. 381; 11 C. W. N. 721; 6 C. L. J. 5; 4 A. L. J. 461; 2 M. L. T. 435; 9 Bom. L. R. 671; 17 M. L. J. 347.

(2) 31 M. 114; 3 M. L. T. 308.

rule have been satisfied. Before he takes any action he must further consider what the conduct of the defendant was in the Court of first instance; and if the defendant was wilfully absent in the original Court, it would hardly be right to make an order for further investigation unless the Subordinate Judge is satisfied that undue advantage was taken of his absence by the plaintiffs with the result that an incorrect and unreliable report has been submitted by the Commissioner. The appellant is entitled to the costs of this appeal. We assess the hearing fee at two gold *mohurs*.

It is conceded that this order will govern the other appeal (Miscellaneous Appeal No. 109 of 1910). This appeal will, therefore, be also allowed and the case remanded as before. The appellant will be entitled to costs. We assess the hearing fee at two gold *mohurs*. Let the record be sent down at once,

Appeal allowed.

CALCUTTA HIGH COURT
MISCELLANEOUS CIVIL APPEAL NO. 608. OF 1910.
April 11, 1911.
Present:—Mr. Justice Chity and Mr. Justice N. Chatterjea.
JAIWANTI KUMRI AND OTHERS—APPELLANTS
versus
GAJADHAR UPADHYA AND ANOTHER—RESPONDENTS.

Guardians and Wards Act (VIII of 1890), s. 8—Order appointing guardian—Substantive application, whether necessary—Pardanashin *ladies.*

A Court has no power to make an order appointing a guardian of minors except on a substantive application.

The mere fact of the mother of a minor being a *pardanashin* lady is no obstacle to her being appointed guardian of the minor.

Appeal from the order of the District Judge of Bhagalpore, dated December 6th, 1910.

Dr. *Rash Behary Ghosh*, Babus *Khetra Mohan Sen*, and *Jogendra Chandra Dutt*, for the Appellants.

Babus *D. N. Chakravarti* and *Lal Mohan Ganguli*, for the Respondents.

JUDGMENT.—This is an appeal by *Musammat* Jaiwanti Kumri from an order of the learned District Judge of Bhagulpur refusing her application to be appointed guardian of the property of her minor sons Babu Jagdish Prosad and Babu Jogeshwar Prasad.

It appears that along with the petition of *Musammat* Jaiwanti Kumri, the mother of the minors, the District Judge had before him a petition of *Musammat* Champabati Kumri, the grandmother of the minors, that she should be appointed. On the 22nd of November 1910, the ladies were agreed that Babu Dalip Narain Singh should be appointed guardians of the property of the minors, that gentleman was asked whether he would undertake the charge but he declined. The learned District Judge then; without holding any enquiry into the respective merits of the application of the mother and the grandmother, made an order which is in form a permanent order but which from his letter would appear to be a temporary order, appointing the *Nazir* of his Court to be the guardian of the property of the minors. He appointed the mother *Musammat* Jaiwanti Kumri to be the guardian of the person of the minors and that no objection is taken. It is conceded by the learned Pleaders for both the ladies that the District Judge's order cannot possibly stand. A Court has no power to make an order appointing a guardian of minors except on a substantive application (see section 8 of the Guardians and Wards Act, 1890). The appointment, therefore, of the *Nazir* was *ultra vires.*

With regard to the refusal of *Musammat* Champabati Kumri's application, she has filed no appeal against the order of the learned District Judge, and there is, therefore, no application of hers at present before the Court. With regard to the application of *Musummat* Jaiwanti Kumri, the mother, it is not seriously contended that there ought not to be a proper inquiry into her case. Section 13 distinctly prescribes that "on the day fixed for the hearing of the application, or as soon afterwards as may be, the Court shall hear such evidence as may be adduced in support of or in opposition to the application". The learned District Judge has as yet taken no evidence on either side. In his order of the 22nd of November he remarks that "both the ladies are *pardanshins* and are for that reason not very suitable guardians for a large property like that in question in this case." We ought to point out that the mere fact if the mother being a *pardanashin* lady is no obstacle to her being appointed guardian.

It is true that a *pardanashin* lady may not be able to personally supervise the management of the property, but the safe custody of the property and its due administration may be sufficiently guaranteed by security being taken from the proposed guardian by the Court. The grandmother, *Musammat* Champabati Kumri, has made very definite allegations against her daughter-in-law in her petition of objection. Those should be inquired into by the District Judge recording the evidence on both sides.

With these remarks we set aside the order of the learned District Judge and send down the case for him to deal with the application of *Musammat* Jaiwant Kumri on the merits.

Each party will bear their own costs of this appeal.

We direct that the record be sent down at once.

Case sent down.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 825 OF 1909.

April 28, 1911.

Present:—Mr. Justice Mookerjee and Mr. Justice Teunon.

JUTHI SINGH—PLAINTIFF—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT—RESPONDENT.

Public Demands Recovery Act (I B. C. of 1895)—Certificate—Rent not settled by agreement or by Court.

No sum can be levied from any one on account of his occupation of Government land by the certificate procedure under the Public Demands Recovery Act till rent has been settled by agreement of parties or has been assessed by a competent Court.

Appeal from the decree of the District Judge of Gya, dated January 25th, 1909, affirming that of the Munsif of Gya, dated August 31, 1908.

Babu *Kulwant Sahay*, for the Appellant.

Babu *Srish Chandra Chaudhri*, Junior Government Pleader, for the Respondent.

JUDGMENT.—The substantial question of law raised in this appeal is one of some novelty. The plaintiffs sued for a declaration that two certificates issued against them under the Public Demands Recovery Act were made without jurisdiction, and that they are consequently entitled to a refund of the sum they have been obliged to pay towards the satisfaction of these certificates. The circumstances under which the certificates in question were made, are not disputed. The District Judge has held that the plaintiffs are in possession of waste lands which form the property of Government, that they have been in possession of these lands without payment of any rent, and, that consequently, the Certificate Officer was entitled to levy from them by the certificate procedure what he considered to be fair and equitable rent for the lands in their occupation. In this view, the District Judge in concurrence with the original Court has dismissed the suit.

On behalf of the plaintiffs-appellants it has been argued that the certificates were made without jurisdiction, because no sum could be levied from them on account of this occupation of the disputed lands, till rent had been settled by agreement of parties or had been assessed by a competent Court. In our opinion this contention is well-founded and must prevail. If the contrary view were maintained the result would be that as soon as a certificate was made, of the description now before us, it would be open to the judgment-debtor to take exception to the certificate on the grounds which, the Legislature could not possibly have intended, were to be investigated by the Certificate Officer. To take one illustration only, the certificate might be questioned on the ground that the land, for occupation of which rent was claimed on behalf of the Secretary of State from the judgment-debtor, was included in his tenancy and was accordingly land in respect whereof no rent was payable by him; or again, it might be contended by the occupier that the rent payable was much less than what had been assessed by the Certificate Officer. It is clear, upon the provisions of the Public Demands Recovery Act, that the Legislature could never have intended that questions of this description, involving issues of title and status should be summarily investigated and determined by a Certificate Officer. In our opinion, the provisions of section 7 of the Public Demands Recovery Act, 1895, plainly imply that a certificate may be made to recover money due under a pecuniary obligation imposed by statutory provisions, or by agreement of parties, or by the decision of a competent authority. In the case before us, Certificate Officer was not vested with jurisdiction to assess rent, and consequently, before a certificate could be carried by him for recovery of money alleged to be due as rent, the rent must have been previously determined either by agreement of parties or by the decision of

a competent Court. In this view, the conclusion is irresistible that the certificates were made wholly without jurisdiction.

The result is that this appeal is allowed, the decree of the District Judge set aside, and the suit decreed. The plaintiffs will have a declaration that the certificates in question were made without jurisdiction, and they will also be entitled to a refund of the sums paid by them for the satisfaction of the certificates. As it is plain, however, upon the facts found that plaintiffs have been in possession of lands belonging to the Government, without payment of any consideration for many years past, each party will pay his own costs throughout this litigation.

Appeal allowed.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 324 OF 1910.
April 25, 1911.
Present :—Mr. Richards, K. C., Chief Justice, and Mr. Justice Tudball.
Sheikh MOHAMMAD HUSSAIN AND OTHERS—DEFENDANTS—APPELLANTS
versus
DHANESHAR RAI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXXIV, r. 6, O. II, r. 12—Mortgage—Suit for sale on mortgage by subsequent mortgagee—Subsequent mortgagee paying off the prior mortgagee—Entire debt of subsequent mortgagee not satisfied by sale of the mortgaged property—Simple money decree—Limitation—Whether a second suit would lie to recover the balance money.

J., who owned three properties *A.*, *B.* and *C.*, mortgaged *A.* to *S.*, in 1882, the debt being re-payable in 1891. In 1883 *J.* again mortgaged *A.* to *S.* for a second time, debt being re-payable in 1886. In 1885 *J.* executed a third mortgage in favour of *D.* in respect of the same property, *A.*, to be re-paid in 1894. *S.* brought two suits on the basis of the two mortgages of 1882 and 1883 for sale of the property, but *J.*, being unable to pay the debt, compromised the suits and executed another mortgage-deed, dated 31st August, 1888 in order to satisfy the debts due under the two mortgages and the expenses of the litigation. In this mortgage *J.* mortgaged all the three properties *A.*, *B.*, *C.* and promised to pay the debt in 1900. In 1903, *D.* brought a suit on the basis of the mortgage of 1885 and *S.* having pleaded priority, *D.* had to pay off the entire sum due to *S.* In execution of the decree in this suit the mortgaged property *A.* was sold but the proceeds of sale did not satisfy the entire debt. *D.* then brought another suit for sale of the properties *B.* and *C.*, comprised in the mortgage of 1888 to recover the balance due:

Held, (*a*) that the suit did not lie;

(*b*) that the balance of the money could not be recovered by sale of the properties *B* and *C.*, which had not been mortgaged in the mortgages of 1882 and 1883 by virtue of which *S.* claimed priority against *D.*;

(*c*) that the plaintiff was not entitled to a simple money-decree as the claim for a simple money-decree had become time-barred.

Second appeal from the decision of the District Judge of Ghazipur, dated the 18th of September, 1909.

Mr. *Abdul Raoof* (with him Mr. *Rahmatullah*), for the Appellants.

Mr. *M. L. Agarwala* (with him Mr. *Govind Proshad*) for the Respondents.

JUDGMENT.—The facts of this case are as follows:—

The defendants-appellants are heirs of the original mortgagor Jahan Bibi who owned shares in three properties,—

I *Mauza* Tari.

II. *Mauza* Gangbarar Tari.

III. *Arazi* Bagh Tari.

In 1882 (17th April) she mortgaged property No. I to Sheoamber Pande, the debt being re-payable in 9 years, *i. e.*, on 17th April 1891.

In 1883 (14th August) she mortgaged to Sheoambar the same property No. I for a second debt re-payable in 3 years' time, *i.e.*, on 14th August 1886.

On 30th April 1885, she mortgaged the same property (No. I) to the predecessors-in title of the present plaintiffs. The debt was re-payable in 9 years, *i.e.*, on 20th April 1894. Two suits were brought by the mortgagees on the basis of the two bonds of 1882 and 1883 Being unable to resist them or to pay off the debts the mortgagor came to terms and gave the mortgagee a fresh mortgage of properties Nos. I, II and III in lieu of the debt due on the bonds of 1882 and 1883 plus the costs incurred in the suits. This mortgage is dated 31st August 1888. The debt was re-payable in 12 years' time, *i.e.*, in 1900.

On 22nd July 1903, a suit was brought by the present plaintiffs on their deed of 1885. They impleaded Baldeo Pando (heir of Sheoambar Pande) as a puisne mortgagee.

The latter defended the suit and pleaded that he was a prior mortgagee in that the consideration for his mortgage of 1888, was the debt due on the two mortgages of 1882 and 1883, *i. e.*, he held up the two mortgages of those years as a shield and urged that the plaintiffs could not put the property to sale

without first redeeming them. As the law was then understood and applied in these provinces, the property which a mortgagee could put to sale was held to be the actual property itself and a puisne mortgagee could not put it to sale, without first redeeming prior mortgages, in which case he could recover the total sum of his own debt and those due on prior mortgages by sale of the property. Accordingly, the plaintiffs amended their plaint and expressed their willingness to redeem Baldeo Pande.

It is quite clear that the mortgages which they had to redeem were the two prior mortgages of 1882 and 1883 and which were held up as a shield.

The Court calculated the amounts due to the plaintiffs and Baldeo Pande, and granted a decree ordering the mortgagors to pay what was due to the plaintiffs within a fixed time; in default the decree ordered sale of the mortgaged property conditional on the plaintiffs' paying the amount due to Baldeo Pande in which case they might add this amount to that of their own debt and put the property to sale to recover the total sum of the two amounts. The mortgagors failed to pay. The plaintiff paid off Baldeo Pande and there was thus a sum of Rs. 11,257-15-3 due to them.

They put the mortgaged property *Mauza* Tari to sale and recovered Rs. 9,200. The sale took place on 20th November 1907; the decree was passed on 4th May 1904 and the order absolute on 26th August 1905. The plaintiffs have now on 12th February 1909 brought a fresh suit to recover Rs. 2,200 the balance due to them on the decree of 4th May 1904 after the sale of the mortgaged property. This they seek to recover by sale of the properties Nos. II and III which were mortgaged together with property No. I to Sheoambar Pande under the mortgage of 1888. In paragraph 3 of their plaint they pleaded that they had acquired the rights of the prior mortgagee in respect to properties Nos. II and III "which had been hypothecated in the prior document owned by Baldeo Pande." The first Court granted them a decree for sale.

On appeal the lower Court held that no fresh suit would lie, but treating the plaint as an application for a decree over under Order XXXIV, rule 6, held that the money was recoverable otherwise than out of the property sold and that the plaintiffs were entitled to a decree for the amount. It then proceeded to uphold the lower Court's decree (which was a decree for sale) and dismissed the appeal. The mortgagors have now come here on second appeal. It is quite clear that no fresh suit can lie. At the utmost, after the mortgaged property had been sold, the plaintiffs could get a decree under Order XXXIV, rule 6, if all the necessary conditions existed.

Their first suit after the amendment of their plaint became a suit wherein a puisne mortgagee sought to redeem a prior mortgagee and to recover the total amount due on both mortgages by sale of the property. In such a suit a puisne mortgagee is entitled to and must ask for a sale of properties which are liable under the mortgages concerned. The decree in such a suit orders the sale of the mortgaged property, or so much of it as may suffice to satisfy the decree. After obtaining the decree, the mortgagee may put the various items of property to sale one by one in execution of his decree until the latter is satisfied. If, after all the properties have been sold, a balance remains due to him and the money is legally recoverable otherwise than out of the property sold, he may apply for and obtain a simple money-decree under Order XXXIV, rule 6.

If he fails to ask for and obtain a decree for sale of any portion of the property liable to sale under the mortgages he cannot bring a fresh suit for sale to recover the balance left over after sale of the property mentioned in the decree. That balance is money for which he has already obtained a decree ordering payment. Order II, rules 1 and 2, forbid this. He cannot be allowed to vex his defendants twice for the same cause.

In the next place, it is eqally clear that the plaintiffs are not entitled to an order for sale of properties Nos II and III. These properties were not hypothecated in the two prior mortgages of 1882 and 1883. It was on these two mortgages that Baldeo Pande took his stand and which he held up as a shield. The mortgage of 1888 was a subsequent mortgage and it was only because this mortgage satisfied the two prior ones that Baldeo Pande was able to fall back upon these latter.

Thus, the plaintiffs redeemed not the mortgage of 1888 (a subsequent one) but the mortgages of 1882 and 1883 and they

acquired rights under those mortgages. The property hypothecated therein did not include the properties which they now seek to bring to sale and, therefore, they are not entitled to put them to sale. There remains the question whether, treating this suit as an application in execution under section 47 (2), Civil Procedure Code, the plaintiffs are entitled to a simple money decree. The first suit was brought on 22nd July 1903. The debts due on the mortgages of 1882 and 1883 were payable in 1891 and 1886. In 1888 there was an acknowledgment in the bond of that year. The personal remedy under those bonds expired, therefore, in 1897 and 1894.

The debt due on the bond of 1885 was payable on 30th April 1894. The personal remedy thereon expired in 1900.

It was only on the bond of 1888 that the personal remedy had not expired when the suit was brought in 1903. The debt due under that bond was payable in 1900.

But the plaintiffs have no rights under this bond. Their rights arise out of the bonds of 1882, 1883 and 1885 and the personal remedy thereunder is, so far as the record goes, barred by time. They are, therefore, not entitled to a personal decree and, in any event, they are not entitled as a matter of course to such a decree when they bring a suit for sale in the manner in which they have done in the present case and failed.

In this view the suit must fail. We allow the appeal and dismiss the suit *in toto* with costs in all Courts, those in this Court including fees on the higher scale.

Appeal allowed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 10 OF 1910.

April 28, 1911.

Present:—Mr. Justice Shah Din and Mr. Justice Chevis.

NIAMAT AND OTHERS—DEFENDANTS—APPELLANTS

versus

NURA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Custom—Adoption—Khokar Rajputs *of Ferozepore District—Adoption of wife's relations or a stranger invalid—Pleadings—Concurrent findings—Limitation Act (IX of 1908), Sch. I, Arts* 118, 144—*Suit for possession—Suit for declaration of invalidity of adoption—Limitation*

A Musalman *Khokhar Rajput* of the Ferozepore District cannot validly adopt one of his wife's relations or a stranger. According to the *Riwaj-i-am* the power of adoption is limited to *yak jaddis or* to a *nawasa* who is a also a *yak jaddi.*

A suit for possession of property and not for a declaration of the invalidity of an adoption is not governed by Article 118 but by Article 144 of the Limitation Act.

Surjan Singh v. *Kharak Singh*, 96 P. R. 1908; 79 P. W. R. 1908, followed

Concurrent findings of fact can only be disturbed in second appeal for cogent reasons.

Second appeal from the order of the Additional Divisional Judge, Ferozpore, dated the 19th October 1909, modifying that of the Munsif, Ist Class, Ferozepore, dated the 14th June 1909, decreeing plaintiff's claim in part.

Maulvi *Muhammad Taj-ud-din Qureshi* for the Appellants.

Mr. *Nand Lal* for the Respondents.

JUDGMENT.—This judgment will cover Civil Appeals Nos. 10 and 114 of 1910.

The facts are very fully stated in the judgment of the learned Divisional Judge. In Appeal No, 10 of 1910 the appellants' Pleader has contended (1) that the land in dispute is not proved to be the ancestral property of the plaintiffs and Ghula, deceased; in other words, that it is not proved that Kada, the common ancestor, held the land; (2) that the Courts below have erred in holding that a *Khokhar Rajput* of the Ferozepore District could not validy adopt one of his wife's relations or a stranger; and (3) that the plaintiffs' suit was barred by limitation. As regards the first contention it having been held by both the Courts below that the land in suit was the ancestral property of Ghula and the plaintiffs, we can only disturb their concurrent finding if very cogent reasons were shown by the appellants for our doing so, and after hearing their Pleader we think that no such cogent reasons have been shown to exist. It is urged that the plaintiffs' ancestors were not among the original settlers of the village and that the sons of Kada held unequal areas of land. These facts, it is contended, show that Kada could not have held the land in dispute. But the inequality in the areas held by Kada's sons is after all not very great and a great deal of weight must attach to the fact that two plots of land situate in two *pattis* of the village were held by all the sons jointly which circumstance raises a strong presump-

tion that they (Kada's sons) inherited the land which was in their possession from their father. We, therefore, overrule the first contention.

The second contention is equally untenable. The appellants' Counsel concedes that there is no proof on the record of any instance in which a *Khokhar Rajput* of the Ferozepore District had adopted one of his wife's relations or a stranger, but he contends that as there are some instances of the adoption of strangers and of wife's relations among *Rajputs* of other *gots* residing in the Districts of Jullundur, Hoshiarpur, Ludhiana, Amballa and Sialkote, it must be held established that a *Khokhar Rajput* in the Ferozepore District possesses similar powers of adoption. The decisions relied upon in this connection are all mentioned in the judgment of the learned Divisional Judge, and we need say here no more than that we quite agree with the learned Judge that no definite rule of custom as to adoption among *Khokhar Rajputs* can be deduced from those decisions. As observed by the Divisional Judge, in some of the instances relied upon by the appellants, the *onus probandi* was, in view of the ruling in *Ralla* v. *Rudha* (1), wrongly imposed and the decision in favour of the power of adoption cannot, therefore, be considered as of any value. The entry in the *Riwaj-i-am* is clearly opposed to the power of adoption such as is claimed in this case as it states that among *Mussalmans* adoption is limited to *yak jaddis* or to a *nawasa* who is also a *yak jaddi*; for these reasons, we are constrained to agree with the Courts below that the adoption of the appellants' father, Nikku, by Ghula was invalid and the defence, so far as it is based upon that adoption, therefore, fails.

There remains the last contention, namely, that the suit having been brought more than six years after the adoption of Nikku is barred by limitation. The adoption in question was made in April 1901 and the suit was not filed until December 1908, that is to say, more than seven years after the date of adoption. The suit is, however, not one for a declaration of the invalidity of the adoption, but one for possession of the property left by Ghula and to such a suit it is Article 144 of the Second Schedule of the Limitation Act that applies and not Article 118 [*Surjan Singh* v. *Kharak Singh* (2)]. The plea of limitation is, therefore, untenable and we overrule it. We may note in this place that this plea was not raised in either of the Courts below, it is only in the memorandum of appeal filed in this Court that the point is taken but in view of the above-mentioned decision of this Court, which is the latest authority on the subject, we must hold that the suit was within limitation.

For the foregoing reasons, we maintain the decree of the lower Appellate Court so far as it concerns the land in dispute and dismiss Appeal No. 10 of 1910 with costs.

As regards Appeal No. 114 of 1910, the appellant's Counsel has relied on the oral evidence of a few witnesses who state that the houses in dispute were Ghula's ancestral property, though they are unable to say definitely that they were built by Kada, the common ancestor of the plaintiffs, and Ghula. This evidence, therefore, in no way helps the appellants, and we must uphold the finding of the Divisional Judge as regards the houses in question.

The result is that this appeal also fails and is dismissed with costs.

Appeal dismissed.

(1) 50 P. R. 1893.

(2) 96 P. R. 1908; 79 P. W. R. 1908.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1152 OF 1909.

March 28, 1911.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Sundara Aiyar.

KADAKAM VALLE MARU MILLE SANKARAM MOOSAD—APPELLANT

versus

K. C. OTHENAN NAIR AND OTHERS—RESPONDENTS.

Mortgage—Purchase of mortgaged property from another by mortgagee—Liability of mortgagee to present redemption by mortgagor—Estoppel.

A mortgagee cannot acquire any higher right as against the mortgagor merely by setting up an absolute title in himself to the mortgaged property.

Suit properties were held by 1st defendant's family on *otti* right under the plaintiff's family. In an action by plaintiff for redemption, 1st defendant pleaded that plaintiff's family had not the *jenm* right in the properties which the 1st defendant had purchased from a third person:

Held, that whether plaintiff had the *jenm* right or not in the properties, 1st defendant was estopped from denying the plaintiff's right to recover the land on the demise, and that 1st defendant's purchase of the

jenm right from a third person could not enlarge his rights so far as his obligation to surrender the land to the demiser was concerned.

Second appeal against the decree of the Subordinate Judge of Calicut in A. S. Nos. 656 and 675 of 1908 presented against the decree of the Principal District Munsif of Calicut in O. S. No. 567 of 1907.

Mr. *J. L. Rosario*, for the Appellant.

Mr. *C. V. Ananthakrishna Iyer*, for the Respondent.

JUDGMENT.—We are unable to accept the finding of the Subordinate Judge with regard to items Nos. 1 and 3 of the plaint. In 1843 the members of the first defendant's family admitted that these items belonged to the plaintiff's family and were held by the former family on *otti* right under the latter family. There is no evidence to show that the rights of plaintiff's family to recover on the *otti* referred to in Exhibit E was barred by limitation on the date of Exhibit A. Whether the plaintiff's family possessed the *jenm* right over the 14 items or not the first defendant's *karnavan* would be estopped from denying the plaintiff's right to recover the land on the demise. The purchase of *jenm* righ from a third person under Exhibit II in 1870 which relates to item No 1 could not enlarge the rights of the first defendant's *tarwad* so far as its obligation to surrender the land to the demiser was concerned. A mortgagee cannot acquire any higher right against the mortgagor merely by setting up an absolute title in himself to the mortgaged property. The defendants made no attempt to show that the acknowledgment of the demise of 1818-1819 contained in Exhibit E was incorrect. The *kanom* evidenced by Exhibit A was acted on by Ukkandan Nair, the succeeding *karnavan* in Exhibit C. The Subordinate Judge did not take into consideration the fact that the *kaichit* referred to in Exhibit C could, on the defendant's own case, refer to any other demise than Exhibit A. We must, therefore, hold that Exhibit A was binding on the first defendant's *tarwad* so far as items Nos. 1 and 3 were concerned.

With regard to item No. 2, Exhibit B having been found not to be genuine, we cannot interfere in second appeal. The decree of the lower Appellate Court will be modified and there will be a decree for redemption of items of the Munsif's judgment, with the modification that the amount awarded to the third defendant for improvements, *viz.*, Rs. 226-12-9, should be struck out, that Rs. 151-5-4 should be substituted for Rs. 227-5-0. The amount awarded as arrears and the future money-rent awarded should be Rs. 6 instead of Rs. 8. Proportionate costs will be allowed to both parties in all three Courts.

Decree modified.

PUNJAB CHIEF COURT.

CRIMINAL REVISION NO. 148 OF 1911.

May 8, 1911.

Present:—Sir Arthur Reid, KT., Chief Judge, and Mr. Justice Johnstone.

EMPEROR—COMPLAINANT

versus

UMDA—ACCUSED.

Evidence Act (I of 1872), ss. 24, 30, 133—Confession not relevant against the maker, whether relevant against a co-accused—Statement—Confession—Accomplice.

A house was broken into at night and certain property stolen. During the police investigation one *K.* stated that he and *U.* had committed the burglary. On search some stolen property was recovered from *U.*'s possession. *U.* alone was sent up for trial and *K.* appeared as a witness for the prosecution. *K.* in his evidence gave the same story implicating himself and *U.* On this the Magistrate transferred *K.* from the witness box to the dock and trying them jointly convicted both of them. It was found on appeal that *K.*'s statement, which amounted to a confession, had been induced in one of the manners specified in section 24 of the Evidence Act:

Held, that as *K.*'s confession could not be used against himself, as being irrelevant under section 24 of the Evidence Act, it could not be taken into consideration against *U.*, a co-accused.

Held, also, that *K.* was not an accused person when he made his statement as a witness before the Magistrate but *K.* was an accused person with *U.* when his statement was used against both and consequently it was a confession.

Held, further, that as an accomplice is a witness and not an accused person, section 133 of the Evidence Act did not affect the question in the case.

Case reported by the Sessions Judge, Ambala Division, with his No. 181 G. of 25th January 1911.

FACTS of this case are as follows:—

A house was broken into at night and certain property was stolen. During the Police investigation Kalu stated that he and Umda had committed the burglary and on search some stolen property was recovered from Umda's possession.

The Police sent Umda alone up for trial

but also sent Kalu to Court as a witness for the prosecution.

In his evidence as a witness in the case Kalu gave the same story implicating himself and Umda, and on this the Magistrate transferred Kalu from the witness box to the dock and proceeded to try him and Umda jointly for the offence.

Both Kalu and Umda were convicted and Umda's appeal was rejected on 11th November, 1910,

In Kalu's subsequent appeal which has just been decided (No. 402 of 1910) Kalu has been acquitted on the ground that his statement is irrelevant under section 24 of the Evidence Act (*Vide* judgment in appeal No. 402 of 1910).

The accused, on conviction by Lala Mukand Lal, exercising the powers of a Magistrare of the first Class, in the Karnal District, was sentenced, by order dated 3rd October 1910, under section 457 of the Indian Penal Code, to one year's rigorous imprisonment including two months' solitary confinement.

The proceedings were forwarded for revision to the Chief Court by the Sessions Judge on the following

GROUNDS.—On deciding Kalu's appeal I have great doubt as to whether or not the conviction of Umda is legal. His conviction rests mainly on the statement of Kalu which I have found to be irrelevant as against Kalu. As Kalu and Umda were tried jointly in one and the same proceeding the inference is that a statement irrelevant in those proceedings against Kalu is entirely irrelevant and cannot be used against Umda. The statement, however, was made as a witness before Kalu became a co-accused and as it is corroborated by the fact that stolen property was found in his possession, I am inclined to think that Umda's conviction is sound, *vide* section 133 of the Evidence Act.

The point, however, appears to me to be extremely doubtful and I think it my duty to refer the case to the Chief Court on the revision side for orders.

JUDGMENT.—The facts are stated in the learned Sessions Judge's referring order.

The question for consideration is whether the statement of Kalu, recorded when he was examined as a witness for the prosecution at the trial of Umda, is excluded from consideration against Umda by section 24 of the Evidence Act.

The learned Sessions Judge has found that the statement of Kalu, which constitutes a confession of his guilt of the offence for which Umda was being tried, was induced in one of the manners specified in section 24 of the Act. We see no reason for differing from this finding.

Although Kalu was not, when examined as a witness, an accused person, he was subsequently accused and tried jointly with Umda and his statement was a confession. He was an accused person at the time at which his confession was used against Umda, *i.e*, at the termination of the trial and, in our opinion, the test of relevancy is, whether the statement was relevant under section 30 of the Evidence Act. Section 24 provides that an induced confession by an accused person is irrelevant in a criminal proceeding. The trial was a criminal proceeding and the irrelevancy is not limited to the case of the accused person who confessed but extends to the whole proceeding including the case of the co-accused. Section 30 provides that a confession which has been proved may be used against a co-accused but if the confession is irrelevant it cannot be proved and a confession irrelevant under section 24 cannot be proved and consequently cannot be taken into consideration against the co-accused.

Section 133 of the Act cited by the learned Sessions Judge does not, in, our opinion, affect the question, inasmuch as it applies only to relevant statements by an accomplice. The accomplice is not an accused person but a witness.

For these reasons we hold that the statement of Kalu is excluded by section 24 and we set aside the order dismissing Umda's appeal and return the record for disposal of the appeal.

Petiton dismissed.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1036 OF 1910

May 4, 1911.

Present:—Sir Arthur Reid, KT., Chief Judge, and Mr. Justice Johnstone.

BADRI PERSHAD—JUDGMENT-DEBTOR—APPELLANT

versus

FAKIRA AND OTHERS—DECREE-HOLDERS—RESPONDENTS.

Civil Procedure Code (Act XIV of 1882), s. 269—Attachment—Sale—Conditions to be complied with.

BADRI PERSHAD *v.* FAKIRA.

In cases under section 260 of the Civil Procedure Code of 1882 a valid subsisting attachment is an indispensable precedent to a sale under that section. The section is a highly penal one and must be construed strictly. Under it when a sale is ordered the following conditions must exist:

(*a*) a valid original attachment;

(*b*) application *within* one year of that attachment by decree-holder for sale;

(*c*) lapse of one year from date of attachment.

Therefore, where an order of attachment was made on 27th June 1908 and was carried out on 20th July 1908 and no application for sale was made by 20th July 1909:

Held, that the attachment ceased to exist. The order for sale, therefore, was set aside.

Second appeal from the order of the Divisional Judge, Hissar Division, dated the 29th April 1910, confirming the order of the Munsif 1st Class, Hissar dated the 6th October 1909, directing the sale of the house under attachment.

The Hon'ble Rai Bahadur *Shadi Lal*, for the Appellant.

Lala *Lajpat Rai* for the Respondents.

JUDGMENT.—This case has had a long and intricate history, which, however, it is not necessary for us to detail at length, as we can and must decide it on the simple ground of the meaning and effect of the 3rd paragraph of section 260, Civil Procedure Code, (1882); a few particulars, however, are necessary.

Litigation began in 1903. On 12th May 1906 this Court passed the decree, which is now the decree in the case and under which defendant judgment-debtor was to close 4 windows (*janglas*) and 2 *jalis* or ventilator, also called *jharokas*. Attempts at execution were made, the latest application bearing date 11th January 1908. On 10th March 1908 judgment-debtor was ordered to comply with decree by 2nd April 1908 on pain of suffering the penalties of section 260, Civil Procedure Code (1882). The judgment-debtor having said that there were no ventilators or windows liable to be closed, the Court visited the spot, and on 3rd May gave judgment-debtor another month to obey. It having been reported that the order had not been complied with, on 29th June 1908 attachment was ordered under section 260 aforesaid and was effected on 20th July 1908. On 19th April 1909 judgment-debtor applied, saying he lived in Calcutta and not at Bhiwani, where the house is, that he had to the best of his knowledge complied with the decree, and that the attachment should be removed. On 1st May 1909 the Munsif passed an order that none of the openings beyond the gateway need be closed, that the 6 *jalis* must be plastered outside, and not only inside, as had been done, and that the windows must be bricked up and not merely closed by wooden planking inside. The appeal against this order was dismissed on 14th July 1909. On 13th August 1909 decree-holder applied for sale of the house under section 260 aforesaid, and on 6th October 1909 sale was ordered against this order and the appellate order connected with it dated 29th April 1910 this revision was filed. In the admitting order it was not clearly stated whether the revision was under clause (*a*) or clause (*b*) of section 70 (1), Punjab Courts Act; and the office has wrongly, treated the case as a further appeal under clause (*b*). After hearing Counsel, we have decided that the case is not an appeal, but a revision under clause (*a*), the grounds taken being concerned rather with questions of procedure than of law.—see Explanation to section 70 and *Coates* v. *Kashi Ram* (1).

Revision under clause (*a*) is, of course, a matter of discretion; but we think we should interfere in the present case, because, section 260, Civil Procedure Code (1882), containing a highly penal provision of law, has been applied in the case of a valuable property in connection with a decree requiring a good deal of interpretation; because before 1st May 1909 judgment-debtor had certainly done much towards compliance with that decree and may well have entertained doubts as to what more he was to do. No doubt, the sale has not yet been carried out; but, in our opinion, it is more convenient to deal with the 1st Court's irregularities now, than to await the completion of a sale, which would have to be set aside.

Among the points taken by Mr. Shadi Lal is this, that inasmuch as the order of attachment was made on 29th June 1908 and was carried out on 20th July 1908, and no application for sale had been made by 20th July 1909, the attachment, under 3rd paragraph of section 260 aforesaid, ceased to exist. In our opinion this contention is unanswerable, and Mr. Lajpat Rai has been able to raise no intelligible objection against it. It follows that when the sale was ordersd on 6th

(1) 76 P. R. 1903; 170 P. L. R. 1903.

October 1909, no attachment existed, and we have no hesitation in holding that, in cases under section 260, Civil Procedure Code (1882), a valid subsisting attachment is an indispensable precedent to a sale under that section. The section is a highly penal one and must be strictly construed. Under it, when sale is ordered, there are conditions that must exist—(*a*) a valid original attachment, (*b*) application within one year of that attachment by decree-holder for sale, (*c*) lapse of one year form date of attachment. In the present case there was, when sale was ordered, no attachment subsisting, because of the absence of condition (*b*). It has also been argued that contition (*a*) also was wanting but we used not go into that.

The remaining points taken and argued need not be noticed.

We allow the revision and set aside the order for sale of the house; but in view of the conduct of the petitioner, we direct that the parties do bear their own costs throughout.

Revision allowed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 907 OF 1910.

April 4, 1911.

Present—Mr. Justice Banerji.

KHUDA BUX AND ANOTHER—DEFENDANTS—APPELLANTS

versus

FATEH CHAND—PLAINTIFF—RESPONDANT.

Contract Act (IX of 1872), s. 22—Mistake of fact—Voidable contract—Kabuliat *entered into under mistake of fact but acted upon by executant—Absence of fraud or misrpresentation, effect of.*

A contract entered into under a mistake of fact is only voidable and is binding until it is avoided.

A *kabuliat* undertaking payment of rent at enhanced rate, was executed under a mistake of fact as to the title of the executant. The excutant acted upon it put it forward in the Revenue Court and on the basis of it successfully resisted a claim for ejectment:

Held, that if there was any mistake at all it was a case of innocent mistake and as there was no fraud or misrepresentation the *kabuliat* was binding upon the heir of the executant.

Sahiban Bibi v. *Madho Lal*, 4 A. L. J. 475, referred to.

Second appeal from the decision of the District Judge of Saharanpur, dated the 7th June 1910.

Dr. *Satish Chandra Banerji* (with him Mr. *Girdhari Lal Agarwala*), for the Appellants.

Mr. *M. L. Agarwala*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought for arrears of rent under the following circumstances; one *Musammat* Kauri was the occupancy-tenant of the holding in question. On her death Khoda Bakhsh, defendant, and Ilahi Bakhsh, the father of the other defendant, applied to be recorded as heirs and successors to the deceased. That application was rejected; a suit was subsequently brought by the then *zemindar*, the predecessor-in-title of the present plaintiff, for the ejectment of those persons. On the 30th of June 1915 Ilahi Bakhsh, the father of the second defendant, executed a *kabuliat* in respect of half the holding agreeing to pay rent at the enhaced rate of Rs. 222 per annum for the said half of the holding. In the ejectment suit he set up this *kabuliat* and contended that he was not liable to ejectment. The suit for ejectment was dismissed. The plaintiff now sues for arrears of rent for the *rabi* harvest of 1314 *fasli* and for the whole of the rent for 1315 and 1316 *faslis*. He has claim rented at the rate of Rs. 333 a year, that is, half of the old rate as against Khuda Bakhsh and the increased rate of Rs. 222 against Nathu, the son of Ilahi Bakhsh. The Court of first instance decreed the claim holding that Khuda Bakhsh was liable for $\frac{1}{3}$ and Nathu for the remainder, and that the *kabuliat* executed by his father was binding. On appeal the decision of the Court of first instance was affirmed by the learned Judge. He also held that the *kabuliat* was binding. This second appeal has been preferred by the defendants, and it is contended that the *kabuliat* was executed under a mistake of facts and, therefore, could not bind the parties. As regards Khuda Bakhsh he has apparently no ground of complaint. He has been held liable for only half of the rent at the old rate. As regards Nathu the *kabuliat* executed by his father contains a contract for payment of rent at the enhanced rate. This contract was entered into at a time when under the order of the Revenue Court refusing to enter Ilahi Bakhsh's name it was believed by Ilahi Bakhsh that he had no title. If there was a mistake of fact as to his title, the contract would only be voidable. But until it is avoided, it is a valid contract which is binding; further Ilahi Bakhsh acted in accordance with

the contract, put it forward in the Revenue Court, and on the basis of it successfully resisted the claim for ejectment. If there was any mistake at all, it was a case of innocent mistake, and there being no fraud or misrepresentation, the *kabuliat* was binding. This case is similar in principle to that of *Sahiban Bibi* v. *Madho Lal* (1). There is no force in the appeal. I dismiss it with costs.

Appeal dismissed.

(1) 4 A. L. J. 475.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 905 OF 1910.

April 5, 1911.

Present:—Mr. Justice Banerji.

JAIMANGAL SONAR - PLAINTIFF—APPELLANT

versus

BACHU PANDE AND OTHERS—DEFENDANTS—RESPONDENTS.

Parties, non-joinder of - Wrong person sued as heir of a deceased persrn—True heir not taking steps for a long time, effect of.

M. and *R.* were two brothers. *M.* died leaving a son *J.* A mortgage suit was brought against *R.*, in which he was sued in his own capacity and also as the heir of his deceased brother *M. J.*, who was the legal representative of *M.*, was not made a party to the suit. In execution of the personal decree obtained in that suit, certain property, which belonged to both *R.* and *M.*, was sold in 1879. No step was taken by *J.* until this suit to question the validity of the sale:

Held, that *J.*'s interest in the property also passed away by the sale.

Second appeal from the decision of the Subordinate Judge of Mirzapur, dated 15th July 1910.

Mr. *Parmeshwar Dyal* (for Mr. *Kalindi Proshad*) for the Appellants.

Mr. *P. L. Banerji* (for Dr. *Satish Chandra Banerji*) for the Respondents.

JUDGMENT.—This appeal arises out of a suit for the redemption of the mortgage made by two brothers, namely, Mata Dial also called Mata Din, and Ram Din, in favour of the predecessors-in-title of the defendants on the 10th of August 1870. The plaintiff is the son of Ram Din, one of the mortgagors. The defendants raised among various other pleas the contention that the plaintiff's equity of redemption had passed them under and auction sale which took place on the 24th of March 1879. That auction sale was held under the following circumstances; A suit was brought by one Nand Kumar Tewari against three persons one of whom was Mata Din, Sonar *i. e.*, Mata Dial. He was described in the plaint as defendant in his own right and also as heir to his deceased brother Ram Din. The suit was based upon a mortgage and the decree passed directed the sale of the mortgaged property and also a personal decree against the defendants. This decree was passed on the 25th of February 1878 and in execution of it the whole of the property mortgaged by Mata Dial and Ram Din was sold by auction on the 24th of March 1879 and was purchased by the original mortgagee the predecesssor-in-title of the defendants. A sale certificate was granted to the auction-purchaser on the 28th of August 1879 and it described the property sold as 8 *bighas* 8 *biswas*, No. 233, 361 and 143. This is the property of which redemption is claimed. The Court of first instance held that as the plaintiff was not a party to the suit in which the property was sold in 1879, the sale did not affect his interest in the property, and accordingly made a decree in his favour for redemption of a half of it. The lower Appellate Court has set saide the decree of the Court of first instance and dismissed the whole of the suit. In my opinion the conclusion at which the lower Appellate Court arrived is correct. The suit brought by Nand Kumar was a suit in which Mata Dial, *alias* Mata Din, was made defendant not only in his own right but also as representing the estate of his deceased brother Ram Din. It has been found that the two brothers formed a joint Hindu family. It is possible that the plaintiff was not born at the time when the suit was brought. It is equally possible that he was born and was a child in arms at that time as he gives his age in the plaint at 32 years. But as Mata Dial was a defendant in the suit as the legal representative of Ram Din, it is clear that the Court made its decree against the estate of Ram Din. It subsequently sold by auction not only the share of Mata Dial but also the interest of Ram Din. This sale took place so far back as 24th March 1879 and since then no step was taken by the plaintiff to question its validity. The principle of the ruling of their Lordships of the Privy Council in *Mulkarjan* v. *Narhari* (1) applies to this case. The whole

(1) 25 B. 337 (P. C.) 27 A. 216.

of the property including the interests of the plaintiff's father having been sold by auction and purchased by the mortgagee, the equity of redemption of either of the mortgagors no longer exists and is vested in the mortgagee. The plaintiff has, therefore, no right to redeem the mortgage, and his suit has been properly dismissed. I dismiss the appeal with costs including fees in this Court on the higher scale.

Appeal dismissed.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL NO. 583 OF 1909.

May 1, 1911.

Present :—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice Coxe.

ASIMUDDI SHEIKH—PLAINTIFF—APPELLANT

versus

SUNDARI BIBEE AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XXI, rr. 89, 92 and O. XLIII, r. 1, cl. (j), and ss. 2 (2), 104 (2)—Appeal from order disallowing application under r. 89—Second appeal, whether lies—Change in law.

No second appeal lies from an order made on appeal from an order disallowing an application under Order XXI, Rule 89, of the Civil Procedure Code.

Change in the law pointed out.

Appeal from the order of the Sub-Judge of Jessore, dated September 27th, 1909, confirming that of the Munsif of Jhenidah, dated March 15th, 1909.

Babu *Hara Chandra Chakravarti*, for the Appellant.

Babu *Mohini Mohan Chakravarti*, for the Respondents.

JUDGMENT.—This case comes before us by way of appeal from an appellate order, and a preliminary objection has been taken that no appeal lies. The application which has resulted in this appeal arises out of rule 89 of Order XXI of the Civil Procedure Code of 1908. The application under rule 89 was disallowed and the Court, as required by rule 92, made an order confirming the sale. Thereupon, the sale became absolute. From such an order an appeal lies under Order XLIII, rule 1, clause (*j*) which provides that an appeal shall lie from an order under rule 92 of Order XXI setting aside or refusing to set aside a sale. Section 104, sub-section (2), provides that no appeal shall lie from any order passed in appeal under this section, and among the orders that come within operation of that sub-section is any order made under rules from which an appeal is expressly allowed by rules. An endeavour has been made to escape from this clear provision of the law by the help of decisions under the Code of 1882 in relation to section 310A. But they are of no assistance. To begin with, section 310A (which corresponds with rule 89 of Order XXI) did not come within the operation of section 312, whereas rule 89 comes within the operation of rule 92, and so the basis on which the decisions of the Court under the old Code proceeded no longer exists. The decisions as to the appealability of orders under section 310A rested on the view that orders under that section were, in the majority of cases orders determining a question mentioned or referred to in section 244 and, therefore, were decrees from which there would be an appeal and second appeal on appropriate conditions. But this view was dependent on the circumstance that an order under section 310A was not specified in section 588 as an order from which an appeal would lie as an appeal from an order. This has been changed under the Code of 1908, for though it is provided by section 2 (2) that a decree shall be deemed to include the determination of any question within section 47 (corresponding with section 244 of the Code of 1882) the definition goes on to provide that it shall not include any adjudicaton from which an appeal lies as an appeal from an order. But an appeal does now lie as an appeal from an order made on an application under rule 89 of Order XXI.

In this view it is unnecessay to consider the further ground urged against this appeal, for I hold, for the rersons I have stated, that the preliminary objection taken on behalf of the respondents must prevail, and that this appeal must be dismissed with costs. We fix the hearing fee at two gold *mohurs*.

Appeal dismissed.

BHAGWAT PERSHAD *v.* LACHMI PERSHAD.

CALCUTTA HIGH COURT
SECOND CIVIL APPEAL No. 1230 OF 1908.
April 25, 1911.
Present:—Mr. Justice Mookerjee and
Mr. Justice Teunon.
Thakur BHAGWAT PERSHAD—PLAINTIFF —APPELLANT
versus
LACHMI PERSHAD AND OTHERS — DEFENDANTS - RESPONDENTS.

Civil Procedure Code (Act XIV of 1882), s. 373—Withdrawal of suit with liberty to bring fresh suit—Application to be treated as indivisible—Leave to withdraw without liberty to bring fresh suit, not to be given—Appeal treated as application for revision.

An application for leave to withdraw from a suit with liberty to bring a fresh suit on the same cause of action, should be dealt with as an indivisible whole. A Court which grants leave to withdraw but does not give the liberty prayed for, acts without jurisdiction, and if the order is not appealable, the High Court will interfere in revision treating the appeal as an application for revision.

Mahant Behari Dasji v. *Parshotam Das Ram Das*, 32 B. 345; 10 Bom. L. R. 293 and *Sitara Begum* v. *Faiz Ali Khan*, 9 Ind. Cas. 994, relied upon.

Appeal from the decree of the Sub-Judge of Saran, dated March 7th, 1908, affirming that of the Munsif of Sewan, dated June 22nd, 1907.

Babu *Dwarka Nath Mitter*, for the Appellant.

Moulvi *S. M. Taher* for Moulvi *Mahammad Mustafa Khan* and Babu *Chandra Sekar Banerjee*, for the Respondents.

JUDGMENT.—This appeal is directed against a decree by which the Court below has allowed the plaintiff to withdraw from his suit without leave to bring a fresh suit on the same cause of action. The plaintiff sued to recover possession of land which had been sold in execution of a certificate under the Public Demands Recovery Act. The suit was dismissed in the Court of first instance, and he appealed to the Subordinate Judge. After the appeal had been aruged at considerable length, the plaintiff applied for leave to withdraw from the suit with liberty to bring a fresh suit on the same cause of action. The learned Judge thought that in the circumstances of the case, leave ought not to be reserved to the plaintiff to bring a fresh suit. He thereupon simply granted leave to the plaintiff to withdraw from the suit and made him liable for the costs of the respondent. This order is clearly erroneous. The Subordinate Judge, in the view he took of the matter, ought to have refused the application made by the plaintiff and heard out the appeal on the merits. This position is supported by the decision of the learned Judges of the Bombay High Court in *Mahant Behari Dasji* v. *Parshotam Das Ram Das* (1). Instead of adopting this the obvious course, and dealing with the prayer in the application as an indivisible whole, the Subordinate Judge treated it as composed of two parts, granted one half and refused the other. It was plainly not competent to him to deal with the application in this manner.

The result, therefore, is that this appeal is allowed, the decree of the Court below set aside, and the case remanded to that Court in order that the appeal may be heard on the merits. The costs will abide the result.

We may add that a preliminary objection was taken by the learned Vakil for the respondent as to the competency of the present appeal, on the ground that no appeal is allowed by the Code from an order of this description. In answer to this contention, it was argued by the learned Vakil for the appellant that the order might be treated in substance as a decree within the meaning of section 2 of the Code, because, although it merely purports to grant leave to the plaintiff to withdraw from the suit, as leave has not been reserved to him to bring a fresh suit on the same cause of action, the order is really equivalent to a dismissal of the appeal, and practically embodies a final and conclusive decision upon the matters in controversy between the parties. As we have already pointed out, the order is not one contemplated by section 373 of the Code of 1882, and was made entirely without jurisdiction. It thus becomes unnecessary for us to decide whether it is or is not liable to attack by way of appeal, because, manifestly, if the order is not appealable, it may be set aside in the exercise of our revisional jurisdiction, if the memorandum of appeal is treated as an application for revison as was done in the case of *Sitara Begam* v. *Faiz Ali Khan* (2).

Appeal allowed.

(1) 32 B. 345 ; 10 Bom. L. R. 293.
(2) 9 Ind. Cas. 994.

MADARS HIGH COURT.

ORIGINAL SIDE CIVIL APPEAL No. 9 OF 1910.

April 7, 1911.

Present—Sir Arnold White, KT., Chief Justice, and Mr. Justice Munro.

T. SUBRAYULU CHETTY AND OTHERS —DEFENDANTS—APPELLANTS

versus

KAMALAVALLI THAYARAMMA— PLAINTIFF—RESPONDENT.

Hindu Law—Mitakshara—*Maintenance to widow—Partition among her husband's co-parceners after suit for maintenance, how far affects claim for maintenance—Claim, enforceability of, as against the whole undivided family.*

The claim of a Hindu widow for maintenance as against the undivided family of her deceased husband is not affected by a partition effected between the co-parceners of her husband after the institution of her suit.

The claim is enforceable against the whole undivided family, *i. e.*, against all the co-parceners who can be traced to a common ancestor, and not against that branch of the family only to which the plaintiff's husband belonged.

Hemangini Dasi v. *Kedarath Kundu Chowdhury*, 16 C. 758, distinguished.

Jayanti Subbiah v. *Hlamelu Mangamma*, 27 M. 45, explained and referred to.

Appeal from the judgment of the Hon'ble Mr. Justice Sankaran Nair, dated the 12th day of January 1910 passed in the exercise of Ordinary Civil Jurisdiction of the High Court in C. S. No. 264 of 1908.

Messrs. *C. V. Anantakrishna Iyer* and *V. V. Sreenivasa Iyenger*, for the Appellant.

Messrs. *Venkatasubba Row* and *Radhakrishnaya*, for the Respondent.

JUDGMENT.

WHITE, C. J.—This is an appeal from a judgment of Mr. Justice Sankaran Nair awarding the plaintiff Rs. 25 a month by way of maintenance and giving a decree in her favour for a sum of Rs. 700 which represents the value of certain jewels which she claimed as her property.

Three points were raised on behalf of the appellant. The *first* was, that the decree was wrong inasmuch as it was given against all the members of the family of the plaintiff's deceased husband. The *second* point was, that Rs. 25 a month was too much for her maintenance. The *third* point was, that the learned Judge was wrong in giving plaintiff a decree for Rs. 700 for the jewels which she claimed.

I can deal with the second and the third points quite shortly and I will take them first. In arriving at Rs. 25 a month as the proper sum to be awarded in the plaintiff for maintenance the learned Judge refers to a discussion that took place after the plaintiff's husband's death and to a discussion by certain arbitrators who were of opinion that the plaintiff should be paid Rs. 10 a month for maintenance, that she would be given jewels worth Rs. 1,500. The learned Judge points out that this really amounts to a payment of about a sum of Rs. 1,500 as representing the value of jewels to which she is absolutely entitled and a monthly payment of Rs. 10 and a life-interest in jewels worth Rs. 500 and taking that into consideration he thinks that Rs. 25 a month in lieu of a monthly payment of Rs. 10, Rs. 1,500 worth of jewels and a life-interest in Rs. 500 worth of jewels, should be a fair equivalent. He accordingly assesses her maintenance at that rate. I am not prepared to hold that the learned Judge was wrong in assessing the maintenance at that amount. The third point was not seriously pressed by Mr. Ananthakrishnaiyer. The learned Judge says that he is inclined to accept the evidence of the plaintiff that jewels claimed belonged to her and accordingly found in her favour. I am not prepared to say he was wrong.

We come now to what is really the important point in this case. The contention on behalf of the appellant is, that the Judge was wrong in giving a decree against all the members of the undivided family of the plaintiff's husband. The actual form of the decree is that the 1st, 3rd, 4th and 5th defendants do pay to the plaintiff her arrears of maintenance and a further sum of Rs. 25 a month, and that the arrears and the monthly maintenance be a charge on a certain house No. 334, Mint Street, which forms a part of the family property. Now it appears from the genealogical tree which has been furnished to us, that the fifth defendant is the brother of the deceased husband of the plaintiff, and represents the plaintiff's husband's branch of the family. The plaintiff's husband as the grandson of the common ancestor Rangiah Chetty and the fifth defendant represented one branch of the family. The fourth defendant is the grandson of the common ancestor through another son and the first defendant is a son of the common ancestor. The third defendant is the grandson of the common ancestor through another son. There are

thus four branches of the family of which Rengiah Chetty was the common ancestor.

After the presentation of the plaint by the plaintiff in this case, an agreement was come to amongst the surviving members of the family for a partition of the family property. It is fairly obvious that this was a counter move to the plaintiff's claim for maintenance. Of course, the other members of the family are perfectly entitled in law to take any steps which the law allows to defeat a claim for maintenance which is raised by a widow of a deceased member of the family.

In regard to the partition agreement the learned Judge observes that no transaction amongst defendants subsequent to the plaint can prejudicially affect the plaintiff's claim and her claim must, therefore, be treated as that of widow of a member of an undivided family. It was said on behalf of the respondent, that learned Judge might have put the case higher than he did. His reference to the presentation of the plaint, of course, with regard to the argument that was presented to him in the case, and it may well be that he could have put it that a completed partition amongst the defendants before the suit was instituted would not defeat the claim of a widow for maintenance. However, it is not necessary for me to discuss that question. I prefer to deal with this case on the facts that actually arise. The case we have to deal with is a case where widow presents a plaint for maintenance against the surviving members of her deceased husband's family and after the institution of the suit, as a matter of fact in this case, after the settlement of issues, a partition is arranged between the members of the family. Mr. Ananthakrishna Iyer contended that the proposition of the learned Judge was wrong. He relied upon the authority of the decision in *Hemangini Dasi* v. *Kedarath Kundu Chowdhury* (1). In that case there is to be found on page 766 this passage—"Where there are several groups of sons the maintenance of their mothers must, so long as the estate remained joint, be a charge upon the whole estate, but when a partition is made the law appears to be that their maintenance is distributed in accordance to relationship, the sons of each mother being bound to maintain her. The step-sons are not under the same obligation." In the course of the judgment reference is made to a passage in *Dayabhaga*, Chapter III, section 1, referred to at page 764 of the report. It seems perfectly clear that the decision was given with reference to *Dayabhaga* Law and with reference to the special acts of that particular case which was a case of several groups of sons, and the right to maintenance of their mothers have to be decided. I do not think the judgment in that case is binding upon us in any way with reference to the question which we have to decide under the *Mitakshara* Law as administered in this Presidency. I am of opinion, therefore, that the learned Judge was perfectly right when he says that the transaction subsequent to the suit cannot prejudically affect the plaintiff's claim and that her plaint must be treated as that of a widow of a deceased member of an undivided family.

Now the question is, what are the rights of a widow of an undivided family? Mr. Ananthakrishna Iyer's argument was this, as I understood it, the share or interest of the deceased husband of the plaintiff passed not to the members of the undivided family as a whole but to the surviving members of that branch of the family of which he and the fifth defendant were members and that the decree against the other members of the family was wrong. In support of that proposition he relied upon an observation of Mr. Justice Bhashiam Aiyangar, in the case of *Jayanti Subbiah* v. *Alamelu Mangamma* (2), the observation appearing on page 48. The learned Judge there says, "When an undivided Hindu family consists of two or more males related as father and sons or otherwise, and one of them dies leaving a widow, she has a right of maintenance against the surviving co-parcener or co-parceners, *quoad* the share or interest of her deceased husband in the joint family property which has come by survivorship into the hands of the surviving co-parcener or co-parceners, and though such right does not in itself form a charge upon her husband's share or interest in the joint family property, yet when it becomes necessary to enforce or preserve such right effectually it could be made a specific charge on a reasonable portion of not exceeding her husband's share or interest therein". Now Mr. Anantha-

(1) 16 C. 758.

(2) 27 M. 45.

krishna Iyer contended that the words share or interest of the deceased husband in the joint family property which has come by survivorship into the hands of the surviving co-parcener or co-parceners, were only meant to apply to surviving co-parceners who derived an immediate benefit from the fact of their being the survivors in respect of the share or interest of the deceased member of the family. That is to say, to put the case concretely, with reference to the facts of this case he contended that the "surviving co-parcener" meant the fifth defendant, the other member of the plaintiff's branch of the family, and not the other members of the undivided family. The expression "into the hands of the surviving co-parceners" is, of course, figurative because nothing but an intangible share passes by way of survivorship. It is, no doubt, true here that the fifth defendant's share increases *co instanti* by right of survivorship on the death of the only other member of his branch of the family, and that the share of the other members of the family do not increase *co instanti*.

But I am certainly not prepared to hold that the words of the learned Judge were intended to apply to the members of the branch of the family of which the deceased man was a member, and not to the members of the joint family. We have been referred to various text-books and authorities by the learned Vakil for the respondent and I dare say he would have cited more if we had not stopped him. I may refer to a few of them. I shall first take paragraph 470 in Mayne's Book on Hindu Law "Having ascertained what property there is to ascertain its amount. . . . . For this purpose it is necessary first to deduct all claims against the united family for debts due by it or other charges on account of maintenance, marriages or ceremonies which it would have to provide for if it remained united." So the obligation to maintenance is placed on exactly the same basis as an obligation to pay any other family debt.

Then in Bhattacharya's Law relating to Joint Hindu Family, Edition of 1885 at page 290, the learned author observes, "I have already noticed that in many instances the right of a family member to maintenance founds itself upon two or three relationships. Thus, since a *Mitakshara* family may be composed of brothers or cousins of the first degree or those of second or third degrees: as soon as any of the members dies his widow as such gets maintenance from all the surviving members."

In West and Bulher, on page 791, the learned authors say—"Other liabilities, that is provisions for the maintenance or portions of persons not entitled to shares may be distributed by agreement amongst the co-sharers. But the estate at large is liable, at least in the hands of the members of the family making a partition, and co-parceners who desire to limit their responsibilities must obtain the assent of the persons interested."

I do not propose to cite more authorities.

With regard to so much of the decree as directs that the maintenance will be a charge on the house No. 334, Mint Street, we are certainly not satisfied that the sum of Rs. 25 a month which the learned Judge has awarded to the plaintiff is more than the value of the share of her deceased husband in the family property or the income derivable therefrom. It may be that a decree would not be enforceable against a member of a joint family which gave something more than the interest of the deceased husband which passed by survivorship to the surviving member. But we have to consider this Rs. 25 a month does not represent more than the share to which the husband would have been entitled to, if during his life time he had obtained partition of the joint family property. I think the learned Judge was right and I would dismiss the appeal with costs.

MUNRO, J.—I agree.

Appeal dismissed.

MADRAS HIGH COURT.

CRIMINAL APPEAL No. 77 OF 1911.

April 26, 1911.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Ayling.

MADASAWMY CHETTY AND OTHERS – APPELLANTS

versus

EMPEROR—OPPOSITE PARTY.

Sessions Trial—Concerted action by accused—Acts forming part of same transaction—Misjoindor of charges—Criminal Procedure Code (Act V of 1898), s. 239.

Where a number of accused persons are charged with having associated themselves to commit an offence and having done acts forming part of the same transaction, it is not necessary, in order to sustain the charge, to prove that all of them acted

together from start to finish in order to make their acts parts of one single transaction. It is enough to show that as each batch of them joined the principal accused they adopted his intention.

Choragudi Vencatadri v. *Emperor*, 33 M. 502; 7 M. L. T. 299; 1 M. W. N. 65; 5 Ind. Cas. 847; 11 Cr. L. J. 258 and *Emperor* v. *Duttu Hanmant Shahapurkar*, 30 B. 49; 7 Bom. L. R. 633; 2 Cr. L. J. 578, referred to.

Appeal against the order of the Court of Session of the Tinnevelly Division in Case No. 1 of 1903 of the Calendar for 1910.

Messrs. *S. Krishnamachari* and *Venu Gopal Chetty*, for the Appellants.

Mr. *C. F. Napier*, Public Prosecutor, Contra.

JUDGMENT.—It is contended that the trial is bad for misjoinder of charges, as the acts done by accused Nos. 1, 2, 3, 4 and 5 to 8 did not form part of the same transaction. We are entirely unable to agree with this contention. It is not necessary that all the accused should have acted together from start to finish to make their acts parts of one single transaction, [see *Choragudi Venkatadari* v. *Emperor* (1)] and we do not think that the learned Judges who decided the case of *Emperor* v. *Duttu Hanmant Shahapurkar* (2) intended to lay down a contrary rule.

It is next argued that is not proved that all the accused shared in the first accused's object of preventing Prosecution Witness No. 3 from baling water to his land. We agree with the learned Judge that as each batch of accused joined the first and second accused they adopted their intention of obstructing the baling of water. In our opinion it would be quite enough if they determined to inflict injuries on the Prosecution Witness in order to forward first accused's object. There is really no variation between the charge and the finding with respect to the common object. With respect to the sentences we find that the first accused is not stated to have inflicted any specific injury on the Prosecution Witness either in Exhibit D or in the inquest report. We confirm the conviction of all the accused but reduce the sentence on first accused to three years, on the third and fourth to two years and on the fifth to eighth accused to one year's rigorous imprisonment. The sentence on second accused is confirmed.

(1) 33 M. 502; 1 M. W. N. 65; 7 M. L. T. 299; 5 Ind. Cas. 847; 11 Cr. L. J. 258.

(2) 30 B. 49; 7 Bom. L. R. 633; 2 Cr. L. J. 578.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2964 OF 1908.

April, 26, 1911.

Present:—Mr. Justice Holmwood and Mr. Justice D. Chatterjee.

JANHABI AND OTHERS—DEFENDANTS—APPELLANTS

versus

BALBHADRA SUAR AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Widow—Alienation of husband's property—Purpose of paying off husband's debts—Inquiry by purchaser—No inquiries made from alleged creditor—Whether inquiry sufficient.

A person dealing with a Hindu widow is bound to make *bona fide* inquiries into the necessities of the transaction and to honestly satisfy himself that it was in the particular instance for the benefit of the estate.

Hunooman Persaud Pandey v. *Munraj Koonweree*, 6 M. I. A. 393; 18 W. R. 81 *note*, relied upon.

The defendant purchased from a Hindu widow a part of her husband's property. The reason for the sale, as stated in the *kobala*, was the payment to *B*, her husband's creditor. The defendant did not make any inquiries from *B.* as to the existence of the debt but satisfied himself with an inquiry from the widow as to the reason for the alienation. In a suit by the reversioners to recover possession of the property, it was found that *B.* was not a creditor of the deceased husband:

Held, that the inquiry fell short of that which is required of a purchaser and that the suit was rightly decreed.

Appeal from the decree of the Sub-Judge of Sambalpur, dated July 28th, 1908, reversing that of the Munsif of Sambalpur, dated March 31st, 1908.

Babu *Gopal Chandra Sarkar*, and Mr. *G. Sirkar*, for the Appellants.

Babu *Satish Chandra Ghosh*, for the Respondents.

JUDGMENT.—The plaintiffs who are the reversioners of one Hari Suar, brought the suit giving rise to the present appeal for the purpose of recovering certain properties sold by *Musammat* Bhabani, the mother of Hari Suar, in 1904 after his death. The facts shortly are that Hari Suar died in 1878 leaving his widow Madhi and his mother Bhabani. The widow died in 1901 after having incurred certain debts on mortgages on her husband's property. Suits upon these debts were brought against *Musammat* Bhabani after the death of *Musammat* Madhi and decrees were recovered declaring that the decretal amounts were to be considered as binding upon the estate *Musammat* Bhabani paid up these decretal amounts and

subsequently sold a part of the family properties to Dharnidhar stating that she was taking the consideration money for the purpose of paying up the debts due to certain *Gauntias* from whom she had borrowed for the purpose of paying the aforesaid decrees.

The lower Appellate Court has found that the witnesses Banomali and Narain are not entitled to credit and that the defendant's stroy that Bhabani took loans from Banomali and his brother to pay off the decretal debt from the late widow of Hari Suar is a tissue of falsehood. The reason for the sale, as stated in the *kobala*, is the payment of Banomali and his brother, and when it is found that Banomali and his brother did not advance any money it is virtually found that the reason stated in the *kobala* is false.

It is contended, however, that that finding is not sufficient for the decision of the case. The principle of the ruling in the case of *Hunooman Persaud Pandey* v. *Musammat Babooee Munraj Koonweree* (1) has been applied to the case of alienations by Hindu widows. It was therein laid down by their Lordships of the Privy Council that a person, dealing with one in the position of the manager of an infant, or as in this case, with a Hindu widow in possession of the property of the last owner, is bound to make *bona fide* inquiries into the necessities of the transaction and to be honestly satisfied that it was in the particular instance for the benefit of the estate. Applying this principle to this case, it appears, and it is admitted, that Dharnidhar did not make any inquiries from Banomali or his brother as to the existence of the debt. He satisfied himself with an inquiry from Bhabani as to the reason for the alienation. Upon a proper application of the principle laid down by their Lordships of the Privy Council we are of opinion that the abstention from any inquiry from Banomali and his brother is an indication that the inquiry was not such an inquiry as is required to be made by their Lordships. In fact the inquiry made in this case falls short of that which was required of the purchaser. In this view of the case we think that the finding of the learned Subordinate Judge is sufficient to dispose of the case; and, there being no evidence of any inquiry by Dharnidhar from the alleged creditors, there is no need for any remand for the purpose of a fresh finding as to the completeness or *bona fides* of the inquiry made by the purchaser.

The appeal is dismissed with costs.

Appeal dismissed.

(1) 6 M. I. A. 293; 18 W. R. 81, *note*.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 721 OF 1909.

March 21, 1911.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Sundara Aiyar.

MALAIKOLANDU CHETTIAR AND ANOTHER—APPELLANTS

versus

PERIA PILLAY *alias* PERIYANAGAM PILLAY—RESPONDENT.

Pleadings—Suit for money—Objection to maintainability of suit—Defendant's consent while giving evidence to plaintiff's recovering the amount, whether validates suit—Issue not framed—Right of Appellate Court to adjudge on questions not the subject of an issue.

Where in a suit an issue is framed as to plaintiff's right to maintain it, the mere consent of the defendant, while being examined as a witness, to plaintiff's recovering the amount, will not be sufficient to entitle the plaintiff to maintain the suit.

Where no issue on a matter is raised by the pleadings and the Court of first instance has not dealt with it, it is competent to the Appellate Court to entertain the question in appeal.

Second appeal against the decree of the District Court of Trichinopoly in Appeal Suit No 230 of 1903, presented against the decree of the District Munsif of Trichinopoly in Original Suit No. 1 of 1907.

JUDGMENT.—The Appellate Court has not satisfactorily disposed of the questions arising in the case. No finding has been recorded on the second issue. The Judge is wrong in supposing that second defendant's consent, while being examined as a witness, to the plaintiff's recovering the amount sued for would be sufficient to entitle the plaintiff to maintain the suit. The question to be decided is, whether, on the date of the plaint, the plaintiff had a valid assignment of the debts sued for. This question must now be decided. The first defendant in his written statement denied that the amounts sued for were due to the plaintiff's assignor. but no issue was raised with reference to this contention and consequently there was no finding by the District Munsif. On appeal

the District Judge disallowed four of the items of debts claimed on the ground that there was no evidence that they were due except the original creditor's accounts. In the absence of an issue raising the question of indebtedness the District Judge should no have entertained the question in appeal. The first defendant objected only to three out of four items in the 8th ground in his memorandum of appeal. As there was a clear denial of indebtedness in the written statement we cannot say that the first defendant has waived his right to have the question tried but he must be confined to the three items mentioned in the 8th paragraph of his appeal memorandum. The finding on the question of the plaintiff's right to interest is also unsatisfactory. Mr. Rangachariar contends that interest used to be allowed between the parties at settlement of account between them. If this be so, the plaintiff would be entitled to recover interest. We reverse the decree of the lower Appellate Court and remand the appeal. Issues Nos. 1 and 2 must be disposed of afresh as well as the plaintiff's right to interest on any amount that may be found due to him. The lower Appellate Court must also try another issue *viz.*, "whether any of the sums mentioned in the 8th ground of the first defendant's memorandum of appeal to the lower Appellate Court was due to the plaintiff's assignor." Fresh evidence may be recorded on this issue only. A revised decree must be passed by the lower Appellate Court deciding the above questions. The costs of this second appeal and the memorandum of objections will abide the result.

Case remanded.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1141 OF 1909.

April 26, 1911.

Present: - Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice Coxe.

RATAN MANDAL—DEFENDANT—APPELLANT

versus

AZIM MANDAL—PLAINTIFF—RESPONDENT.

Muhammadan Law — Pre-emption —Talab-i-istishad—*Declaration that* talab-i-mowasibat *had been performed* —*Omission fatal.*

A pre-emptor in making the *talab-i-istishad* or formal demand before witnesses should refer expressly to the fact of *talab-i-mowasibat* or immediate claim having been duly made, for that is an essential condition of tho validity of the assertion of the pre-emptor's right of pre-emption.

Rujjab Ali v. *Chundi Churn*, 17 C. 543 (F. B.) and *Jadu Singh* v. *Butan Singh*, 2 Ind. Cas. 207, followed.

Appeal from the decree of the Sub-Judge of Nadia, dated May 6th, 1909, reversing that of the Munsif of Kushtea, dated September 12th, 1908.

Babu *Girija Prasanna Roy Chowdhry*, for the Appellant.

Babu *Satish Chandra Ghose*, for Moulvi *Serajul Islam*, for the Respondent.

JUDGMENT.—This second appeal arises out of a suit brought to assert a right of pre-emption. One point and one point alone arises for consideration, and that is whether the plaintiff in making the *talab-i-istishad*, or formal demand, before witnesses referred expressly to the fact of *talab-i-mowasibat*, or immediate claims, having been duly made. On the decision of a Full Bench of this Court, reported in *Rujjab Ali* v. *Chundi Churn* (1) that has since been followed in *Jadu Singh* v. *Rutan Singh* (2). it is clear that this is an essential condition of the validity of the plaintiff's assertion of his right of pre-emption. The lower Appellate Court, while affirming that the plaintiff asserted his right of pre-emption in making the *talab-i-istishad* omits to find as a fact whether or not there was this express reference to the *talab-i-mowasibat*; and the case must, therefore, go down for determination of the issue whether the plaintiff in making the *talab-i-istishad* expressly referred to the fact of the *talab-i-mowasibat* having been duly made. This issue must be decided on the evidence at present on the record. The return must be made within a month from the arrival of the record in the lower Appellate Court, and the appeal will be again placed before this Bench as at present consituted as soon as the return is received. We direct that the record be sent down at once.

I have said that the only point that arises is that with which I have dealt. It is true that it has been argued before us that the pre-emption was defective inasmuch as it did not include the whole of the property, but

(1) 17 C. 543.

(2) 2 Ind. Cas. 207.

in our opinion that contention cannot be raised, having regard to the mode in which the parties presented their case to the Court and we, therefore, on that point must decide against the appellant.

Case remanded.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 442 OF 1909.

April 27, 1911.

Present:—Mr. Richards, K. C., Chief Justice, and Mr. Justice Banerji.

MANNU LAL—PLAINTIFF—APPELLANT

versus

FAZAL IMAM AND OTHERS—DEFENDANTS—RESPONDENTS.

Pensions Act (XXIII of 1871), ss. 4, 6—Muafi land since British Government—Pension—'Grant of land revenue,' meaning of—Alienation.

A village, granted to the ancestor of the defendants by a Hindu Raja long prior to the establishment of the British Rule, was held as *muafi*. The defendants mortgaged the village to the plaintiff, and on his suing, on foot of the mortgage, the defendants pleaded that the suit was not maintainable without a certificate under section 6 of the Pensions Act, 1871:

Held, that the grant of the village was neither a pension nor a grant of land revenue within the meaning of the Pensions Act, 1871, that it was an ordinary *muafi* which could be transferred by sale or mortgage and that the Pensions Act did not apply.

Ganpat Rao v. *Anand Rao*, 28 A. 104; *Lachmi Narain* v. *Mukund Singh*, 26 A. 617, referred to.

First appeal from the decision of the Subordinate Judge of Banda, dated the 1st day of December, 1909.

The Hon'ble Mr. *Sundar Lal* (with him Messrs. *Peare Lal Banerji* and *Umashankar Bajpai*) for the Appellant.

Mr. *Abdul Majid*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit on foot of a mortgage. The amount due to the plaintiff was a very large sum, namely Rs. 27,000 odd. He abandoned part of his claim and only sought to recover Rs. 10,000. The property which is the subject of mortgage is referred to in a document called "Proceedings in the Revenue Court, District Banda, dated the 4th of December 1840." This document will be found printed at page 1 of the respondents' book. The document recites the history of the village, and some ancient *sanads* would appear to have been produced at the time. It seems that a grant of the village was first made by one Raja Chhatar Lal in favour of one Pahari Bhand, who, was the ancestor of the defendants. This *sanad* was succeeded by others, long prior to the establishment of British Rule. The document we referred to concludes with the following remarks: "The *sanads* which have been produced were also taken into consideration. Therefore, under section 9 of the circular letter as also under other section of the said letter, this village seems fit to be held as a *muafi* from generation to generation as heretofore. I, therefore, concur in the opinion of the Deputy Sahib as to the maintenance of the *muafi*." Then follows the order "That this village be maintained as *muafi* as before." The village has been held as a *muafi* village up to the present day. It is admitted that the mortgage was made and executed, but the defendants, mortgagors, plead that a suit could not be maintained without a certificate under section 6 of the Pensions Act, XXIII of 1871; and, *secondly*, that it was not competent for the co-sharers to transfer the property at all.

An extract from the *wajib-ul-arz* of 1880 was given in evidence by the defendants. There the entry is to the following effect:—"The *jama* of this *mahal* was remitted for the support of the *zemindars*. It is still remitted by the Government. No co-sharer is competent to transfer property." The learned Subordinate Judge considered that a certificate was necessary under the provisions of the Pensions Act. In our opinion he was wrong. Section 4 provides that no Civil Court shall entertain any suit relating to any pension or grant of money, or land revenue conferred or made by the British or any former Government. It seems to us clear that the grant of the land was not a "Pension." The expression "grant of money" or "land reverue" is defined in section 3 of the Act as including anything payable on the part of the Government in respect of any right, privilege, perquisite or office. Section 8 of the Act throws some light upon what was meant by Pensions and grants by Government of money or land revenue, because it is there provided that they are to be paid by the Collector, Deputy Commissioner, or other authorised Officer. The grant of these villages was certainly not a grant of land revenue, within the ordinary meaning of that expression. It is contended, however, that inasmuch as Government remitted the renenue, they must be said to have granted it. We do not think that this is the true

meaning of the expression in the Act. If it were, all *muafi* holdings would fall within the purview of the Act. It is, however, conceded that ordinary *muafi* can and is daily transferred both by way of sale and mortgage, and that the Pensions Act does not apply to ordinary *muafi*. A Bench of this Court held in the case of *Ganpat Rao* v. *Ananda Rao* (1), that a grant of land revenue was not a grant within the meaning of the Act. On appeal their Lordships of the Privy Council did not differ from the finding of the Court. The same view was taken in the case of *Lachmi Narain* v. *Mukund Singh* (2).

The only question which remains is the effect of the entry in the *wajib-ul-arz*. It seems to us that this entry standing by itself cannot have the effect of making property, which *prima facie* is transferable, untransferable. We do not know under what circumstances the entry was made. In the proceedings of 1840, to which we have referred, there is not the smallest reference to any restraint upon alienation on the grantees. In our opinion, the decision of the Court below was wrong.

We, therefore, allow the appeal, set aside the decree of the Court below and decree the plaintiff's claim with costs in both Courts including in this Court-fees on the higher scale. We fix six months from this date for payment and direct that the decree be drawn up in the terms of Order XXXIV, rule 4, of the Code of Civil Procedure.

Appeal allowed.

(1) 28 A. 104; A. W. N. (1905) 206.
(2) 26 A. 617.

CALCUTTA HIGH COURT.
REGULAR CIVIL APPEAL NO. 349 OF 1909.
April 25, 1911.
Present:—Mr. Justice Chitty and
Mr. Justice N. Chatterjea.
MAHOMED FAZLUR RAHMAN CHOWDHRI AND ANOTHER—DEFENDANTS—APPELLANTS
versus
MAHOMED FAYZUR RAHMAN CHOWDHRI—PLAINTIFF AND OTHERS—DEFENDANTS—RESPONDENTS.

Partition—Mahomedans—Partition of portion of properties—Whether allowable.

It is inexpedient to allow suits for partition of a portion of properties because it would lead to a multiplicity of suits and to endless litigation between the parties who are jointly entitled to the properties.

There is no distinction in principle between partition of joint property under Hindu or Muhammadan Law.

Appeal from the decree of the first Sub-Judge of Mymensingh, dated July 12th, 1909.

Babus *Jogesh Chandra Roy* and *Sasankajiban Roy*, for the Appellant.

Babus *Dwarka Nath Chakravarti*, Moulvi *Mahomed Mustafa Khan* and Mr. *G. Sarkar*, for the Respondents.

JUDGMENT.—This is an appeal from a decree of the learned Subordinate Judge of Mymensingh in a suit brought by the plaintiff for partition of certain moveable properties. The plaintiff is the brother of defendants Nos. 1, 2 and 3; and defendant No. 4 is their mother. The father of the plaintiff and defendants Nos. 1, 2 and 3, Mahomed Mofizur Rahaman Chowdhury, died on the 29th June 1904, leaving the parties to the suit surviving him, and also two daughters Rahim-un-nissa Banu and Kalim-un-nissa Banu. He appears to have left considerable property both moveable and immoveable. The plaintiff now sues for a partition of the moveable properties on the allegation that subsequent to the death of his father, Mofizur Rahaman Chowdhury, a document, called the deed of partition was effected between the plaintiff and the defendants on the 12th October 1904, by which the daughters relinquished their claim to the moveable properties now in suit and to the brick-built room of the dwelling house. The plaintiff goes on to state that the moveable properties and the remaining immoveable properties are the *ijmali* properties of the plaintiff and the defendants and are in their joint ownership and possession. It is true that he states that the immoveable properties are separately enjoyed by the brothers; but no partition of them has been made.

Defendants Nos. 1 and 2 objected to the frame of the suit. The objections which they made in the lower Court and which have been repeated here, are, *firstly*, that the present suit being one for partition of a portion only of the joint family property, cannot be maintained; *secondly*, that the daughters were necessary parties to this suit inasmuch as they repudiate the alleged relinquishment by them of their right to the properties now in question.

The learned Vakil for the appellants raised other objections but we need not go beyond these preliminary questions. Certain cases have been cited to us which, no doubt, deal with suits for partition of property of Hindus, but so far as the question before us is concerned there does not seem to be any distinction in principle between partition of joint property under Hindu or under Muhammadan Law. The real objection to the suit is one which seems common to both classes of cases, namely, that it is inexpedient to allow suits for partition of the properties, because it would lead to a multiplicity of suits and to endless litigation between the parties who are jointly entitled to the properties. It is clear upon the admission of the plaintiff that there are properties other than those in suit jointly owned by him and by the defendants. It is also a patent fact that the sisters Rahim-un-nissa Banu and Kalim-un-nissa Banu (who have not been made parties to this suit) in their evidence repudiate, as we have said, any relinquishment by them of the claim to a share of these moveable properties, while the so-called deed of partition has not even been placed on the record. Under these circumstances it appears to us right that the case should go back in order that the plaintiff may amend his plaint and make his suit one to which there can be no objection either on the score of his suing only for a part of his cause of action, or of non-joinder of parties necessary to the suit.

The learned Vakil for the plaintiff-respondent says that he cannot raise any serious objection to this course being taken. The learned Subordinate Judge has disposed of these preliminary objections somewhat curiously. He does not appear to have fully considered the law on the point, nor has he considered at all the convenience of the parties.

We accordingly allow this appeal, set aside the judgment and decree of the Subordinate Judge and remand the case to his Court with directions that within two months from the date of the receipt of the record by the lower Court, the plaintiff be allowed to amend his plaint by making his suit into one for partition of the whole property and also by adding his sister as parties defendant so that there may be a final adjudication of the rights of all the parties interested. The plaintiff must pay the costs of the first and second defendants of the suit and of this appeal up to date. These costs must be paid by him before he is allowed to amend his plaint, that is to say, within two months from the date of the arrival of the record in the lower Court.

As for the third defendant, he has, so far as we understand, sided with the plaintiff. We, therefore, direct that he do pay his own costs in the Court below as well as in this Court. If the plaintiff fails to amend his plaint within the time specified, then this appeal will be allowed and his suit will stand dismissed with costs in both the Courts.

We assess the hearing fee in this appeal at five gold *mohurs*.

Let the record be sent down without delay,

Appeal allowed.

CALCUTTA HIGH COURT.

CIVIL RULE No. 4276 OF 1910.

December 12, 1910.

Present:—Mr. Justice Mookerjee and Mr. Justice Coxe.

RAJ KUMAR ROY AND OTHERS—DEFENDANTS—PETITIONERS

versus

HARA KRISHNA CHAKRAVARTI—AND OTHERS—PLAINTIFFS—OPPOSITE PARTY.

Consent decree—Reversal—Excess of Pleader's authority—Set aside by same Court—Revival of original suit.

When a consent decree made by a Court is set aside by the same Court in a separate suit on the ground that the decree was passed an a compromise in excess of the authority of the Pleaders of the parties, the effect is to revive the original suit which was terminated by the compromise decree.

Kshetra Mohan Barik v. *Man Gobinda Pal*, 6 Ind. Cas. 13; 14 C. W. N. 558, distinguished.

Solomon v. *Abdool Azeez*, 6 C. 687; 8 C. L. R 169, *Sarbesh Chandra Basu* v. *Hari Doyal Singh Rai*, 5 Ind. Cas. 236; 14 C. W. N. 451; 11 C. L. J. 346; and *Sharat Chunder Ghose* v. *Kartick Chunder Mitter*, 9 C. 810 12 C. L. R. 455, relied upon.

Rule against the orders of the Court below dated June 1st and July 9th, 1910.

Babu *Surendra Chandra Sen*, for the Petitioner.

Babu *Dwarka Nath Mitter*, for the Opposite Party.

JUDGMENT.—There is no controversy as to the circumstances under which the orders now assailed on the ground that they were made without jurisdiction, were passed

by the Court below. The petitioners were defendants in an action for recovery of possession of land commenced against them by the plaintiffs opposite party in the Court of the Munsif of Faridpur. That suit terminated in a consent decree made on the 30th March 1906. In 1909 the petitioners brought a suit in the same Court to set aside the consent decree on the ground that it had been made on the basis of a compromise assented to by their Pleaders in excess of their authority. They also alleged that the compromise had been brought about by fraud. On the 16th April 1910, the suit was decreed. It was found that the allegation of fraud was not established but that the Pleaders for the petitioners had acted in excess of their authority. The result was that the consent decree was set aside. Thereupon, on the 1st June 1910, the Court made an *ex parte* order for revival and re-hearing of the suit. The petitioners then asked the Court to reconsider the matter but their application was refused on the 9th July. We are now invited to set aside the orders made on the 1st June and the 9th July on the ground that they were passed without jurisdiction. The learned Vakil for the petitioners has contended that the effect of the setting aside of the consent decree is not a revival of the suit which was terminated by that decree and that the only remedy of the plaintiffs opposite party is to institute a fresh suit for the enforcement of their rights even though such a suit might be defeated by the plea of limitation. In support of this position, he has placed reliance upon the case of *Kshetra Mohan Barik* v. *Man Gobinda Pal* (1). In answer to this contention, reliance has been placed by the learned Vakil for the opposite party upon the decision of this Court in the cases of *Bibi Soloman* v. *Abdool Azeez* (2) and *Sarbesh Chandra Basu* v. *Hari Doyal Singh Rai* (3). In our opinion, the view taken by the Court below is correct and the rule ought to be discharged.

As a matter of principle, there can, in our opinion, be no doubt that when a consent decree has been set aside on the ground that the decree was passed on a compromise in excess of the authority of the Pleaders of the parties, the effect is to revive the original suit which was ended by the compromise decree. But the learned Vakil for the petitioners has contended that this view is opposed to that taken in the case of *Kshetra Mohan Barik* v. *Man Gobinda Pal* (1) upon which he relies. That case, in our opinoin, is clearly distinguishable. There the decree made by consent was set aside in a suit commenced in a Court of equal jurisdiction and the learned Judges appear to have held that a Court of equal jurisdiction had no authority to direct a revival of the suit which had been originally tried in another Court. Whether the decision in question can be defended on principle, may be a matter for serious consideration when another case precisely of the same character comes before the Court. It is sufficient for our present purpose to hold that, in this case, as the decree was set aside by the Court which had originally passed it, no question can arise as to the competency of the Court to direct a revival of the suit which it had tried and which had been terminated by the compromise decree. The view we take is supported by the cases of *Bibi Soloman* v. *Abdool Azeez* (2): *Sarbesh Chandra Basu* v. *Hari Doyal Singh Rai* (3) and *Sharat Chandra Ghose* v. *Kartick Chandra Mitter* (4), in each of which cases an order of the description made by the Court in the present case was made, apparently without any question that it was open to the Court to set aside the consent decree and to direct a revival of the original suit. See also *Neale* v. *Gordon-Lennox* (5). We may point out that there is analogy to support this view. It cannot be disputed that when an order of dismissal of a suit is set aside, whether upon review or by reason of an order made under sections 103 or 108 of the Code of 1882, the effect is to revive the original suit. It cannot also be disputed that in execution proceedings, if the order by which the proceedings have terminated is ultimately set aside, even by a separate suit, the result is to restore the proceedings. To take one illustration only, if an execution-sale is set aside on the ground that it has been improperly held, the result is substantially to revive the execution proceedings and to allow

(1) 6 Ind. Cas. 13; 14 C. W. N. 558.
(2) 6 C. 687; 8 C. L. R. 169.
(3) 5 Ind. Cas. 236; 11 C. L. J. 346; 14 C. W. N. 451.
(4) 9 C. 810; 12 C. L. R. 455.
(5) (1902) A. C. 465; I S. E. C. (N. S.) 309; 71 L., J. K. B. 939; 87 L. T. 341; 66 J. P. 757; 51 W. R. 140; 18 T. L. R. 791.

the decree-holder to carry them on as if no sale ever took place; and if he makes an application in this behalf on question of limitation arises [*Issurree Dassee* v. *Abdool Khalak* (6), *Qamar-ud-din* v. *Jawahir Lal* (7): *Rahim Ali Khan* v. *Phul Chand* (8)]. In our opinion, it would be clearly illogical to hold that it is open to the petitioner to have the decree by which the original suit was terminated, vacated on the ground that the decree had been improperly made, and at the same time to insist that the plaintiffs are not entitled to an adjudication by the Court upon their rights.

The result, therefore, is that the orders made by the Court below must be affirmed and this rule discharged with costs. We assess the hearing fee at two gold *mohurs*

Rule discharged.

(6) 4 C. 415; 3 C. L. R. 46.
(7) 27 A. 334.
(8) 18 A. 482.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 211 OF 1910.

March 7, 1911.

Present:—Mr. Justice Mookerjee and Mr. Justice Caspersz.

ABINASH CHANDRA PAL—PETITIONER—APPELLANT

versus

PROBODH CHANDRA PAL OPPOSITE—PARTY—RESPONDENT.

Succession Certificate Act (VII of 1889), ss. 4, 6—Certificate taken by Hindu widow in respect of husband's estate—Death of widow—Certificate by husband's heir.

G. a Hindu died many years ago. His widow *M.* took out a succession certificate. After *M.*'s death, some of *G.*'s heirs applied for a succession certificate in respect of the estate of *G.*, for (1) a sum in deposit as compensation money awarded in a case under the Land Acquisition Act, (2) a sum payable as arrears of rent for non-agricultural lands from the tenant of certain premises comprised in the estate of *G.* and (3) a Government Promissory Note standing in the name of *M.* as the certificate-holder of the estate of *G.* The Court below dismissed the petition on the ground that as *G.* died many years ago, the petition could not be entertained, and it suggested that the petitioners might ask for a succession certificate to the estate of *M.*, or obtain Letters of Administration to the entire estate of *G.*

Held, that, although *G.* died many years ago, his estate was in his widow's possession as a qualified owner, and when succession opened out after her death, the reversionary heirs took the estate as if the limited estate taken by the widow had not intervened, and that a certificate may be granted to the applicant in respect of each of the three items.

Appeal form the order of the District Judge of 24-Pergannas, dated April 5th, 1910.

Babu *Surendra Nath Guha*, for the Appellant.

Babu *Manmotha Nath Mukerjee*, for the Respondent.

JUDGMENT.—This appeal is directed against an order by which the Court below has dismissed an application for a succession certificate without any inquiry.

It appears that one Gopal Chandra Pal died many years ago. He left a widow Mahamaya Dasi who took out a succession certificate under Act XXVII of 1860. Mahamaya died on the 20th December 1909. On the 24 February 1910, the proceedings out of which the present appeal arises, were initiated by an application presented by three of the nephews of Gopal Chandra Pal, under section 6 of Act VII of 1889. The application was vague and indefinite and the learned Judge would have been amply justified if he had rejected it or called upon the petitioners to make more precise allegations. Neither of these courses was, however, pursued, and the application was registered. When the case came to be heard, the application was treated as one for a succession certificate in respect of the debts and securities payable to the estate of Gopal Chandra Pal. The learned Judge held that, as Gopal Chandra Pal had died many years before the application, it could not be entertained; and he suggested that the applicants might either ask for a succession certificate to the estate of Mahamaya Dasi or obtain Letters of Administration to the entire estate of Gopal Chandra Pal. The propriety of this order is questioned in the present appeal.

On behallf of the appellant it has been argued, that the District Judg ought to have held that a succession certificate could be issued under the Act in respect of the debts and securities which are mentioned in the application and which, it is asserted, form part of the estate of Gopal Chandra Pal. In support of this contention, reliance has been placed upon the cases of *In re Tripoora Soonduree* (1) and *Bishun Dass* v. *Mungul Dass* (2). In answer to this contention, it has been argued on behalf of the respond-

(1) 22 W. R. 45.
(2) 24 W. R. 203.

ent who also claims as a nephew of Gopal Chandra Pal, that the application could not be entertained under the Succession Certificate Act inasmuch as the debts mentioned accrued due long after the death of Gopal Chandra Pal and could not consequently be treated in any sense as debts due to the deceased, within the meaning of section 4 of the Succession Certificate Act. It has further been argued that there is no evidence to show that the debts and securities mentioned in the application did really form part of the estate of Gopal Chandra Pal. In our opinion the contention of the appellant is well-founded and must prevail.

The three items in respect of which succession certificate is sought are described in the application as follows: *first*, a sum in deposit as compensation-money awarded in a case under the Land Acquisition Act: *secondly*, a sum payable as arrears of rent for non-agricultural lands from the tenant of certain premises comprised in the estate of Gopal Chandra Pal: and, *thirdly*, a Government Promissory Note standing in the name of Mahamaya Dasi as the certificate-holder of the estate of her husband Gopal Chandra Pal.

With regard to the first two items, it may be conceded that as the compensation-money was awarded and the rent due accrued long after the death of Gopal Chandra Pal, if the expression used by the Legislature in section 4 of the Succession Certificate Act, namely "a debtor of a deceased person," be strictly construed, the view may well be maintained that a succession certificate cannot be granted in respect of either of these sums. We are not prepared, however, to place a narrow and restricted construction upon the provisions of the Succession Certificate Act. In the case before us, although Gopal Chandra Pal died many years ago, his estate was in the possession of his widow as a qualified owner, and when succession opened out after her death, the reversionary heirs took the estate as if, for certain purposes at any rate, the limited estate taken by the widow had not intervend. For instance, with regard to the question of limitation, the Legislature has expressly rul d that the reversionary heirs are entitled to recover the estate within 12 years from the date of the death not of the original, but of the limited owner. In fact, the true position, in a case of the description now before us, is to some extent anomalous. The widow was in possession not in her own right as full owner, but as the representative of her husband, clothed only with a qualified power of alienation. The sum claimed as compensation-money under the Land Acquisition Act was consequently payable to her, not in her own right but as the representative of her husband. This is manifest from the provisions of section 32 of the Land Acquisition Act which provides as follows. "Where land in respect whereof the sum was awarded belonged to any person who had no power to alienate the same, the Court shall either order the money to be invested in the purchase of other lands to be held under the like title and conditions of ownership as the land in respect of which such money shall have been deposited, was held, or if such purchase cannot be effected forthwith, then in such Government or other approved securities as the Court shall think fit." It follows, plainly, from this provision that although the compensation-money was nominally payable to the widow, yet in the contemplation of law, it could be given to her only in her representative character as the holder of the estate of her husband [*Mrinalini Dasi* v. *Abinas Chandra* (3)]. Similar remarks, it may be observed, apply to the second item, namely, arrears of rent in respect of certain premises comprised in the estate of the husband of the lady. She was entitled to realise the rent not in her own right but as the representative of her husband. In so far as the third item is concerned, it is asserted on behalf of the appellant, that the security stands in the name of the lady as the certificated holder of the estate of her husband. We are clearly of opinion, therefore, that the language used by the Legislature in section 4 of the Succession Certificate Act does not require to be unduly strained if we hold that a certificate may be granted to the appellant in respect of each of the three items mentioned in the application.

The view we take is supported by the decision in *Bishan Das* v. *Mungul Das* (2). It is suggested, however, by the learned Vakil for the respondent that this view is inconsistent with that taken by a Full Bench of this Court in *Bancharam Mojamdar* v. *Adya*

(3) 6 Ind Cas. 508; 11 C. L. J. 533; 14 C.W.N. 1024

Nath Bhattacharya (4). That case, however, is plainly distinguishable. It was ruled there that a debt existing in the life-time of a creditor, which did not become payable until after his death, was still a debt due to the deceased, and that consequently his heirs could obtain a succession certificate in respect therof. The principle recognised by the Full Bench has obviously no application to the circumstances of the case before us, whereas we have held the sum payable to the widow may by legal fiction be treated as a debt really due, if not to the deceased personally, at any rate to the estate of the deceased full owner.

The result is that this appeal is allowed and the order of the Court below set aside. The case is remitted to the District Judge in order that it may be re-tried in accordance with law. All the issues which arise properly upon the pleadings, must be determined upon the evidence. The costs of this appeal will abide the result. We assess the hearing fee at two gold *mohurs*.

Appeal allowed.

(4) 13 C. W. N. 966; 36 C. 936; 3 Ind. Cas. 492; 10 C. L. J. 180.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 194 OF 1909.

February 17, 1911.

Present :—Mr. Justice Mookerjee and Mr. Justice Teunon.

MURLIDHAR SUPAL—DECREE-HOLDER—APPELLANT

versus

NARSINGH DAS—JUDGMENT-DEBTOR—RESPONDENT.

Execution of decree—Application for execution—Dismissal for default, effect of—Whether takes away effect of previous order—Order for attachment.

The mere circumstance that an application for execution has been dismissed for default, does not take away the effect of any previous order which might have been made.

Kamini Debi v. *Aghore Nath Mookerjee*, 4 Ind. Cas. 402; 11 C. L. J. 91; 14 C. W. N. 357, relied upon.

An application for execution of a decree was made on August 5th, 1904. Then another application was made on October 5th, 1907. Notice of that application was duly served under section 248 of the Code of 1882 on the judgment-debtor who asked for time to prefer his objections. Time was granted, but he failed to appear on the date fixed. On that date the Court passed this order: "Decree-holder is to take further steps on or before January 7th, 1908". On this day the application for execution was dismissed for default. The present application was presented on August 6th, 1908:

Held, that the order necessarily implied an adjudication that the decree at the time was capable of execution and that consequently no question could be raised in the present proceeding that the application of October 5th, 1907, was barred by limitation.

Mungul Pershad Dichit v. *Grija Kant Lahiri*, 8 C. 51; 11 C. L. R. 13; 8 I. A. 23, relied upon.

The principle of the decision in *Mungul Pershad Dichit's* case is applicable whenever there is an adjudication by the Court upon the rights of the parties to an execution proceeding: it is not essential that there should be an order for attachment.

Mazzem Hossain v. *Sarat Kumari Debi*, 5 Ind. Cas. 89; 14 C. W. N. 432; 11 C. L. J. 357, referred to.

Appeal from the order of the Sub-Judge of Mozaffarpur, dated March 16th, 1909.

Dr. *Rash Behary Ghosh*, and Babu *Shorashi Charan Mitra*, for the Appellant.

Dr. *Sarat Chandra Basak* and Babu *Chandra Sekhar Banerjee*, for the Respondent,

JUDGMENT.—This appeal is directed against an order by which the Court below has dismissed an application for execution of a decree on the ground that it is barred by limitation. The decree now under execution was made on the 7th August 1899, in affirmance of the decree of the Original Court passed on the 10th September 1897. The first three applications for execution were made within the time allowed by law, on the 18th April 1901, 13th February 1903 and 5th August 1904, respectively, the fourth application for execution was presented on the 5th October 1907. The present application for execution was presented on the 6th August 1908. There is no question that the application for execution now before us was made within the time allowed by law after the date of the previous application for execution. But it has been argued that the previous application itself had been made beyond time, and that consequently the present application is barred by limitation. In answer to this argument, it has been contended on behalf of the decree-holder that there was an adjudication by the executing Court, that the previous application was not barred by limitation, and that consequently in the present proceedings it is no longer open to the judgment-debtor to urge that the execution of the decree is barred by limitation. The question in controversy between the parties, therefore, is as to the effect

of the order which was made in the previous execution proceeding.

Now, we find that on the 5th October 1907, an order was made by the Court for the issue of notice upon the judgment-debtor under section 246, Civil Procedure Code. On the 29th November following there was an order for the issue of fresh notice upon the application of the decree-holder. On the 20th December 1907, it was reported that the notice had been served and that the service was proved. The judgment-debtor appeared and prayed for time to enable him to put in his objection to the execution. Thereupon the case was adjourned to the 4th January 1908. On that date, the judgment-debtor did not enter any appearance. Thereupon, the Court recorded the following order: "Decree-holder is to take further steps on or before the 7th January 1908." On the latter day the application for execution was dismissed for default. On behalf of the decree-holder it has been argued that the order of the 4th January 1908 implies a determination by the Court that the decree at that time was capable of execution and that consequently no question can be raised in the present proceeding that the application is barred by limitation. On behalf of the judgment-debtor it has been contended that there was no adjudication directly or by implication on the 4th January 1908, that the decree was capable of execution and that, as subsequently the application for execution was dismissed for default, the matter is still open for consideration. In our opinion the contention of the decree-holder is manifestly well-founded and must prevail.

The principle applicable to cases of this description has been laid down by the Judicial Committee in the case of *Mungul Pershad Dichit* v. *Grijakant Lahiri* (1) and has been thus explained by Mr. Justice West in the case of *Sheikh Budan* v. *Ram Chandra Bhunjgaya* (2). "The judgment-debtor though called on to dispute, if he wished or if he could, a certain proposition of right and consequential demand of relief or action by the judgment-creditor, either failed in his contention or at any rate allowed the judgment to go by default-" If this contingency happens it is not not open to the judgment-debtor in a subsequent proceeding to ignore the adjudication that has been made and to have the whole matter re-opened for consideration. In the case before us, the judgment-debtor was entitled to a notice under section 248 of the Code of 1882. That notice was duly served upon him. He entered appearance and asked for time to enable him to prefer his objection to the execution proceeding. Time was granted to him but he subsequently failed to appear on the day fixed for the trial. The result was that the Court made an order under section 249 of the Code, which provides as follows:—"If the person to whom notice is issued under the last proceeding section does not appear or does not show cause to the satisfaction of the Court why the decree should not be executed the Court shall order the decree to be executed." When, on the 4th January 1908, the judgment-debtor did not appear and did not show cause why the decree should not be executed, it was the duty of the Court to direct execution of the decree. The Court accordingly directed the decree-holder to take further steps on or before the 7th January 1908. This order necessarily implies an adjudication that the decree at the time was capable of execution. But it has been suggested, by the learned *Vakil* for the judgment-debtor that inasmuch as the application for execution was subsequently dismissed for default, the rule laid down by the Judicial Committee in the case of *Mungal Pershad Dichit* v. *Grijakant Lahiri* (1), has no application. In support of this view he has placed reliance upon the case of *Bhagwan* v. *Dhondi* (3). That case, however, is clearly distinguishable. In that case after service of notice under section 248, the application for execution was dismissed for default. There is nothing to show that any intermediate order was made of the description now before us. Consequently, that case cannot be treated as an authority for the broad proposition, that the mere circumstance that the application for execution has been dismissed for default takes away the effect of any previous order which might have been made. On the other hand, the decision of the Court in the case of *Kamini Debi* v. *Aghore Nath Mukerjee* (4) shows that if an order has been made which directly or by implication determines the rights of the parties

(1) 8 C. 51; 11 C. L. R. 13; 8 I. A. 23.
(2) 11 B. 537.
(3) 22 B. 83.
(4) 11 C. L. J. 91; 4 Ind. Cas. 402; 14 C. W. N. 357.

to the execution proceeding, the fact that the decree-holder does not choose to proceed with execution and the case is struck-off does not entitle either party to re-open the question upon which there has been a previous adjudication. No doubt, as pointed out in the judgment of this Court in the case of *Monmohan* v. *Dwarka Nath Karmakar* (5), the principle in question has no application when it is proved that there was no adjudication by reason of the failure of the decree-holder to prosecute the execution proceedings with due diligence. That is so, because there is no judicial determination of the objection by reason of the default of the decree-holder. The same consequence follows if there is no determination of the objection by reason of the defective notice served upon the judgment-debtor or by reason of fraudulent suppression of notice issued upon him. The principle which underlies cases of this description is that the previous order cannot rightly be held to operate as an effective bar to an inquiry into the merits of the case, on the occasion of the subsequent application for execution, because no opportunity has been afforded to the judgment-debtor to have his objection determined by the execution Court. The view is in accord with that taken by this Court in the cases of *Khoshal Chandra Rai* v. *Ukiladdi* (6), and *Mochai Mondal* v. *Meseruddin Molla* (7), The learned Vakil for the respondent has also suggested that in order to make the principle of the decision in *Mungul Pershad* v. *Grija Kant* (1) applicable it is essential that there should be an order for attachment. In our opinion the principle of the decision is applicable whenever there is an adjudication by the Court upon the rights of the parties to the execution proceeding, it is not essential that there should be an order for attachment. *Mauzzem Hossain* v. *Sarat Kumari Debi* (8). Our attention was, however, drawn to the decision of the Allahabad High Court in *Tileshar Rai* v. *Parbati* (9), but that decision has been subsequently dissented from in *Sheoraj Singh* v. *Kameshar Nath* (10) and is clearly opposed to the decision of the Judicial Committee in the case of *Mungul Pershad* v. *Grija Kant* (1).

The result, therefore, is that the order made by the Court below cannot be supported. The appeal is allowed and execution is directed to proceed. The appellant is entitled to his costs both here and in the Court below. We assess the hearing fee in this Court at two gold *mohurs*.

Appeal allowed.

(5) 12 C. L. J. 312; 7 Ind. Cas. 55.
(6) 14 C. W. N. 114; 3 Ind. Cas. 47.
(7) 13 C. L. J. 26; 9 Ind. Cas. 213.
(8) 5 Ind. Cas. 89; 11 C. L. J. 357; 14 C. W. N. 433.
(9) 15 A. 198.
(10) 24 A. 282.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL NO. 305 OF 1909.

April 28, 1911.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice Coxe.

PARESH NATH MALLIK—AUCTION-PURCHASER—APPELLANT

versus

HARI CARAN DEY—JUDGMENT-DEBTOR—RESPONDENT.

Fraud, what is—Execution of decree—Ex parte *decree—Sale*—Ex parte *decree set aside after sale—Title of purchaser for value.*

The word "fraud" is very loosely used in cases for setting aside of sales: every irregularity is taken to be fraud with the consequence that such a finding involves. A finding of fraud should be reserved for that which is dishonest and morally wrong; a vague general finding of fraud is not sufficient; actual fraud must be established.

In an execution sale under an *ex parte* decree, to all appearances in order, a person became a purchaser for value. Subsequently, the *ex parte* decree was set aside as it was proved that summons had not been duly served:

Held, that the sale was valid and the purchaser could not be deprived of the benefit of his purchase.

It is the policy of the Court, and a very wise policy, to protect its purchasers, for although in an individual case there may be some hardship, it would be far more prejudicial to the general body of judgment-debtors that any doubts should be thrown upon titles acquired by purchasers in execution under decrees which are to all appearances in order and free from objection.

Appeal from the order of the District Judge of Hooghly, dated March 31st, 1910, confirming that of the Munsif of Serampur, dated October 11th, 1909.

Bubu *Dwarka Nath Mitter*, for the Appellant.

Babus *Boidya Nath Dutt* and *Tarakeswar Pal Chowdhury*, for the Respondent.

JUDGMENT.

JENKINS, C. J.—This appeal arises out of an application to set aside a sale held in

execution of a decree for rent. This decree was passed *ex parte* in 1903, and on the 12th February 1903 there was a sale in execution of this decree at which the appellant before us became the purchaser. It is this sale that is now impugned. On the 17th of May 1906 an application was made to have the decree set aside, and on the 21st of May an application was made to have the sale set aside. On the 19th of August this application to have the sale set aside was dismissed and though an application was subsequently made for its restoration that application was rejected. On the 1st of September 1906 the decree was set aside, and the suit was restored, with the result that a modified decree was passed in the plaintiff's favour. On the 5th February 1909 the present application was made to have the sale set aside.

I may deal with one point at once: It is the suggestion that there is fraud in this case. That suggestion is passed upon a remark by the Munsif to this effect, "the auction-purchaser is in no way connected with the fraud proved in this case." Though the Munsif there implies that there was fraud there is nothing in his judgment which justifies the conclusions of fraud. The view that there was fraud manifestly did not find favour with the District Judge, because he makes no reference to it, and there is nothing direct or indirect in his judgment that suggests that he thought there was fraud. The fact is that the word *fraud* is very loosely used in this class of case—any irregularity is taken to be fraud with the conseqence that such a finding involves. But a finding of fraud should be reserved for that which is dishonest and morally wrong; and it is not sufficient to come to a vague, general finding of fraud; actual fraud must be established. In this view of the case it is unnecessary for me to consider the question that has been argued before us whether, if there be fraud, an auction-purchaser is affected by it, though he himself may be innocent of the fraud. It is said that there is authority to that effect. But should the case arise for consideration, I think it would be undesirable for any Court to come to a conclusion upon that point, without having regard to what was laid down by their Lordships of the Privy Council in *Lalla Bunseedhur Koonwar* v. *Bindeseree Dutt Singh* (1). The ground on which the decree of 1903 was set aside was that it was *ex parte*, and the summons had not been served. Therefore, those conditions were established which entitled the aggrieved defendant to have the decree set aside under section 108. But though the decree was thus set aside in September 1906, the Court could not have passed its decree in 1903 without holding that the summons had been duly served; that is the condition laid down by section 100 of the Civil Procedure Code of 1882. So we have this position, that the Court wrongly, as events have subsequently shown, found that though the defendant was not present the summons had been duly served. The purchaser was entitled to rely on that finding. He had not the opportunity or the means of questioning the propriety of the decision at which the Court had arrived when it determined that the conditions were established entitling it to pass an *ex parte* decree; and the Court should have much hesitation in visiting a purchaser at one of its sales with the consequences of an irregularity or defect of procedure which was not discovered, by its officers, and was not apparent on the face of the record. The position, thus, is that under a decree, to all appearances in order, the present appellant became a purchaser, why is he to be deprived of the benefit of his purchase? I have already said, there was no fraud to which he could have been a party. At the same time it is the policy of the Court and a very wise policy, to protect its purchasers, for although in an individual case there may be some hardship it would be far more prejudicial to the general body of judment-debtors that any doubts should be thrown upon titles acquired by purchaser in execution under decrees which are to all appearances in order and free from objection. The decree under which the appellant bought was not a nullity, it stood until it was set aside, and so the doctrine laid down in *Khiarajmal* v. *Daim* (2) has no application. On the contrary, what was said by the Privy Council in *Malkarjun* v. *Narhari* (3) is apposite. Lord Hobhouse there said, "It was contended that the preson served was not the right person but the Court having re-

(1) 10 M. I. A. 454 at p. 473.

(2) 32 C. 296; 3 A. L. J. 71; 1 C. L. J. 584; 7 Bom. L. R. 1; 9 C. W. N. 201.

(3) 25 B. 337; 27 I. A. 216.

ceived his protest decided that he was the right person, and so proceeded with the execution; and in so doing the Court was exercising its jurisdiction. It made a sad mistake, it is true; but a Court has jurisdiction to decide wrong as well as right. If it decides wrong, the wronged party can only take the course prescribed by law for setting matters right, and if that course is not taken the decision, however wrong, cannot be disturbed." So here, as I have already indicated, the Court decided in 1903 that there was sufficient proof of the service of summons. He was entitled so to decide and the purchaser was entitled to rely on that decision.

In the circumstances, it appears to me that there is no sufficient ground on which the purchase by the appellant, who is an innocent purchaser for value, should be disturbed, and I, therefore, hold the decree of the lower Appellate Court should be reversed and the application dismissed. I may mention a further difficulty in the present applicant's way. As his application to have the sale set aside was dismissed and the application for restoration was rejected, it is at least doubtful whether he can successfully prefer the present application for the same purpose.

The appellant is entitled to his costs in all Courts. We fix the hearing fee in this Court at two gold *mohurs*.

COXE, J.—I agree.

Application dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1928 OF 1908.

December 21, 1910.

Present:—Mr. Justice Mookerjee and Mr. Justice Coxe.

JOY KALI ROY CHOWDHRY—DEFENDANT—APPELLANT

versus

HEMANGINI DEBI—PLAINTIFF—RESPONDANT.

Res judicata—*Decree for rent—Relationship of landlord and tenant—Physical possession—Abridgment of title—Adverse possession—Registration of name, whether equivalent to possession.*

A decree for rent operates as *res judicata* upon the question of the existence of the relationship of landlord and tenant between the parties.

Radha Madhub v. *Monohur*, 15 C. 756, *Kasiswar* v. *Mohendra*, 25 C. 136 and *Ekabbar* v. *Hara Bewa*, 8 Ind. Cas. 660; 13 C. L J. 1; 15 C. W. N. 335, referred to.

Although a person may be in physical possession of property, his title therein may be abridged by reason of adverse possession on the part of his opponent.

Although registration of name under the Land Registration Act may be evidence of possession, it is not necessarily equivalent to actual possession, nor is it sufficient to interrupt the adverse possession of the opponent of the person whose name has been registered.

Appeal from the decree of the District Judge of 24-Pergannahs, dated June 6th, 1908 reversing that of the Munsif of Alipur, dated November 11th, 1907.

Babus *Boidya Nath Dutt* and *Atul Krishna Roy*, for the Appellant.

Babus *Dwarka Nath Chakravarti*, *Tarak Chandra Chakravarti*, *Surendra Nath Roy* and *Satyendra Nath Roy*, for the Respondent.

JUDGMENT.—This is an appeal on behalf of the defendants in an action for recovery of possession of immoveable property. The property in dispute is a half-anna share in *chak* Roshan Mahomed which at one time admittedly belonged to the predecessor-in-interest of the appellant Dina Nath Roy Chowdhury. On the 25th August 1873, half-anna share of the three-annas which belonged to Dina Nath was sold at an auction-sale and purchased by one Nobin Krishna. Nobin Krishna apparently did not obtain possession of the property purchased by him and on the 21st October 1887, he sued the heirs of Dina Nath for recovery of possession. He got a decree and obtained delivery of possession through Court on the 25th April 1892. Meanwhile, on the 7th November 1884, the plaintiff-respondent had taken a *putni* lease from Dina Nath in respect of the entire three anna share. The plaintiff was not made a party to the suit by Nobin Krishna and the decree must be treated as apparently not binding upon her. On the 21st February 1898, the plaintiff purchased from the widow of Nobin Krishna a half share of the three-annas owned by Dina Nath, that is, the share covered by the decree in the suit of 1887. After this purchase, the plaintiff appears to have repudiated the *putni* in respect of the share covered by the conveyance. The defendants, however, successfully asserted their title and recovered rent from her by suit for the period between *Bysak* 1304 and *Chaitor* 1312; that is from 14th April 1897

to 13th April 1906. The plaintiff now seeks for a declaration of her title to this one-half share and for recovery of possession. The Court of first instance found that the suit was barred by limitation. That finding has not been accepted by the District Judge who has made a decree in favour of the plaintiff. In our opinion, it is reasonably plain that the suit is barred by limitation.

The Original Court found that Nobin Krishna, although he obtained delivery of possession on the 25th April 1892, did not actually get possession of the property. The District Judge has found that Nobin was not in possession from the 25th April 1892 up to the 21st February 1895, when the property was conveyed to the prsent plaintiff. We have thus the fundamental fact that the defendants have been in adverse possession of the property since the 25th April 1892. The questisn next arises, whether this adverse possession has continued up to the date of the present litigation. The District Judge has found, in concurrence with the Court of first instance, that the defendants have successfully obtained decrees for rent against the plaintiff for the period which intervenes between April 1897 and April 1906. In successive suits for rent brought by the defendants, the plaintiff asserted that she had, by her purchase from the widow of Nobin, acquired one-half share of the superior interest; in other words, that one-half of the share covered by the *putni* of 1884 had vested in her as proprietor. This defence, however, was unsuccessful and the result was that a decree for rent was made in favour of the defendants against the plaintiff. Such decree clearly operates as *re judicata* upon the question of the existence of the relationship of landlord and tenant between the parties [*Radha Madhub* v. *Monohur* (1); *Kasiswar* v. *Mohendra* (2); *Ekabar* v. *Hara Bewah* (3)]. It follows, consequently, that the adverse possession of the defendants has continued from 1892 to 1906. But it has been strenuously contended by the learned Vakil for the plaintiff-respondent that the adverse possession was interrupted by reason of two circumstances.

It has been suggested, in the first place, that as the plaintiff was in actual possession of the land and as she asserted a title hostile to that of the defendants, the adverse possession of the defendants must be taken to have been interrupted. This contention is clearly unsustainable in view of the decision of the Judicial Committee in the case of *Secretary of State* v. *Krishna Moni Gupta* (4), and of this Court in the case of *Bidhumukhi Dasi* v. *Jitendra Nath Roy* (5). The effect of these decisions is to show that, although a person may be in physical possession of property, his title therein may be abridged by reason of adverse possession on the part of the opponent. In the case before us, it is clear that so far as the representatives of Nobin were concerned, there was adverse possession as against them on the part of the defendants. In so far as the plaintiff claims to be the representative-in-interest of Nobin by reason of her purchase in 1898, there has also been adverse possession, because the defendants have successfully asserted a title superior to that of the plaintiff. Consequently, we must hold that there was no interruption of the adverse possession of the defendants by reason merely of the circumstance that the plaintiff was in actual occupation of the lands.

It has been suggested, in the second place, that the adverse possession of the defendants was interrupted because the name of the plaintiff was registered under the provision of the Land Registration Act from the 5th September 1903 to the 10th September 1904. It appears, that at one stage of the proceedings under the Land Registration Act, the plaintiff obtaind an order in her favour which was subsequently cancelled. It has been contended by the learned Vakil for the respondent that this registration of the name of the plaintiff was equivalent to possession, and that at any rate it was sufficient to interrupt the adverse possession of the defendants. In support of this view, reliance has been placed upon the decision of the Court in the case of *Janab Sheikh* v. *Maharaja Surya Kant Acharyya* (6); *Mamtaz-ud-din* v. *Barkatulla* (7) and *Protap Chandra* v. *Durga Charan* (8). These cases, however, are clearly distinguishable and are of no assistance to the plaintiffs. It was ruled in these cases that where the rightful

(1) 15 C. 756; 15 I. A. 97.
(2) 25 C. 136.
(3) 8 Ind. Cas. 660; 13 C. L. J. 1; 15 C. W. N. 335.
(4) 29 C. 518 (P. C.); 29 I. A. 104.
(5) 10 C. L. J. 527; 4 Ind. Cas. 443.
(6) 10 C. W. N. 1081; 33 C. 821.
(7) 2 C. L. J. 1.
(8) 9 C. W. N. 1061.

owner of land has been dispossessed but has succeeded in ousting the trespasser without recourse to law and has continued in occupation until he has lost possession by virtue of a decree obtanined by the trepasser under section 9 of the Specific Relief Act, the possession so obtained by the rightful owner is possession within the meaning of Article 142 of the Limitation Act. In the case before us, however, there was no possession on the part of the plaintiff as proprietor between September 1903 and September 1906. The position cannot possibly be maintained that the mere fact of the registration of her name in the Collectorate was equivalent to possession as proprietor; or, in other words, was equivalent to an ouster of the defendants. It is well-settled that, although registration of name under the Land Registration Act may be evidence of possession, it is not necessarily equivalent to actual possession [*Shyama Sundari* v. *Mahomed Zarif* (9), the decision in which case was subsequently affirmed on an appeal preferred under section 15 of the Letters Patent]. It is clear, therefore, that in this view also the adverse possession of the defendants has not been interrupted.

The inference is, therefore, irresistible that the defendants have been in adverse possession from the 25th April 1892 to the 29th November 1906 when the present action was commenced. It may be conceded that this adverse possession has not been of the same character throughout the period from the 25th April 1892 to the 21st February 1898 when the defendants kept the representatives of Nobin out of possession of the property, they were not in actual possession but collected rent from the tenants. At that time the plaintiff was in possession or was entitled to be in possession as *putnidar*, although it is asserted on behalf of the plaintiff that no rent was collected under the *putni* at any time anterior to 1892. Since the 21st February 1898, the defendants have been in occupation by receipt of rent from the plaintiffs which she was obliged to pay under due process of law. Consequently the defendants have been in adverse possession from 1892 to 1906. In this view the title of the plaintiff, if any, has been extinguished by adverse possession on the part of the defendants.

We may add that the view we take is supported by the finding of the learned District Judge, and his view would have been in agreement with the conclusion at which we have arrived, if he had not erroneously held that the 10th *Falgun* 1304 (21st February 1898), that is, the date of the conveyance in favour of the plaintiff was anterior to *Baishakh* 1304, (April and May 1897) which was the commencement of the period in respect of which the plaintiff was obliged to pay rent to the defendants.

The result, therefore, is that this appeal must be allowed, the decree of the District Judge set aside and the suit dismissed with costs in all the Courts.

Appeal allowed.

(9) 9 C. L. J. 91; 3 Ind. Cas. 693.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 1165 OF 1910.

May 8, 1911.

Present:—Mr. Justice Johnstone.

HARNAM SIGNH AND OTHERS—APPELLANTS

versus

Musammat HARDEVI AND OTHERS—RESPONDENTS.

Custom—Sodhis *of* mauza *Bhamipura*, Tahsil *Jagraon*, *District Ludhiana*—*Alienation*—*Succession*—*Custom or Hindu Law*—*Collaterals in the fourth degree, whether exclude daughters*—*Initial presumption in case of* Khatris, *especially of* Sodhis—*Presumption, how rebutted*—*Proper test in such cases.*

Sodhis of *Mauza* Bhamipura, *Tahsil* Jagraon, District Ludhiana, do not follow agricultural custom in connection with alienations of, or succession to, ancestral immoveable property but follow Hindu Law, and collaterals in the fourth degree do not exclude daughters.

The *initial* presumption in the case of *khatris*, and especially of *Sodhis*, is that they follow Hindu Law. They are not essentially agriculturists, and they have, as a rule and as a tribe, a priestly *status*. This presumption can be rebutted by proof of a special custom, or of special incidents and circumstances calculated, according to the authorities, to shift the burden of proof.

In cases in which it is presumed that persons, not essentially agriculturists by race, follow agricultural custom, the question always is, whether they form a compact village community, or at least a compact and considerable body of landowners in a more or less homogeneous village. If they do, and if they have been agriculturists for generations, the presumption aforesaid is made.

But while the *absence* of the adoption of agriculture as a means of livelihood for several generations is fatal to the plea that custom is followed, it must not be supposed that in all cases the existence of this incident is sufficient in itself to prove that custom is necessarily followed.

HARNAM SINGH v. HARDEVI.

Appeal from the order of the Additional Divisional Judge, Ambala Division, dated the 18th July 1910, confirming that of the Munsif, 1st Class, Ludhiana, dated the 15th January 1906, dismissing plaintiff's claim.

Lala *Lajpat Rai*, for the Appellants.

Rai Bahadur Lala *Lal Chand* and Bakhshi *Sohan Lal*, for the Respondents.

JUDGMENT.—These three appeals (Nos. 1165 to 1167 of 1910) all turn upon the same point. They have been tried together below and have been argued together before me, and a single judgment will suffice to dipose of them all.

The three suits were brought by the same plaintiffs, who are reversioners in the fourth degree of the last male holder of the lands involved, for declarations that certain alienations made by defendants, widows, should have no effect against plaintiff's rights after the ladies' deaths.

The first Court found:—

(*a*) that the lands are not proved ancestral;

(*b*) that the parties follow their personal (*Hindu*) law, under which daughters are not excluded by collaterals like plaintiffs; and so that Court dismissed plaintiff's suits but without costs.

On appeal the learned Divisional Judge (Mr. Mul Raj) held that the *onus* of proving that the parties follow Hindu Law lay on defendants, and that the *onus* had not been discharged. He thereupon accepted the appeals and remanded the cases under Order XLI, rule 23, Civil Procedure Code, to the first Court for re-trial.

Appeal to this Court (Civil Appeal No. 793 of 1909) resulted in the setting aside of these orders, the suits not having been decided on a preliminary point and the remand of appeals to the Divisional Court for decision according to law; and in the end the new Divisional Judge (Mr. Ellis) in an exhaustive and able judgment, dated 18th July 1910, dismissed the appeals, finding, as the first Court did, that the property is all ancestral, and going on to rule that the presumption, on the precedents and authorities, is against *Sodhi Khatris* following agricultural custom and that this presumption has not been rebutted.

The defendants coming on here on the revision side have succeeded in having their petitions admitted as further appeals under section 70 (1) (*b*), Punjab Courts Act, upon the question of custom. The question of the ancestral nature of the land is disposed of and cannot be touched upon here. I have heard arguments on the question of Custom *versus* Hindu Law and my opinion is much the same as that of the learned Divisional Judge Mr. Ellis.

The way I look at the case is this. The *initial* presumption in the case of *Khatris*, and especially of *Sodhis*, is that they follow Hindu Law. [*Maya* v. *Gurdit Singh* (1)]. They are not essentially agriculturists, and they have as a rule and as a tribe, a priestly *status*. The presumption has to be met by the plaintiffs with proof of a special custom, or of special incidents and circumstances calculated according to the authorities, to shift the burden of proof. Mr. Lajpat Rai, speaking for the plaintiffs instances, the following special circumstances, namely.

(*i*) Family established in the village since 1823.

(*ii*) Means of subsistence—agriculture.

(*iii*) Not shown that these *Sodhis* exercise priestly functions.

(*iv*) *Janeo* abandoned.

(*v*) Marriage by *Karewa* and *Anand* practised.

(*vi*) Apart from these three alienations there was another among *Sodhis* of a simalar kind in connection with which it is asserted that there was a law suit (Chief Court Civil Appeal No. 60 of 1902), in which the result was practically in favour of the reversioners and against daughters.

At first sight, all this looks serious for defendants, but the above contentions are, liable to large discounts. In cases in which it has been presumed that persons not essentially agriculturists by race, follow agricultural custom, much stress has always been laid upon the question whether they form a compact village community, or at least a compact and cosiderable body of land owners in a more or less homogeneous village: *Cf.* Civil Appeal No. 997 of 1906, quoted in *Sardar Singh* v. *Maharaj Das* (2).

(1) 1 P. R. 1910; 128 P. W. R. 1909; 145 P. L. R. 1909; 4 Ind. Cas. 947.

(2) 79 P. R. 1909; 127 P. W. R. 1909; 3 Ind. Cas. 603.

If they do, and if they have been agriculturists for generations, the presumption aforesaid is generally made, but here, though these *Sodhis* have held land in the village for nearly 90 years, they did not come in with the founders, they are only *kabza maliks*, they number only five families, holding 100 acres of land out of a village area of 3,000 acres. Then there is no positive evidence one way or the other whether they live solely by agriculture, one would imagine it would be difficult for five families to live on the profits to so small an area as that stated above. As to abandonment of *Janeo* and no actual exercise of priestly functions see the analogous case *Gopal Singh* v. *Sukha Singh* (3) dealing with *Brakmans* who had become *Sikhs*. I do not think much can be inferrred from the adoption of irregular marriage customs, and, after considering the facts and results of Civil Appeal No. 60 of 1902 aforesaid, which was compromised in a manner very unfavourable to the reversioners, I cannot see that it helps plaintiffs.

Of the rulings quoted by Counsel the following relate to *Sodhi khatris*:—

Harvans Singh v. *Harnam Singh* (4) *Tahsil* (Zira, District Ferozepore), *Sodi Kartar Singh* v. *Sher Singh* (5) (*Tahsil* Muktsar, District Ferozepore), Civil Appeal No. 2647 of 1884 (District Ferozepore), *Sardar Singh* v. *Maharaj Das* (2), (*Tahsil* Batala District Gurdaspur). In *Harvans Singh* v. *Harnam Singh* (4) a Full Bench case, it was assumed for the purposes of the reference that the parties followed custom, the ruling is of no use to us here. In *Sodi Kartar Singh* v. *Sher Singh* (5) it was found upon instances and the opinions of aged and respectable persons, that reversioners could control alienations. I cannot see how this case helps the plaintiffs as it was decided on its own special facts. The unpublished judgment seems to me to have no bearing on the case before me, and *Sardar Singh* v. *Maharaj Das* (2) is all in favour of defendant. In that case I explained what was, in my opinion, the proper way of looking at these cases.

There are some *Bedi Khatri* cases that are worth looking at in this connection, *e. g.*, *Kharan Singh* v. *Maddi* (6), *Nihal Chand* v. *Bhagwan Singh* (7) and *Uttam Singh* v. *Jhanda Singh* (8) and from Hoshiarpur. In *Nihal Chand* v. *Bhagwan Singh* (7) one test in questions like the present was stated to be the adoption of agriculture as a means of livelihood for several generations; that is to say, the absence of this incident was held to be fatal to the plea that custom was followed. But it must not be supposed that in all cases the existence of this incident is sufficient in itself to prove the opposite.

Considering all these authorities and the facts of the present case, and the entire absence of positive proof of the adoption of agricultural custom by this family, I have no hesitation in agreeing with the learned Divisional Judge that these *Sodhis* of *Mauza* Bhamipura, *Tahsil* Jagraon, District Ludhiana do not follow agricultural custom in connection with alienations of, or succession to, ancestral immoveable property but follow Hindu Law, and that collaterals in the fourth degree do not exclude daughters.

I dismiss all three appeals with costs.

Appeals dismissed.

(3) 58 P. R. 1906.
(4) 84 P. R. 1898.
(5) 50 P. R. 1895.
(6) 122 P. R. 1893.
(7) 33 P. R. 1907; 9 P. L. R. 1908.
(8) 21 P. R. 1896.

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 423 OF 1909.

May 5, 1911.

Present:—Mr. Justice Shah Din and Mr. Justice Chevis.

SUNDER SINGH AND OTHERS—DEFENDANTS—APPELLANTS

versus

SAJJAN SINGH AND OTHERS—PLAINTIFFS AND DEFENDANTS—RESPONDENTS.

Pre-emption—Lis pendens—*A person having equal or superior right to pre-emptor buying property during pendency of suit—Application of the doctrine of* lis pendens *Punjab Pre-emption Act (II of* 1905*), s.* 14, *application of.*

The doctrine of *lis pendens* does not apply to a case where a person, having an equal or superior right to a plaintiff pre-emptor, asserts that right out of Court while the plaintiff's claim is pending in Court and the vendee-defendant re-sells the property to the former by a private sale in recognition of that right.

Section 14 of the Punjab Pre-emption Act applies only to cases in which several pre-emptors, in respect of one particular sale, are found by the Court to be equally entitled to the right of pre-

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emption. It does not apply to a case in which a pre-emptor is claiming to enforce his right of pre-emption by suit against an original vendee or a second vendee who has an equal right of pre-emption with such pre-emptor.

A. sold some land to *B.* on 12th June 1906. *B.* sold it to *C.* on 17th June 1907. On 9th June 1908 *D.* sued to pre-empt the sale in favour of *C.*, on 11th June 1908 *C.* re-sold the land to *A.* in recognition of *A*'s right of pre-emption. *A.* and *D.* had equal rights to pre-empt the sale to *C.* *A.* was impleaded as defendant in *D.*'s suit.

Held, (1) that as *A.*'s right of pre-emption existed prior to the institution of *D.*'s suit and as the re-sale in *A.*'s favour was effected in recognition of that right, the rule of *lis pendens* had no application.

Mahmud Khan v. *Khuda Bakhsh*, 26 P. R. 1908, *Muhammad Khan* v. *Sardar*, 7 P. R. 1910; 5 Ind. Cas. 249, followed.

Ghasitey v. *Gobind*, 30 A. 467, not followed.

(2) That as there was only one pre-emtor *D.* before the Court, section 14 of the Pre-emption Act did not apply.

Second appeal from the order of the Divisional Judge, Ferozepore, dated 15th February 1909, reversing that of the Sub-Judge 1st grade Ferozepore, dated 30th November 1908, dismissing plaintiff's claim.

Bakhshi *Tek Chand*, for the Appellant.

Bhagat *Govind Dass*, for the Respondents.

JUDGMENT.—The facts of this case are briefly these. The land in suit consists of two plots:

(1) 41 *kanals*, 1 *marla* of land comprised in *khewat* No. 471 *khasra* Nos. 4586, 4587 and 4609, and (2) 58 *kanals*, 15 *marlas* of land, being 3/10th of 195 *kanals*, 19 *marlas* comprised in *khewat* Nos. 472, 476, *khewat* Nos. 471 also includes *khasra* No. 1225, consisting of 48 *kanals*, 8 *marlas* of land, which is not in dispute.

The land in suit originally belonged to Sunder Singh and Thumri, sons of Ram Singh, defendants Nos. 3 and 4, who sold it to Sunder Singh, son of Moluk Singh, defendant No. 1, on the 12th June 1906. On the 17th June 1907 defendant No. 1 sold this land to Harnam Singh defendant No. 2, for Rs. 2,000. The plaintiff, Sajjan Singh, instituted the suit for pre-emption, out of which the present appeal has arisen, on the 9th June 1908. On the 10th June 1908 defendants Nos. 3 and 4 sent a registered notice to defendant No. 2, Harnam Singh, stating that they had a right of pre-emption in respect of the land which he had purchased from Sunder Singh and threatening him with a suit if he did not give up the land to them. On the 11th June 1908, Harnam Singh sold the land to defendants Nos. 3 and 4 in recognition of their right of pre-emption. On the 2nd July 1908, on which Sujjan Singh's suit was fixed for hearing, Sunder Singh and Thumri were impleaded as defendants by order of Court, and they put in their pleas on 29th July, urging that the plaintiff's right of pre-emption was not superior to theirs, and that as against them his suit should be dismissed. In replication, it was urged by the plaintiff *inter alia*, that the re-sale in favour of defendants Nos. 3 and 4 by the original vendee Harnam Singh, having been made *pendente lite* was invalid and could not affect his right of pre-emption. He did not, however, dispute that the right of pre-emption of defendants Nos. 3 and 4 was equal to his. The first Court framed several issue, of which the second and third issues, which only need be noticed at this stage of the case, were,—

(2) Whether the re-sale in favour of defendants, Sunder Singh and Thumri, was not binding (on the plaintiff) and was bad by reason of having been made *pendente lite*; and

(3) whether the re-sale in question was a *bona fide* transaction * * * * * * * ?

On these issues, the Court held that the re-sale by the first vendee in favour of Sunder Singh and Thumri was a *bona fide* transaction and that, upon the principle laid down in *Mahomed Khan* v. *Khuda Bakhsh* (1) the doctrine of *lis pendens* did not apply to the said re-sale. The Court further held that as the plaintiff had failed to prove that his right of pre-emption was superior to that of defendants Nos. 3 and 4 his suit could not succeed against them, and it, therefore, dismissed the suit.

On appeal, the Divisional Judge agreed with the first Court in holding that the re-sale to defendants Nos. 3 and 4 was a *bona fide* transaction and that the rule of *lis pendens* did not apply to it, because, in the language of the learned Judge, "defendants Nos. 3 and 4 having asserted their pre-existing right by the purchase of the 11th June 1908 are in as good a position as if they had brought a suit for pre-emption." The Divisional Judge further laid down that defendants Nos. 3 and 4" must in fact be classed as rival pre-emptors equally entitled with plaintiff within the meaning of section 14 of the

(1) 26 P. R. 1908; 39 P. W. R. 1903; 145 P. L. R. 1908.

Punjab Pre-emption Act" and he remanded the case under Order XLI, rule 23, Civil Procedure Code, with a declaration to the first Court to decide what share the plaintiff was entitled to in the land in dispute and also as to whether the price mentioned in the second deed of sale had been paid or fixed in good faith.

From that order of remand defendants Nos. 3 and 4 have preferred an appeal to this Court, and we have heard full arguments on both sides on the main questions involved in the case. Those questions are (1) whether the re-sale by the original vendee in favour of defendants Nos 3 and 4 was bad in law by reason of its having been made *pendente lite*, and (2) whether, if the rule of *lis pendens* did not apply to the re-sale in question and it was not, therefore, invalid, the plaintiff, having an equal right of pre-emption with defendants Nos. 3 and 4, was entitled to share in the land in dispute under section 14 of the Punjab Pre-emption Act.

Upon the first question we think that the view taken by the Courts below is correct, namely, that since the re-sale, in favour of defendants Nos. 3 and 4, was made by Harnam Singh in recognition of their pre-existing right of pre-emption which was admittedly superior to his, the mere fact that that re-sale was made after the plaintiff had brought his suit for pre-emption against Harnam Singh to enforce his own right of pre-emption was not of itself sufficient to vitiate the said re-sale as one opposed to the doctrine of *lis pendens* In support of his position that the rule of *lis pendens* applied to the re-sale by Harnam Singh the plaintiff's Pleader has relied on the decision of the Allahabad High Court in *Ghasiti* v. *Gobind* (2), of which the head-note runs as follows:—

" After the filing of a suit for pre-emption but before service of summons on the defendants, the defendant-vendee re-sold the property claimed to a second vendee who had equal rights as a co-sharer with the plaintiff. This second vendee was added by the Court as a party defendant, but the plaint was not amended and the plaintiff did not seek to pre-empt the sale made in his favour. *Held*, that the doctrine of *lis pendens* applied and the plaintiff was entitled to a Decree."

(2) 30 A. 467; 5 A. L. J. 477; A. W. N. (1908) 221

This ruling is, no doubt, in favour of the plaintiff, but as it is opposed to the principle laid down in the decisions of our own Court in *Mahmud Khan* v. *Khuda Bakhsh* (1), and *Muhammad Khan* v. *Sardar* (3), and as we concur in the view adopted in the two last mentioned cases, we must, with all due respect to the learned Judges of the Allahabad High Court, decline to follow their ruling. In the Allahabad case the position of a person entitled to a right of pre-emption in respect of a particular sale who asserts that right privately and in recognition of whose right the original vendee re-sells the subject of sale to him, has not been kept in view and it has been assumed that the second vendee had acquired rights in the property sold simply by reason of the re-sale in his favour, thus deriving title under the first vendee by the alienation made by him pending the suit. In our opinion, this is an erroneous view of the legal position of a per-emptor who successfully enforces his right of pre-emption against the original vendee by obtaining a re-sale privately in his favour, the correct view being the one which is fully explained in *Mahmud Khan* v. *Khuda Bakhsh* (1) The following extracts from the judgment of the Division Bench in that case have a direct bearing upon the point before us.

" Put broadly and briefly, the doctrine of *lis pendens* forbids creation of new rights over property already the subject of suit, *pendente lite*, which are calculated to injure the rights of the claimant. It does not, and if we consider for a moment we see that it could not, apply to the assertion of rights which existed prior to the institution of the pending suit " * * * * *

"No doubt he (the second vendee) gets no further rights as against the respondent (pre-emptor) by the deed of sale *per se* but he can maintain that sale if he can prove a pre-existent right to have it executed in his favour. So far does the doctrine of *lis pendens* apply, that the sale could create no new right in his favour having its birth subsequent to the suits of the respondent but obviously he is not debarred from asserting any pre-existent right he may have had against the vendor and the vendee by the mere fact that some one else had brought a claim against

(3) 7 P. R. 1910; 14 P. W. R. 1910; 5 Ind. Cas. 249.

them in reference to the same property"

* * * * * *

In claims for pre-emption the right of any particular claimant is not prejudiced "*qua* his own right, by the assertion by another claimant of his own pre-existing rights."

* * * * * *

"No doubt the sale to the appellant, Muhammad Khan (the second vendee), would be useless to him if that were the basis of his title, but here his title to pre-empt was existent prior to the suit and is independent both of it and of the subsequent sale which was only executed in recognition of the assertion of his right." * * *

The plaintiff's Pleader has tried to distinguish *Mahmud Khan* v. *Khuda Bakhsh* (1) from *Ghasiti* v. *Gobinda* (2) and from the present case, on the ground that whereas in the first mentioned case the pre-emptive right of the second vendee (Mahmud Khan) was held to be *superior* to those of the pre-emptors (Amir Buksh and Khuda Baksh) who had brought separate suits for pre-emption against the original vendee in the Allahabad case, as also in the present case, the rights of the second vendee were only *equal* to those of the plaintiff pre-emptor. In our opinion this distinction is immaterial; and the *ratio decidendi* in *Mahmud Khan* v. *Khuda Baksh* (1) applies as well to a case in which the pre-emptive right of the second vendee claiming under a private re-sale to himself is equal to that of the pre-emptor who enforces his right by suit as to a case in which the former's right of pre-emption is superior to that of the latter. In fact, in *Mohammad Khan* v. *Sardar* (3), which is a sequel to *Mahmud Khan* v. *Khuda Bakhsh* (1), the pre-emptive right of the second vendee, Mahmud Khan was found to be *equal* to that of Amir Bakhsh and not superior to it. The observations made in *Mahmud Khan* v. *Khuda Bakhsh* (1) regarding the alleged superior right of Mahmud Khan to those of Amir Baksh and Khuda Baksh clearly did not constitute the real foundation of the decision that the doctrine of *lis pendens* did not apply to th e re-sale in favour of Mahmud Khan, and on further inquiry during the subsequent stages of the case it was discovered that Mahmud Khan had no superior right. In spite of that finding, it was held that the re-sale in his favour by the first vendee was a perfectly good one and the competing claims of the plaintiffs pre-emptors and of the second vendee were adjudicated upon that basis. What *Mahmud Khan* v. *Khuda Bakhsh* (1) really decided was, that the doctrine of *lis pendens* did not apply in that case because the second vendee relied in answer to the plaintiff pre-emptor's suit for pre-emption not upon the re-sale made to him after the institution of the suit but upon his own right of pre-emption which existed prior to the date of the said suit and in recognition of which the re-sale took place in his favour, whether that right was superior to or equal with that of the plaintiff pre-emptor was, upon the principle enunciated in the aforesaid decision, perfectly immaterial. We hold, therefore, that the second sale made by Harnam Singh in favour of defendants Nos. 3 and 4 during the pendency of the plaintiff's suit for pre-emption was not bad by reason of the rule of *lis pendens* which, in our opinion, has no application in this case; and we, therefore, decide the first question in favour of defendants Nos. 3 and 4. The ruling of the Allahabad High Court in *Narain Singh* v. *Parbat Singh* (4), which was incidentally relied upon by the plaintiff's Pleader, is not in harmony with the principle laid down in the above mentioned decision of this Court and we are not prepared to follow it.

Upon the second question, namely, whether on the facts found in this case and in spite of the re-sale in favour of the second vendee being perfectly valid, the plaintiff has a right to share in the land sold under section 14 of the Pre-emption Act. We think that the Divisional Judge's view is erroneous. The section in question clearly applies only to cases in which several pre-emptors having instituted separate suit for pre-emption in respect of one particular sale are found by the Court to be equally entitled to the right of pre-emption. It does not apply to a case in which pre emptor is claiming to enforce his right of pre-emption by suit against an original vendee or a second vendee who has an equal right of pre-emption with such pre-emptor *Khan Zaman* v. *Fateh Sher* (5).

In the present case, therefore, the plaintiff, who is the only pre-emptor before the Court, cannot take advantage of the provisions of section 14 aforesaid and claim to share in the land in dispute with the second vendee, who

(4) 23 A. 247.
(5) 83 P. R. 1907.

has obtained it by a private re-sale by asserting his pre-emptive right against the original vendee but without bringing a suit for pre-emption in Court. The plaintiff's Pleader does not seriously support the Divisional Judge's view on this point, and we have no hesitation in holding that section 14 of the Pre-emption Act does not apply to the facts of this case.

For the foregoing reasons, we accept this appeal and, setting aside the lower Appellate Court's order of remand, dismiss the plaintiff's suit. As the plaintiff was justified in bringing his suit for pre-emption against Harnam Singh, and as his right has been defeated only by a private re-sale by Harnam Singh to defendants Nos. 3 and 4, against whom the plaintiff had *prima facie* a good ground for proceeding with his suit, we think that the parties should bear their own costs throughout and we direct accordingly.

Appeal accepted.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL NO. 217 OF 1910.

February 17, 1911.

Present:—Mr. Justice Mookerjee and Mr. Justice Teunon.

DEOKI NANDAN SINGH—JUDGMENT-DEBTOR—APPELLANT

versus

BANSI SINGH—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 2, 47 – Decree —Order –Execution of decree—Order assessing value of property to be sold—Appeal.

Every judicial order, made in the course of execution proceedings, is not an order under section 47 of the Code; for an order to be a decree it must conclusively determine the rights of the parties:

An order made in execution of a decree, by which the Court assessed, according to the statement of the decree-holder, the value of the property directed to be sold under the decree at a certain figure, is not one falling under section 47, and consequently is not appealable.

Appeal from the order of the Sub-Judge of Gya, dated May 10th, 1910.

Babu *Kalwant Sahay*, for the Appellant.

Babus *Joy Gopal Ghosha* and *Hari Bhushan Mukerjee*, for the Respondent.

JUDGMEMT.—This appeal is directed against an order made by the Court below by which the value of the property directed to be sold under the decree has been assessed at a certain figure according to the statement of the decree-holder.

A preliminary objection has been taken to the hearing of the appeal on the ground that the order is not one under section 47 of the Code of 1908, that it is not a decree within the meaning of section 2 of the Code and is consequently not appealable as such. In support of this view reliance has been placed upon the decision of the Madras High Court in the case of *Sivagami Achi* v. *Subrahmania Ayyar* (1).

In support of the appeal, reliance has been placed, on the other hand, upon the cases of *Sivasami Naiker* v. *Ratnasami Naiker* (2), *Ramessur Proshad Narain Singh* v. *Rai Sham Krishen* (3) and *Ganga Proshad* v. *Raj Comar Singh* (4).

In our opinion, the decision of the question whether the order in controversy is a decree within the meaning of section 2 of the Code must depend upon its nature and contents. The learned Vakil for the appellant has contended that every judicial order made in the course of execution proceedings is an order under section 47 of the Code and is consequently appealable as a decree. In view of the decision of this Court in the case of *Beharilal Pundit* v. *Kedar Nath Mullick* (5) this position cannot possibly be maintained. It was there pointed out that an interlocutory order in the course of execution proceedings which decides, for instance, a point of law arising incidentally or otherwise is not a decree within the meaning of section 2 of the Code of 1882. It is reasonbaly plain from the terms of section 2 that an order to be a decree must conclusively determine the rights of the parties. If any other view were adopted, the result would be that an appeal would be preferred against every order in the course of the execution proceedings; in other words, proceedings in execution could be arrested at every stage by an appeal on behalf of the judgment-debtor. This could hardly have been contemplated by the framers of the Code. It has also been suggested by the learned Vakil for the appellant that if this order is not now set aside he may be prejudcied later on, in the event of an applica-

(1) 27 M. 259.
(2) 23 M. 568.
(3) 8 C. W. N. 257.
(4) 30 C. 617.
(5) 18 C. 469.

tion to set aside the execution sale on the ground of material irregularity and substantial injury. In our opinion, this apprehension is entirely groundless. The order does not involve a judicial adjudication of the value of the properties which would be binding upon the parties in any subsequent proceedings. The application of the judgment-debtor for time was refused, and the Court proceeded to assess the value of the property according to the statement of the decree-holder. The decree-holder, with full notice of the assertion of the judgment-debtor that the true value of the property is very much higher than what has been mentioned in the sale proclamation, proceeds to sell it at his risk, and if after the sale any question arises as to the true value of the property it must be determined in the proceeding under rule 90, Order XXI, of the Code. We may observe that the decision of the Madras High Court in the case of *Sivasami Naikar* v. *Ratnasami Naikar* (2) which was followed by the Court in the case of *Ramessur Proshad Narain Singh* v. *Rai Sham Krishen* (3) has been overruled in the case of *Sivagami Achi* v. *Subrahmania Ayyer* (1), where the learned Judges of a Full Bench of the Madras High Court also dissented from the decision of this Court in *Ganga Proshad* v. *Raj Coomar Singh* (4). We are inclined to hold that the view taken in *Sivagami Achi* v. *Subrahmania Ayyer* (1) gives effect to the true intention of the Legislature. In this veiew, it is not necessary to consider the question raised in the cases of *Kashi Pershad Singh* v. *Jamuna Parshad Sahu* (6) and *Saurendra Mohan Tagore* v. *Hurruck Chand* (7) namely to what extent is it obligatory upon the executing Court to hold an investigation into the value of the property sought to be sold by the decree-holder. But it may be observed that the observations of the Judicial Committee in the case of *Sadatmand Khan* v. *Phul Kuar* (8) indicate that an elaborate investigation is not necessary, the decree-holder runs a risk, if he puts in a valuation which is manifestly erroneous, if it is established later on, that the judgment-debtor has suffered substantial injury by reason of such under valuation, the sale is liable to be set aside under the provisions of the Code.

(6) 31 C. 922.
(7) 12 C. W. N. 542.
(8) 20 A. 412.

We may further point out that if the contention of the appellant prevails, whereas there would be only one appeal under the Code from a decision upon the question of valuation in the course of proceedings for reversal of the sale under rule 90 of Order XXI, there would be a first and a second appeal against an order for assessment of valuation antecedent to the sale. This could hardly have been intended by the Legislation.

The result, therefore, is that the preliminary objection is allowed, and the appeal is dismissed with costs. We assess the hearing fee at three gold *mohurs*.

Let the record be sent down at once.

Case remanded.

MADRAS HIGH COURT.

CRIMINAL APPEAL No. 22 OF 1911.

April 28, 1911.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Ayling.

GOLLA HANUMAPPA AND OTHERS—APPELLANTS.

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (Act XLV of 1860), s. 148—Rioting—Existence of common object before fight unnecessary—Criminal Procedure Code (Act V of 1898), ss. 237, 238, 423 (b) - Competency of Appellate Court to alter finding of lower Court.

To sustain a charge of rioting under section 148 of the Indian Penal Code, it is not necessary that all the accused should have had a common object before fighting begins. It is quite enough if some of the accused adopted the object of other accused when they joined the latter. And it is immaterial that the idea of inflicting injury was conceived suddenly after the accused went to the scene of offence.

Section 423 (*b*) of the Criminal Procedure Code does not restrict the powers of an Appellate Court to convict an accused person of an offence of which he is acquitted only in cases falling under sections 237 and 238 of the Code. Sections 237 and 238 provide that in the cases to which they apply, an accused person may be convicted of an offence with which he is not charged. The finding which an Appellate Court may alter under section 423 (*b*) may relate either to an offence with which the accused was separately charged in the lower Court or to one of which he might be convicted without a distinct charge. In cases not falling under sections 237 and 238, the Appellate Court cannot convict a person of an offence with which he was not charged in the first Court, but where he has been charged and the first Court has recorded a finding on the charge, it is competent for the Appellate Court to alter the finding.

Satis Chandra Das Bose v. *Queen-Empress*, 27 C. 172; and *Queen-Empress* v. *Jabanulla*, 23 C. 975, referred to.

Appeal against the conviction and sentence passed on the appellants by the Court of Ses-

sion of Bellary Division, in Case No. 72 of the Calendar for 1910.

Dr. *S. Swaminathan* and Mr. *S. Ranganatha Iyer*, for the Appellants.

Mr. *C. F. Napier*, Public Prosecutor, for the Crown.

JUDGMENT.—The accused in this case were all charged with the offence of rioting under section 148, Indian Penal Code. The second accused was further charged with culpable homicide amounting to murder under section 302, the sixth and fourth accused with causing grievous hurt with a dangerous weapon under section 326. The accused against whom there was no charge of murder or causing grievous hurt as the immediate preparators of those offences were, however, charged with the commission of the offences constructively under section 149 of the Code.

The facts of the case are clearly set forth in the judgment of the Sessions Judge and we consider it unnecessary to repeat them. The cause of the rioting was an encounter between prosecution witnesses Nos. 1, 3 and 4 and probably, also five on the one side and one Narasakka, the mother of accused Nos. 6 to 8, on the other side. A case of abduction of one Narsamma against accused Nos. 2, 3 and 6, initiated by the prosecution fifth witness her husband, was pending at the time of the encounter. One Narasakka, according to the prosecution, was helping the prosecution fifth witness in the abduction case. The prosecution witnesses referred to above were going from their village for sowing their fields on the morning of the day of the offence. The encounter with Narasakka took place just outside of the village. Abusive words and a quarrel ensued between the prosecution party and Narasakka. According to the prosecution, all the eight accused went up to the place where the quarrel was going on. A fight ensued between them and the prosecution party in which very serious injuries were inflicted on Narasappa who died in consequence. Prosecution witnesses Nos. 3 and 4 also sustained serious injuries and prosecution first witness was also injured. Some of the accused also received some injuries. The lower Court acquitted all the accused of murder. It also acquitted them of rioting, holding that what happened was a sudden fight that is to say, apparently that it was not proved that the accused acted in pursuance of a common object and were, therefore, not members of an unlawfnl assembly, But the Judge found that the evidence established that all the accused were guilty of causing hurt and accused Nos. 2 and 6 of causing grievous hurt. His judgment does not show what injuries each of the accused inflicted, and on which of the prosecution witnesses, except with respect to the sixth accused. According to him, it is not certain who dealt the fatal blow which killed Narasappa. He prceeds:—"Though it is not certain that the second accused dealt the fatal blow he certainly took a leading part in the fight, I think there is no reasonable doubt, too, that the sixth accused was particularly active and that he caused grievous hurt to prosecution third witness." He convicted all the accused under section 325, Indian Penal Code, and the second and the sixth accused under section 326, Indian Penal Code, also. Accused Nos. 1 to 3, 4 and 6 have preferred this appeal. The evidence as to the details of the fight and as to the accused who inflicted the fatal blow on the deceased Narasappa, or caused grievous hurt to prosecution witness No. 3, is extremely discrepant and some of the witnesses for the prosecution gave different accounts on different occasions before the trial of the case in the Sessions Court. We are unable to confirm the Sessions Judge's finding that it was the sixth accused that caused grievous hurt to the third accused. Nor are we able to decide on the evidence whose act caused the death of Narasappa. We are, however, of opinion, differing from the Sessions Judge, that the evidence is sufficient to prove that all the accused were members of an unlawful assembly and were guilty of rioting and that they were all responsible for the injuries inflicted on the several prosecution witnesses in the course of the fight. The cause of the quarrel, as already mentioned was the deceased Narasappa's helping the prosecution fifth witness in the abduction cause and acting against accused Nos. 6, 2 and 3, who were the accused in that case. All the accused exposed their cause and joined in the quarrel. We are quite unable to accept the argument of the learned Counsel for the appellants that the existence of a common object before the fight began is necessary to justify the conviction of the ac-

cused of rioting. It is quite enough that accused Nos. 1, 3 to 5, 7 to 8 adopted the common object of accused Nos. 2, 3 and 6 to cause hurt to the prosecution party for helping Narasappa. It is also immaterial that the idea of injuring them was conceived suddenly after the accused went to the scene of offence where Narasappa had already encountered the prosecution party. We agree with the Sessions Judge that the accused Nos. 1 to 3 and 6 are proved to have been present and to have taken part in the fight. We also agree that the second and sixth accused took the most prominent part in it.

With regard to the fourth accused he pleaded *alibi* and examined two witnesses, defence witnesses Nos. 12 and 13, and produced Exhibit X to prove his plea. This is a document purporting to have been executed by the fourth accused in 12th witness' favour for Rs. 26, the balance of consideration due from him to the witness for the purchase of a bull on the date of the offence. The witness swears that the document was executed on the date it bears. He is apparently a respectable witness paying an annual assessment of Rs. 300. Defence 13th witness is the stamp-vendor who sold the stamp on which Exhibit X was executed on the date previous to the offence. The fourth accused is a brother of the fifth accused whose presence at the quarrel we find to be proved and it is possible that he was falsely included in the charge owing to his relationship to some of the accused. Having regard to the conflict of evidence as to the presence of the fourth accused we think there is reasonable doubt regarding his complicity in the occurrence and he is, therefore, entitled to be acquitted.

Dr. Swaminathan contends that it is competent to us to convict the accused of being members of an unlawful assembly or rioting or to hold them constructively guilty of the offences of causing hurt as they were acquitted of those offences by the lower Court. But in our opinion, this contention is not sound. Under section 423, clause (*b*), of the Code of Criminal Procedure an Appellate Court has the power to alter the finding of the lower Court maintaining the sentence. It is urged that this provision entitles the Court to convict an accused of an offence of which he is acquitted only in cases falling under sections 237 and 238 of the Code of Criminal Procedure. We see no reason to adopt the qualification of the plain words of section 423. Sections 237 and 238 of the Code of Criminal Procedure proved that in the cases to which they apply an accused person may be convicted of an offence with which he is not charged. The finding which an Appellate Court may alter under section 423 (*b*) may relate either to an offence with which the accused was separately charged in the lower Court, or to one or which he might be convicted without a distinct charge. In cases not falling under sections 237 and 238 of the Code of Criminal Procedure, no doubt, the Appellate Court cannot convict a person of an offence with which he was not charged in the first Court but where he has been charged and the first Court has recorded a finding on the charge there is no reason for holding that the Appellate Court cannot alter the finding. There is obviously no injustice in doing so. Our view is in accordance with the opinion of the Calcutta High Court in *Satis Chandra Das Bose* v. *Queen-Empress* (1) and *Queen-Empress* v. *Jabanulla* (2). In the result, we acquit the fourth accused and direct that he be discharged and set at liberty. We alter the conviction of the other appellants by finding them guilty of offence under section 147 and under sections 325 and 326 read with section 149 of the Penal Code and confirm the sentences.

(1) 27 C. 172.
(2) 23 C. 972.

CALCUTTA HIGH COURT.
MISCELLANEOUS CIVIL APPEAL No. 479 OF 1909.
March 8, 1911.
Present:—Mr. Justice Mookerjee and
Mr. Justice Caspersz.
MAHANANDA ROY—JUDGMENT-DEBTOR—APPELLANT
versus
SARAT MONI DEBI—DECREE-HOLDER—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 10—Condition restraining alienation—Condition that lessor shall not be able to sell by auction land leased to pay a debt other than arrears of rent—Whether void—No covenant for re-entry—Condition not for benefit of lessor and hence void.

A lease recited (1) that the lessees shall have no power to transfer in any way the property leased, by sale, gift or otherwise, (2) that the lessor shall not be able to have the said lands sold by auction for any

MAHANANDA BOY *v.* SARAT MONI DEBI.

debt other than arrears of rent thereof, nor shall any other creditor be able to cause the same to be attached and sold by auction, and (3) that the lessor does not grant the lessees or their heirs any transferable interest in the property:

Held, that unless there is a covenant for re-entry, a restrictive clause of the type contained in the instrument is inoperative in law; that as the conditions are not for the benefit of the lessor, because there is no covenant for re-entry, the conditions are void under section 10 of the Transfer of Property Act, and that the landlord is not bound by the restriction she placed upon herself, namely, that even she would not be able to have the land sold for any debt other than arrears of rent, and that consequently she may bring to sale the property leased, in execution of a decree not for rent obtained by her against the lessees.

Appeal from the order of the Sub-Judge of Nadia, dated August 18th 1909.

Babu *Tarini Das Mukerjee*, for the Appellant.

Babus *Hara Dhone Nag* and *Upendra Narain Bagchi*, for the Respondent.

JUDGMENT.—This appeal is directed against an order by which the Court below has declared that the respondent is entitled in execution of a decree obtained by her to bring to sale a property held by the appellants under her by virtue of a lease granted on the 22nd May 1908. The contorversy between the parties has been limited in this Court to one point, namely, whether upon the terms of the lease, the decree-bolder is entitled to sell the property she has seized in execution. The covenants in the instrument bearing upon this matter, are contained in three clauses, which, in our opinion, must be read together. The lease recites that the lessees shall have no power to transfer in any way the said property by sale, gift or otherwise. It next provides that "I" the lessor "shall not be able to have the said lands sold by auction for any debt other than arrears of rent thereof nor shall any other creditor be able to cause the same to be attached and sold by auction." There is finally a clause to the effect that "the lessors do not grant the lessees or their heirs any transferable interest in the property." It has been contended on behalf of the decree-holder that these covenants are not valid in law, because they are inconsistent with the nature of the interest created. In answer to this contention, it has been argued on behalf of the judgment-debtors that although two of these covenants may be inoperative in law, the restriction which the landlord has placed upon herself, in so far as his right to enforce against the property any claim other than one for arrears of rent is concerned, is enforceable against him. Now there can be no serious controversy that the covenants in the lease, in so far as they restrict the power of alienation of the lessees and make the property inalienable at the instance of their creditors, are void in law. In support of this view, reference may be made to section 10 of the Transfer of Property Act which provides that where property is transferred, subject to a condition or limitation absolutely restraining the transferee or any person claiming under him from parting with or disposing of his interest in the property, the condition or limitation is void, except in the case of lease where the condition is for the benefit of the lessor or those claiming under him. Now in the case before us, the conditions are not for the benefit of the lessor or those claiming under her, because there is no covenant for re-entry. It has been pointed out by this Court in the cases of *Nilmadhab Sikdar* v. *Narotham Sikdar* (1) *Golak Nath Roy* v. *Mathuranath Roy* (2) *Basarat Ali Khan* v. *Manirulla* (3) and *Kesablal* v. *Harasit Ghose* (4), that unless there is a covenant for re-entry a restrictive clause of the type contained in the instrument before us, is inoperative in law. Again, as pointed out by Sir Charles Sargent in *Vyankatraya* v. *Shive Ambhat* (5), although a restriction upon the right of the lessees to have the property sold in execution of a decree obtained against him may be valid, if there is a covenant for re-entry, such a covenant is invalid in the absence of any provision for forfeiture. [*Tamya* v. *Timapa* (6), *Subbaraya Kamti* v. *Krishna Kamti* (7) *In re West Hopetown Tea Co.* (8)]. Consequently, we must hold that the two clauses of the lease which provide that the lessee should have no power to transfer in any way the property demised by sale, gift or otherwise and that no creditor would be able to cause the same to be attached and sold in execution are inoperative in law. No doubt, in the case before us, the covenant has been so drawn as to expressly prohibit not merely, a voluntary alienation but also a sale *in vitum*,

(1) 17 C. 826.
(2) 20 C. 273.
(3) 36 C. 745; 2 Ind. Cas. 416; 10 C. L. J. 49.
(4) 6 Ind. Cas. 685; 12 C. L. J. 126.
(5) 7 B. 256 at p. 261.
(6) 7 B. 262.
(7) 6 M. 159.
(8) 12 A. 192.

so that the question does not arise, whether an execution sale or an assignment by operation of law falls within the mischief of a covenant in restraint of alienation by act of the lessee [*Doe* v. *Carper* (9), *Doe* v. *Hawke* (10), *Davis* v. *Eyton* (11), *Doe* v. *David* (12)]. The covenant is not for the benefit of the lessor and is consequently inoperative.

The only other question for consideration, then, is, whether the landlord is bound by the restriction she placed upon herself, namely, that even she would not be able to have the land sold for any debt, other than arrears of rent. Such a covenant if it stood alone, might not be inoperative because it did not take away completely from the grantee the right of alienation; it cannot obviously be affirmed as an inflexible rule of law that every restriction, however limited in character, upon the right of alienation of the grantee, is invalid in law but it would plainly be not right to separate this covenant from the two others already mentioned. The whole object of the lessor was, as is indicated by the concluding sentence of the lease, that the lessees should not have a transferable interest in the property. This restriction was inserted in the instrument because the lease-hold interest was permanent and would, in the absence of any restriction, have been transferable under section 11 of the Bengal Tenancy Act. The other clauses to which reference has been made, are all subsidiary to the primary object of the lessor. It would not be right to hold, under these circumstances, that although the covenant which restrains the lessee from transferring the property is void and unenforceable and the restrictions by which the creditors of the lessees are declared incapable of attaching and selling the lease-hold interest are equally inoperative, yet the landlord is fettered by the restriction she imposed upon herself. The landlord may reasonably contend that, if the property is in its essence transferable either at the instance of the lessees or their creditors she is at liberty to treat the property in the same way as any other creditor of the judgment-debtors may do. In other words, if the scheme to impress upon the lease-hold interest a character of inalienability has failed, it has failed in its entirety, because the clauses are essentially interdependent and not severable. Reading, therefore, the lease as a whole, we are of opinion that the provisions against alienation are entirely void and that it is open to the decree-holder to proceed with execution of her decree against the property.

The result is that the order made by the Court below is affirmed and this appeal dismissed with costs. We assess the hearing fee at three gold *mohurs*.

Appeal dismissed.

(9) 8 T. R. 57.
(10) 2 East. 481.
(11) 7 Bing. 154; 4 M & P. 820; 9 L. J. (o. s.) C. P. 44.
(12) 5 Tyr. 125; 1 C. M. & R. 405.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2243 OF 1908.

February 17, 1911.

Present:—Mr. Justice Mookerjee and Mr. Justice Teunon.

PRIYA NATH MAJUMDAR—PLAINTIFF—APPELLANT

versus

MAHENDRA KUMAR MITRA AND OTHERS—DEFENDANTS—RESPONDENTS.

Map—Thak *map*—*Map prepared under supervision of Collector*—*Map more than thirty years old*—*Presumption*—*Accuracy to be proved*—*Map prepared by Collector under private capacity*—*Evidence Act (I of* 1872*)*, *ss.* 83, 90—Jungle *lands*—*Title*—*Possession.*

The plaintiff relied mainly on the *thak* map of 1856, whereas the defendant relied upon a map prepared in 1865 at the instance of the Collector in his capacity as the holder of a particular estate:

Held, that section 90 of the Evidence Act only shows that the map of 1865 was prepared at the time at which it purports to have been made by the Collector whose signature it bears but it does not establish the accuracy of the map; and that section 83 has no application to the map as it was prepared by the Collector in his private capacity.

In the case of *jungle* lands, possession *prima facie* is with the person whose title is established.

Appeal from the decree of the District Judge of Khulna, dated July 18th, 1908, affirming that of the Sub-Judge of Khulna, dated December 10th, 1906.

Babus *Provash Chandra Mitter* and *Shachindra Prasad Ghosh*, for the Appellant.

Babus *Surendra Chandra Sen*, *Dwarka Nath Mitter*, *Sailendra Nath Palit* and *Baranashibashi Mukherjee*, for the Respondents.

JUDGMENT.—The subject-matter of the litigation which have given rise to this appeal consists of a tract of land described in the plaint as covering about 120 *bighas*, but found subsequently on measurement to cover about 200 *bighas*. The case for the plaintiff is that the disputed land is com-

prised in *mauzah* Alipur whereas the case for the defendants is that it is part of their property Beel Pabla. The Courts below have concurrently dismissed the suit on the ground that the plaintiff has failed to establish his title as well as possession within 12 years of the commencement of the suit.

The decision of the District Judge has been assailed before us on behalf of the plaintiff substantially on two grounds; namely, *first*, that the question of title has been erroneously decided by reason of the reception of evidence which is inadmissible in law, and *secondly*, that the question of limitation has been erroneously decided because the evidence has not been examined from the point of view of the nature of the land.

In so far as the first branch of the contention of the appellant is concerned, it may be stated at the outset that the plaintiff relied mainly on the *thak* map of 1856 whereas the defendants relied upon the map prepared in 1865 under the supervision of the Deputy Collector, Babu Brahmo Nath Sen. The plaintiff contended before the District Judge that the map of 1865 was not admissible in evidence against him; but this objection was overruled on the ground that the map, on the fact of it, showed that it was prepared in 1865 and was consequently admissible under section 90 of the Indian Evidence Act. In our opinion this position cannot possibly be maintained. Section 90 of the Indian Evidence Act only shows that the map was prepared at the time at which it purports to have been made by the Officer whose signature it bears, but it does not establish the accuracy of the map. But in the Court below as also in this Court, it has been contended that the map is a public map, as was held by their Lordships of the Judicial Committee in the case of *Radhamoni Debi* v. *Collector of Khulna* (1) and by this Court in the case of *Sital Chand Ghatak* v. *Mohendra Kumar Nath* (2) decided by Mr. Justice Woodroffe and Mr. Justice Richardson. In answer to this contention, it has been argued on behalf of the plaintiff that these judgments cannot be used against him for the purpose of establishing that the map is a public map the accuracy of which may be presumed under the provisions of the Indian Evidence Act. In our opinion, this position is incontestable. The question whether the map is a public document within the meaning of section 74 of the Indian Evidence Act is *prima facie* a question of fact and the mere circumstance that the map in question was treated as a public map in some earlier litigation to which the plaintiff was not a party does not bind the plaintiff. It turns out, however, upon an examination of the proceedings in the case of *Radhamoni Debi* v. *Collector of Khulna* (1) that the map in question was not treated as a public map. It appears that at the time of that litigation the Surveyor Mohin Chandra Bose was dead, and consequently two persons of the names of Sital Chandra Mitter and Munshi Muzhur-ud-din Mahomed who had been present at the time the map was prepared were examined to explain the circumstances of its preparation. It further appears from a passage in the judgment of their Lordships of the Judicial Committee that the map was not treated as a public map and it was expressly stated that the evidence of conduct of the parties made it clear that it was entitled to no less than the degree of authority which attaches to Government surveys generally. It has been explained to us that in the earlier litigation, the conduct of the parties to which reference is made in the judgment of the Judicial Committee consisted in the circumstance that the map was mentioned in a certain lease which was apparently binding upon the parties. In the case before us, the map is not mentioned in the lease. It is, therefore, impossible to hold that the decision of the Judicial Committee in the case of *Radhamoni Debi* v. *Collector of Khulna* (1) and of this Court in *Sital Chandra Ghatak* v. *Mohendra Kumar Mitter* (2) proves conclusively against the plaintiff that the map is a public map. On the other hand, it is fairly clear that the map is a public document. It appears to have been prepared at the instance of the Collector who was in charge of the Syedpur Trust Estate because he was dissatisfied with the *thak* map of 1856. We have not been informed whether any steps were taken for the correction of the *thak* map, in the manner provided for that purpose, by an appeal to the superior revenue authorities. If such proceedings had been taken the result would undoubtedly have been indicated in

(1) 27 C. 493; 27 I. A. 136.
(2) R. A. Nos. 37 and 57 of 1907.

the *thak* map itself. Consequently, the true position appears to be that we have on the one hand the *thak* map and on the other the map of 1865 which was prepared at the instance of the Collector in his capacity as the holdor of the Syedpur Trust Estate. Consequently, the map must be treated as a private document; and if it is treated as a private document there can be no question that its accuracy has to be established, because it has been laid down by a series of decisions of this Court that section 83 of the Indian Evidence Act has no application to maps prepared by an Officer of Government while he is in charge of properties as a private proprietor. In support of this position reference may be made to the decision of this Court in the cases of *Junmajoy Mallick* v. *Dwarka Nath* (3); *Ram Chunder Sao* v. *Bunseedhur Naik* (4); *Kanto Prashad* v. *Jagat Chandra Dutta* (5) and the observations in the case of *Dinomoni Chowdhrani* v. *Brojo Mohini Chowdhrani* (6). The contrary view adopted in the case of *Taruck Nath Mookerjee* v. *Mohendra Nath Ghose* (7), which was decided in 1870 before the Indian Evidence Act was passed, cannot, in view of the later decision, be treated a good law. Consequently before the defendants can be allowed to use the map against the plaintiff, they must be called upon to establish its accuracy. But even if its accuracy is established, other circumstances have to be taken into consideration which may affect its evidentiary value. The learned Vakil for the appellant has contended upon the authority of the case of *Kerr* v. *Nuzzar Mahomed* (8) and *Kanto Parshad* v. *Jagat Chunder Dutta* (5), that a map prepared for one purpose cannot be used for totally different purpose, a purpose wholly irrelevant to the subject of dispute in the earlier litigation. The Courts below do not appear to have considered the evidentiary value of the map from this point of view. It cannct be disputed, as pointed out by this Court in the cases of *Moni Roy* v. *Rajbunsee Kooer* (9) and *Ranjit Sinha* v. *Basanta Kumar Ghosh* (10), that even though the boundaries between two villages may have been demarcated as between two contesting parties with regard to one portion of the estate, if an attempt is made in a subsequent litigation between the same parties to use the map with regard to another portion of the boundaries, the matter requires careful scrutiny. If, therefore, this map is duly proved and is, ultimately, used as evidence against the plaintiff, the Court must consider how far the boundaries in so far as the lands now in dispute are concerned, were in view when the map was prepared. If it is established that the portion of the boundary now in dispute was also directly in dispute at the time when the map was prepared, the map would be of considerable value; otherwise, its evidentiary value would be diminished. The learned Vakil for the appellant has further contended that the map is not signed either by the owners or the tenants of the adjoining land that unless it is established that the map was prepared, if not with the assent, at least with the knowledge, of the proprietor of the neighbouring lands affected by the demarcation, its evidentiary value would be very little. This contention is supported by the cases of *Omirta Lal Chowdhry* v. *Kalee Pershad Shaha* (11); *The Collector of Rajshahye* v. *Doorga Soondery Debia* (12) and *Nobo Coomar* v. *Gobind Chunder* (13). The mere recital on the face of the map that other persons had notice of the proceedings would not by any means be conclusive, especially in the absence of the signature, such as is usual on the maps, by the holders of the neighbouring lands. Consequently, if the map is used in evidence this circumstance also must be borne in mind.

The learned Vakil for the appellant has further contended that the map of 1865 appears to be based on the *chitta* of 1234 and as that *chitta* itself was prepared by guess, the evidentiary value of the map cannot exceed that of the *chitta*. The Courts below do not appear to have considered the matter from this point of view, which has obviously to be taken into consideration if the map is to be used in evidence against the plaintiff.

(3) 5 C. 287; 4 C. L. R. 574.
(4) 9 C. 741.
(5) 23 C. 335.
(6) 29 C. 187.
(7) 13 W. R. 56.
(8) 2 W. R. (P. C.) 29
(9) 25 W. R. 393.
(10) 4 Ind. Cas. 81; 9 C. L. J. 597; 12 C. W. N. 739; 6 M. L. T. 364.
(11) 25 W. R. 179.
(12) 2 W. R. 120.
(13) 9 C. L. R. 305.

In answer to this contention of the appellant, it has been argued by the learned Vakil for the respondents that no objection ought to be allowed to be taken, to the admissibility of the map as such objection was not taken in the Courts below. We are unable to hold that objection was not raised to the reception of the map in evidence, although it is quite possible that the objection was not formulated with the precision with which it has been taken in this Court. No doubt, if objection has not been taken to the admissibility of a map which would be admissible, if certain requirements were fulfilled, the objection cannot be allowed to be taken at a subsequent stage, as laid down in the cases of *Girindra Chandra Ganguli* v. *Rajendra Nath Chatterjee* (14); *Gunga Narain Chowdhry* v. *Radhika Mohan Roy* (15) and *Madhabi Sundari* v. *Gaganendra Nath Tagore* (16). These cases, however, are clearly distinguishable; and the substantial objection which has been raised in this Court was taken undoubtedly before the District Judge, if not also before the Court of first instance. It has further been contended by the learned Vakil for the respondents that even if the map is not admissible under section 83 of the Indian Evidence Act, it is admissible under sections 13 and 14 of the Act, as laid down by this Court in the case of *Junmajoo Mallik* v. *Dwarka Nath Maiti* (3) This argument, however, even if it is assumed to be correct, is of no assistance to the respondents. If the map is used in evidence under sections 13 and 14 of the Indian Evidence Act, it is evidence merely of an assertion of the title which is now put forward by the defendant so far back as 1865; but the map has been used by the learned District Judge as showing clearly that the *thak* map is incorrect, and for that purpose it is essential to establish that the map itself is correct.

It has finally been suggested by the learned Vakil for the respondents that the learned District Judge has given an independent reason for the rejection of the *thak* map and that consequently, apart from the map of 1865, the plaintiff cannot possibly succeed. Our attention has been invited to a solitary passage in the judgment of the learned District Judge in which he observes that *thak* maps go upon possession, but here the land was all *jungle* and there was no visible physical possession. Now, it may be conceded that, as was pointed out in the case of *Joytara Dassee* v. *Mahomed Mobaruck* (17), the evidentiary value of *thak* maps would be affected by the condition of the land at the time the survey was made. But obviously the *thak* map cannot be ignored upon a general allegation that the land at the time was *jungle*. It is conceivable that the land in dispute was not *jungle* at the time and was quite capable of survey at the time. Consequently, if the learned District Judge based his judgment merely upon the observation upon which reliance is placed, it would be necessary to direct a further inquiry into the matter. It has been suggested as a last resort by the learned Vakil for the respondents that the map was prepared at the instance of the common superior landlord of both the parties and that, consequently, it may be used in evidence by either party against the other. This contention does not appear to have been raised in either of the Courts below and we have no evidence on the record to show that the title under which the plaintiff claims was created subsequent to the survey of 1865. It is obvious that if his title is antecedent to 1865, the map could not be used against him on the ground suggested. We must, therefore, hold upon the first branch of the case for the appellant that the decision of the District Judge upon the question of title cannot be supported.

In so far as the second branch of the case for the appellant is concerned, reliance has been placed upon the decision of this Court in the case of *Mirza Shamsher Bahadur* v. *Munshi Kunj Behari Lall* (18). In our opinion the decision of the District Judge upon the questson of limitation also cannot be supported. In the first place his decision upon the question of possession is inextricably mixed up with the decision of title which, as we have said, cannot be supported In the second place, the learned District Judge does not appear to have considered the nature of the land. It is clear upon the evidence that up to at least 1874, the land was covered with *jungle*. It has been stated to us

(14) 1 C. W. N. 530.
(15) 21 W. R. 115.
(16) 9 C. W. N. 111.
(17) 8 C. 975; 11 C. L. R. 399.
(18) 7 C. L. J. 414; 12 C. W. N. 273; 3 M. L. T. 212

that, according to the evidence, even on the side of the defendants themselves, portions of the land were brought under cultivation within 12 years of the commencement of the suit. Consequently, the claim of the plaintiff cannot be treated as barred by limitation in respect of such lands. It is farther clear that if the *thak* map goes on possession, the evidence of possession must be considered from an entirely different point of view and in the case of *jungle* lands possession, *prima facie*, is with the person whose title is established. We are of opinion that the case must go back not merely for the decision of the question of title but also for re-consideration of the question of limitation.

The result, therefore, is that this appeal is allowed, the decision of the Distrct Judge set aside and the case remanded to him for re-consideration. The defendant will have opportunity to prove the map of 1865 and the District Judge will, for that purpose, give necessary directions for the reception of evidence by the Court of first instance. The plaintiffs will have opportunity to rebut any new evidence that may be advanced by the defendants. New evidence will not be admissible in so far as the question of possession is concerned. The costs of this appeal will abide the result.

Appeal allowed.

MADRAS HIGH COURT.
CRIMINAL APPEAL No. 46 OF 1911.
April 27, 1911.
Present:—Mr. Justice Sundara Aiyar and Mr Justice Ayling.
KALI MUDALY AND OTHERS—APPELLANTS
versus
EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), s. 526 (8)—Sessions trial—Application for adjournment—Application made after reading the charge—'Before the commencement of the hearing,' meaning of.

For the purposes of section 526 (8), Criminal Procedure Code, the hearing or trial must be taken to include all the proceedings taken to determine a case and the first step in the hearing at a Sessions trial is the reading and explaining of the charge to the accused.

Where, at a Sessions trial, the accused applied for an adjournment under section 526 (8), Criminal Procedure Code, to enable him to apply for a transfer of the case after the charge was read out and explained to him:

Held, that this was not an application made before the commencement of the hearing and that the Court was not bound to grant the adjournment.

Surat Lall Chowdhury v. *Emperor*, 29 C. 211, not approved.

Appeal against the order of the Court of Session of the Coimbatore Division, Case in No. 101 of the Calendar for 1910.

Dr. *S. Swaminathan*, for the Appellants.

Mr. *C. F. Napier*, Public Prosecutor, for the Crown.

JUDGMENT.—The appellants have been convicted of the murder of one Muruga Mudalli on the night of June 13th 1910.

That Muruga Mudalli was murdered there can be no doubt. His corpse appears to have been found on the afternoon of the following day in a pond called Malaiyandi Kuttai near his village Vijayamangalam. No less than 13 ribs were broken, and there were three incised and one punctured wound.

The medical evidence makes it clear that death was the result of these injuries and not of drowning. The question is, whether there is sufficient reliable evidence to bring home the crime to the appellants.

The motive suggested is extermely weak, at any rate for a premeditated crime such as the learned Sessions Judge considers this to be.

The deceased was one of several witnesses who had given evidence five days before in a case of hurt and mischief brought against the second accused, the suggestion is that he was murdered out of revenge. The case was not a serious one on the face of it, although the Magistrate who tried it ultimately imposed a sentence of two months' imprisonment; this was more than might have been anticipated. No personal motive is alleged in the case of the other appellants beyond sympathy with the second appellant. The third appellant is his brother but by his own account on bad terms. The first appellant keeps a sister of the second and third appellants and the fourth appellant is merely a friend and belongs to a different caste.

The evidence briefly summarised is this. The widow (prosecution witness No. 1) says that about 5 P. M. the first appellant who was on fairly good terms with her husband took him off to Mettapudur (about a mile distant) to drink toddy. The deceased never returned and about 8 P. M. she saw the appellants Nos. 2 and 3 and another younger brother Kanda-

sawmy pass her house in the direction of Mettapudur and of the pond and scene of crime. The second prosecution witness proves that at about sunset (5-30 P. M.) or a little later the deceased and the appellants Nos. 1, 2, 4, were drinking toddy in his backyard at Mettapudur and left it to return home. The third prosecution witness saw the same four men on their way back all drunk. The fourth prosecution witness saw them a little further on quarrelling in drunken fashion near another pond called Modunandi Kuttai. Here they were joined by third appellant who came from the direction of Vijayamangalam and all united to beat the deceased. The fifth prosecution witness gives similar evidence and also says he drank a cup with them at Mettapudur; therefore, it is he who introduces the first sinister note by saying that the third appellant began to upbraid the deceased with giving evidence against his brother. His evidence takes us to about 7 P. M. The only other witness is the 6th prosecution witness who says, that about 8-30 or 9 P. M. he saw five or six men, including all the appellants throwing something into the Malayandi Kuttai.

The actual scene of the murder, judging from the blood stains and other signs, appears to be a field between the two ponds and near the village Choultry.

Now it is clear that, except for the sixth prosecution witness, the evidence does not take us up to the murder. The other witnesses speak only to drunken punching and pulling which could not possibly account for the terrible injuries found on the corpse. Indeed, the view of the learned Sessions Judge appears to be that the second and third appellants left the man on the path or on the field, returned home for more assistance and then finished him off, and threw the body in the pond. On this view, the widow must have seen them going back to the scene of crime. This theory involves such an absolute division of events, as to deprive the evidence of the prosecution witnesses Nos. 2 to 5 of any value regarding the offence of murder. It is, morever, very difficult to explain the appellant's conduct. The lad Kandasawmy could have been of no particular help and four of them were surely enough to polish the deceased off, if they meant business. The cut wounds were comparatively trivial, and it can hardly be suggested they went home merely to get a knife.

The learned Public Prosecutor suggests that the man may have been already murdered when the widow saw the second and third appellants but they were returning to dispose of the body. We do not think this theory will hold water. It is possible that the murderers might defer taking the body to the pond till they could do so with the minimum chance of observation. But, if so they would certainly wait till the moon set, and every one was asleep. The moon that night set only shortly before midnight, and at the time spoken by the first and sixth prosecution witnesses many of the villagers were admittedly awake.

In our opinion it is difficult, if not impossible, to reconcile the widow's evidence with that of the other witnesses who represent the second and third appellants as taking part in the preliminary brawl about an hour earlier. Of the two, that of the widow is more probable; it was put forward very early and if there is anything at all in the motive for the murder it is most unlikely that the second appellant, of all the people in the world, would have been found drinking with the deceased at Mettapudur.

Of the other witnesses, the most important are the fifth and sixth prosecution witnesses. The former does not appear to have come forward for more than a week after the discovery of the murder, though he was in Nijayamangatam all the time. We cannot agree with the Sessions Judge in accepting as satisfactory his explanation that he was busy with a marriage in his sister's house.

The sixth prosecution witness is a journeyman weaver, whose story is very suspicious. It is most improbable that if he really interrupted 5 or 6 men throwing a corpse into a tank, they would have stopped to speak to him and make their identifications certain. A still more serious defect is that in his first statement the first appellant is not mentioned as one of the men he saw though he now swears to him. The witness has not been cross-examined on this point, apparently for the curious reason that the Sessions Judge regarded it as immaterial (*vide* paragraph 19 of his judgment).

This by no means the only point of apparent importance which has passed

unnoticed so far as can be seen in the Sessions Court. The omission to examine the woman who sold toddy is explicable, but the inquest report discloses the name of another person not examined whose evidence would have been of great importance. This is one Sellan, the *totty* of Mettapudur. He appears to have deposed that he saw five or six men going home drunk, including the deceased and the second appellant, who were holding each other by the hand, and what is more important that at 10-30 P. M. when he again passed along the path he found a man lying apparently drunk near the corner of the Chattram. This will not fit with the evidence of the sixth prosecution witness. No explanation is suggested for the failure to cite this witness, who would have been a most valuable one.

Nor is any explanation offered for the absence of any evidence from the large *paracheri*, which appears to closely adjoin the path and some of the inhabitants of which must have known something of the occurrence. The police investigating officer himself is not a witness for some explained reason. In crimes of this kind, it is usual to endeavour to trace or account for the petty ornaments worn by most people in this country with a view to test the possibility of robbery as a motive for the murder. Here that point is altogether overlooked and there is not even an entry in the appropriate column of the inquest report, and no witness seems to have been asked a question about it. A most extraordinary fact, also unnoticed by the Judge, is that the deceased's cloth waist-cord and a tin case belonging to him appear to been found in or near the Muduvandi Kuttai, not the one where the corpse was found but a quarter of a mile away (*vide* Exhibit K.)

On a careful consideration of the whole case. It seems to us that the conviction cannot be sustained. The prosecution evidence seems to have been accepted by the Sessions Judge far too readily and without noticing or weighing the numerous points which tend to throw doubt on it. In the view we have taken of the case, it is, perhaps unnecessary to pronounce an opinion on the point raised by Dr. Swaminathan that the whole trial should be set aside as illegal on the ground that the Judge acted contrary to the provisions of section 526, clause 8, of the Criminal Procedure Code in refusing to grant an adjournment of the trial to enable the accused to apply for transfer of the case to some other Court. The application for adjournment was made after the charge had been read and explained to the accused. Section 526, clause 8, does not require the Court to adjourn a case when the application is not made before the commencement of the hearing. The learned Counsel for the appellants contend that the hearing can be said to commence only after the accused plead to the charge. We cannot agree with this contention. The hearing or trial must be taken to include all the proceedings taken to determine a case and the first step in the hearing at a Sessions trail is the reading and explaining of the charge to the accused. In Wharton's Law Lexicon the meaning of the word is given "as the investigation of a controversy." We must hold that the application for adjournment in the case, was not made before the commencement of the hearing. We are not to be understood to accede to the argument that the trial could be held to be illegal assuming that the Court was bound to grant the application. We should find much difficulty in agreeing with the view of the High Court in *Surat Lall Chowdhury* v. *Emperor* (1) if it were necessary to deal the question.

The convictions and sentences are reversed and the appellants are set at liberty.

Conviction quashed.

(1) 29 C. 211.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 2487 OF 1907.

February 25, 1911.

Present:—Mr. Justice Mookerjee and Mr. Justice Teunon.

KALI KUMAR GHOSH—DEFENDANT—APPELLANT

versus

BIDHU BHUSHAN BANERJEE

PLAINTIFF—RESPONDENT.

Landlord and tenant—Amount payable out of rent to third person by tenant under assignment—Nature of amount—Whether rent or not—Res judicata—*Issue on disputed point in rent suit—Purchase of share in permanent transferable tenure—Declaration of right of purchaser by setting aside sale in execution of decree to which he was no party.*

KALI KUMBAR *v.* BIDHU BHUSHAN.

A suit by a landlord against a tenant for a certain sum of money payable by him out of the rent to a third person under assignment, is one for rent and not for damages.

When an issue has been raised on a disputed point in a suit for rent, and has been heard and finally decided, the decision operates as *res judicata* in a subsequent suit.

Ekabbar Sheikh v. *Hara Bewah*, 8 Ind. Cas. 660; 13 C. L J. 1; 15 C. W. N. 335; and *Hara Chandra Bairagi* v. *Bipin Behary Das*, 6 Ind. Cas. 860; 13 C. L. J. 38, referred to.

A person who has purchased a share in a permanent transferable tenure is entitled to a declaration of his right to that share and for possession of the same after setting aside a sale held on execution of a decree to which he was not made a party.

Mohesh Chunder Ghose v. *Saroda Prasad Singh*, 21 C. 433, referred to.

Appeal from the decree of the Sub-Judge of Khulna, dated August 20th, 1907, modifying that of the first Munsif of Khulna, dated December 10th, 1906.

Babu *Troylokya Nath Ghosh* for Babu *Jodu Nath Kanjilal*, for the Appellant.

JUDGMENT.—This is an appeal on behalf of the second defendant in an action for rent. The two substantial points which have been argued in the appeal are *first*, that the suit is not maintainable because part of the amount claimed by the plaintiff is in the nature of damage for breach of contract and not rent; and *secondly*, that the plaintiff is not entitled to the entire rent claimed by him

In so far as the first ground urged on behalf of the appellant is concerned, our attention has been invited to the lease by which the tenancy was created. Under that lease the rent was fixed in perpetuity at Rs. 165. The tenant, the predecessor-in-interest of the present appellant, undertook to pay out of that sum Rs. 125-10, to the superior landlord and the balance Rs. 39-6-0 to the lessor as his profit. On these facts, it has been argued on the strength of the decision of this Court in the cases of *Hemendra Nath Mukerjee* v. *Kumar Nath Roy* (1), and *Girish Chandra Das* v. *Kunjo Behari Malo* (2), that the portion of the claim which represents the sum not paid by the defendant to the superior landlord of the plaintiff is in the nature of damages and not rent, and that consequently a separate suit ought to have been brought to realise that portion of the claim. In our opinion there is no substance whatever in this contention. The decision of a Full Bench of this Court in the case of *Basanta Kumari* v. *Ashutosh Chukerbutty* (3), shows that a suit by a landlord against a tenant for a certain sum of money payable by him out of the rent to a third person under assignment is one for rent and not for damages. The two cases upon which reliance has been placed are clearly distinguishable. It was ruled there that the landlord upon breach of a covenant to pay the rent so assigned is entitled to claim damages and that if he chooses to bring forward such a claim, the suit for the purpose of limitation is to be treated as a suit for recovery of damages for breach of a covenant governed by Article 114 of the second Schedule of the Limitation Act. We must, consequently, overrule the contention of the appellant and hold that the suit as framed has been properly constituted.

In so far as the second contention addressed by the learned Vakil for the appellant is concerned, it has been argued that the plaintiff is not entitled to realise the whole rent because by reason of two execution sales to which we shall presently refer he has not acquired an interest in the whole of the property in question. It has been pointed out that on the 24th November 1892, one of the superior landlords interested to the extent of an one-third share in execution of a decree for arrears of rent in respect of his share only against the registered tenant purchased one-third of the tenure of which the plaintiff now claims to be the entire landlord. On the 21st February 1895, the father of the plaintiff, in execution of a decree for money against the tenant Hemangini, purchased the tenure. Subsequently, on the 21st August 1902, one of the landlords interested to the extent of one-sixth share, in execution of a decree for rent in respect of his share only obtained against Hemangini, purchased the tenure. It has been argued before us that the effect of the sale of 1892 was to vest in the purchaser a one-third share in the tenure and that consequently the father of the plaintiff by his purchase in 1895 acquired a valid interest to the extent of two-thirds share only. It has further been argued that out of this two-third share the plaintiff has lost an one-sixth share which was purchased in 1902, by the landlord at the execution sale. Now, in so far as the first branch of this contention is concern-

(1) 32 C. 169.
(2) 12 C. W. N. 628; 35 C. 683.
(3) 27 C. 67.

ed, the learned Subordinate Judge has held that the decision of the question is barred by the doctrine of *res judicata*. He has pointed out that the same question was raised in a previous suit for rent, that an issue was raised upon the question of the effect of the purchase of 1892, upon the purchase by the father of the plaintiff in 1895, and that it was then decided that the later purchase was in no way affected by the earlier sale of 1892. The learned Vakil for the appellant has, however, contended that a decision in a suit for rent does not operate as *res judicata*, and in support of this proposition he has placed reliance upon the decision of this Court in the case of *Kailash Mondul* v. *Baroda Sundari Dasi* (4). The proposition advanced by the learned Vakil, however, is entirely unsustainable. It is now settled beyond all controversy that when an issue has been raised on a disputed point in a suit for rent and has been heard and finally decided, the decision operates as *res judicata* in a subsequent suit. In support of this proposition it is sufficient to refer to two recent cases on the subject, namely, the cases of *Ekabbar Sheikh* v. *Hara Bewah* (5), and *Hara Chandra Bairagi* v. *Bipin Behary Das* (6).

In so far as the second contention advanced by the learned Vakil for the appellant is concerned, it is clear that there is no foundation for it. The learned Subordinate Judge has held that the execution sale of 1902 did not affect the title of the plaintiff, acquired under the sale of 1895 inasmuch as the latter decree for rent was obtained against Hemangini at a time when she had ceased to have an interest in the tenure in question. The learned Vakil for the appellant has, however, argued that as the effect of the purchase of 1892 was to vest in the purchaser the one-third share of the tenancy and as the effect of the sale of 1895 was to vest in the father of the plaintiff the two-thirds share of the tenancy, the superior landlord was entitled to ignore the purchases of 1892 and 1895 and to maintain a suit for rent against Hemangini the representative of the original tenant. In support of this position he has placed reliance upon the decision of this Court in the case of *Rammoyi Dasi* v. *Rupai Pramanick* (7)

(4) 24 C. 711; 1 C. W. N. 565.
(5) 13 C. L. J. 1; 8 Ind. Cas. 660; 15 C. W. N. 335.
(6) 13 C. L. J. 38; 6 Ind. Cas. 860.
(7) 13 C. L. J. 267; 9 Ind. Cas. 801.

That case, however, is clearly distinguishable. It was not necessary for the learned Judges in that case to consider the effect of a sale held in execution of a decree for rent obtained against the registered tenant after a portion of his interest in the tenure had been validly transferred to a party who was not before the Court. It may be pointed out, however, that the view taken in the case last mentioned is opposed to the decision of this Court in the case of *Baistab Charan Chowdhury* v. *Akhil Chandra Chowdhury* (8). It is now well-settled that a person who has purchased a share in a permanent transferable tenure is entitled to a declaration of his right to that share and for possession of the same after setting aside the sale held in execution of a decree to which he was not made a party. As an authority for this proposition it is sufficient to refer to the decision of this Court in the case of *Mohesh Chundar Ghose* v. *Saroda Prasad Singh* (9). The view taken in this case has been subsequently adopted in *Kali Sundari Debi* v. *Dharani Kanta Lahiri* (10), and *Nand Kumar Naskar* v. *Hari Das Haldar* (11). It was pointed out by the learned Judges in the case first mentioned that although under section 88 of the Bengal Tenancy Act the landlord may not be obliged to recognise the division of the tenancy, he may yet be obliged to recognise the transfer. It follows, therefore, that there is no foundation for the second contention of the appellants.

The result is that the decree made by the Court below is affirmed and this appeal dismissed.

Appeal dismissed.

(8) 11 C. W. N. 217.
(9) 21 C. 433.
(10) 33 C. 279.
(11) 27 C. 545.

KOMALAMBAL AMMAL *v.* KRISHNASAMY BHATTAR.

(s. c. 2 M. W. N. 310.)

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1550 OF 1909.

February 15, 1911.

Present:—Mr. Justice Munro and Mr. Justice Sankaran Nair.

KOMALAMBAL AMMAL—PLAINTIFF—APPELLANT

versus

KRISHNASAMY BHATTAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Partition-deed—Sons by different wives—Construction of partition-deed—Severance in interest as between the sons of second wife.

A had three sons—one by his first wife, and two by his second wife. He executed a Will by which he authorized his executors to effect a partition among his sons when the eldest of them attained the age of majority. The executors did as they were directed. Properties were divided into three shares, one of which was allotted to the eldest son, and two to the other two sons. The deed of separation provided (1) that if any property was left undivided, it should be divided into three shares by the three parties and (2) that in future the parties shall have no connection in respect of property except relationship by blood:

Held, that these provisions effected a severance in interest as between the sons of the 2nd wife also, though their property was kept together without any division.

Second appeal against the decree of the District Court of Tanjore in A. S. No. 816 of 1908, presented against the decree of the Court of the Subordinate Judge of Kumbakonam in O. S. No. 24 of 1908.

FACTS.—One Pranatharthyhara Bhattar had three sons, one son by the first wife and two sons by the second wife. He executed a Will by which he divided the properties into three shares, and directed his executors that they should, after his eldest son attained the age of majority, make a partition of the properties among his sons. The executors divided the properties into three shares, gave one share to the son of the first wife, and handed over the two shares to the sons of the second wife making her their guardian. One of the sons of the second wife died. His wife brought the suit for one-half of the plaint properties and claimed possession of the same with mesne profits on the ground that her husband was separate in interest from the 1st defendant or in the alternative, if plaintiff and the 1st defendant were undivided in interest, for her maintenance out of the family income. Defendants Nos. 1 and 2 pleaded that plaintiff's husband and the first defendant were joint in interest. Among the issues framed were:—"Whether the plaintiff was competent to sue for alternative reliefs," and "whether plaintiff's husband and 1st defendant were divided or undivided in interest." The Subordinate Judge on the 1st issue held that the suit as framed was sustainable and on the 2nd issue, construing Exhibit IV held that the plaintiff's husband and the 1st defendant were divided in interest. The defendants appealed to the District Court on the ground that Exhibit IV has been misconstrued. The District Judge, on a consideration of the same, reversed the decree of the Sub-Judge and decreed plaintiff's maintenance. Plaintiff appealed to the High Court.

Mr. *T. Rangachariar*, for the Appellant:—The father by his Will intended to effect a separation in interest as among his sons. The words used in the Will are:—" * * * * * * * *" In the partition-deed, the words used are "there is no other relationship between us except friendship." The fact that two shares were given to the 2nd wife, on behalf of her sons, does not make any difference in the matter.

Mr. *P. S. Sivaswami Aiyar*, for the Respondent:—The intention manifested by the Will was to effect a division as between the sons of two wives, and not as between the two sons of the second wife and thus constitute the latter, members of a divided Hindu family. Even after partition, the conduct of the brothers shows that they remained joint in interest.

Mr. *T. Rangachariar* in reply:—When a document is unambiguous, conduct of parties will not be admissible in evidence to show what was meant by it.

JUDGMENT.—The question is, whether the plaintiff's husband Subramaniam and the 1st defendant were divided from the date of Exhibit IV, which is a partition-deed executed between Sundara Bhattar and the plaintiff's husband and the 1st defendant. The decision turns upon the construction of Exhibit IV. At the date of Exhibit IV, Sundara Bhattar was a major, while his half-brothers, the other two parties to Exhibit IV, were minors under the guardianship of their mother. We think there can be no doubt that all the three parties to Exhibit IV became divided in interest from the date of that

document. It is true that while Sundara Bhattar's one-third share was defined, the two shares of the minors were kept together without any division of the various items assigned to their two shares. This, however, is quite consistent with a division in interest, and there are provisions in the document which read in their natural meaning leave no doubt that there was a division in interest between the minors. For instance it is provided that, if it should afterwards be found that any property had been left undivided, it should be divided into three shares by the three parties, and that each of them should take his share. And the document winds up by saying that in future the parties shall have no connection in respect of property. The natural meaning of these expressions is clear; and there is nothing in the document which would warrant us in adopting the strained construction suggested by the respondents. We, therefore, reverse the decree of the District Judge and restore the decree of the Subordinate Judge with costs in this and the lower Appellate Court.

Appeal allowed.

(s. c. 2 M. W. N. 311.)

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 115 OF 1908.

March 8, 1911.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Sundara Aiyar.

PACHATHAMMAL—PLAINTIFF—APPELLANT

versus

ELUVAN CHETTY AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Division by co-widows—Alienation by Will—Status of division.

A. executed a Will by which he divided his properties into three shares, giving to the 1st wife one share, 2nd wife another share, and the daughters of the 2nd wife a third share. The two wives made a division of the properties and in the partition-deed they inserted a provision that one should not question the alienation by the other by sale, gift, &c. The first wife made a Will by which she gave the properties to her brother. In a suit to set aside the Will brought by the daughters as reversioners, it was contended that unless the right of survivorship which accrued to one co-widow on the death of the other, was present to the minds of the parties, they must not be intended to have given up such right and the words used only limited the kind of disposition that must remain unquestioned and did not include a disposition by Will:

Held, that the words used in the partition-deed were wide enough to cover the case of disposition by Will also.

Where the document provides that the widows have no right of alienation without the consent of each other, it must be presumed that the right of survivorship was present to their minds and must be deemed to have been given up.

Somathi Ammal v. *Kupputhoyi Amma*, 14 M. L. J. 175, distinguished.

Appeal against the decree of the District Judge of Salem in Original Suit No. 2 of 1907, dated the 3rd March 1908.

FACTS.—One Shunmuga Chetty had two wives, and by the second wife he had two daughters. He executed a Will by which he gave one share to each of his wives, and a third share to his daughters. The wives divided the propeties between themselves and in the partition-deed there was a provision that one should not question the alienation made by another mode. One of the wives subsequently executed a Will by which she gave the properties to her brother. The daughters sued to set aside the alienation on the ground that under the partition-deed their step-mother had only a life-interest and no more. The District Court of Salem dismissed the suit. Plaintiffs now appeal to the High Court.

The Hon'ble Mr. *P. S. Sivaswami Aiyar*, for the Appellant:—On the true construction of the partition-deed, the parties have not dealt with the state of things which may happen on the death of either of them. It has been held in a case that unless the right of survivorship was present to the minds of the parties at the time of the partition-deed, they must not be presumed to have given it up,—*Somathi Ammal* v. *Kupputhoyi Ammal* (1). The partition deals only with the alienation of the life interest and not of their interest beyond.

Mr. *T. Subramania Iyer*, for the Respondent,—

The use of the word "gift" implies that the females dealt with their power to forego their right of survivorship,—*Ramakkal* v. *Ramasami Naiken* (2).

JUDGMENT.—We are of opinion that under Exhibit III the plaintiff agreed not to

(1) 14 M. L. J. 175. (2) 22 M. 522.

object to alienation of any kind. The expression that her co-widow might make the alienation "whether by sale, gift or in any other way," is wide enough to inculde alienation by Will. The case cited by the learned Advocate-General, *Somathi Ammal* v. *Kupputhoyi Ammal* (1), is not in point. The learned Judge who decided that case held that the document in that case proceeded on the footing that the parties to it had rights of alienation and that, therefore, they could not be dealing with any right of survivorship vested in them. Here, on the other hand, Exhibit III proceeds on the basis that the widows would have no right of alienation without the consent of each other. The finding of the lower Court on the question of the testamentary capacity of Poovathammal is not shown to be incorrect. The appeal is dismissed with costs.

Appeal dismissed.

(s. c. 46 P. W. R. 1911).

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 1063 OF 1908.

December 27, 1910.

Present:—Mr. Justice Johnstone and Mr. Justice Chevis.

KHAIRE KHAN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

GHULAM GHAUS AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Alienation—Inheritance—Gift of ancestral land by widow in favour of her husband's near collateral who is also his daughter's son—Naru Rajputs *of* Tahsil *Phillour in Jullundur District—Exclusion of daughters —Burden of proof—Limitation—Estoppel—Mutation of names on consent by minor's mother—Acquiescence—Limitation Act (XV of* 1877*), Sch. II, Art.* 141

Among *Naru Rajputs* of *tahsil* Phillour in the District of Jullundur, daughters are excluded from inheriting ancestral property by collaterals related in the fifth degree. A gift by a widow of her husband's land in favour of his daughter's son is not valid without the consent of the collaterals, oven if the donee be also a near collateral of her husband.

Ranjhi Khan v. *Musammat Kamun*, 179 P. R. 1889; *Musammat Sahibjan* v. *Karm Bakhsh*, 80 P. R. 1875; *Musammat Jiwi* v. *Ganhiya*, 98 P. R. 1891; *Musammat Rabia* v. *Muhammad Bakhsh*, 69 P. R. 1878; *Musammat Fatima* v. *Ghulam Muhammad Shah* 172 P. R. 1889, and *Mansa Ram* v. *Punnu*, 38 P. R. 1870, referred to.

The assent to such a gift by the mother of a minor collateral does not bind him. A collateral, by acting as a *sarbarah lambardar* of the minor donee who has got the *lambardari* in virtue of such gift, is not estopped from contesting its validity. But the collaterals who, before or after the death of the widow, agree that the mutation of names as regards the gifted property should be effected in favour of the donee, cannot be allowed to challenge the gift.

The collaterals can recover the gifted property within 12 years from the date of the widow's death under Article 141 of the Indian Limitation Act XV of 1877, and the donee's possession does not become adverse as long as she is alive.

Though it is a correct principle that persons carry their own customs with them wherever they go, it does not necessarily follow that they retain those customs unchanged after long residence amongst other tribes holding different customs.

The burden of proving that a daughter succeeds in the presence of near collaterals lies on the person asserting such a custom.

First appeal from the order of the District Judge, Jullundur, dated the 25th May, 1908, dismissing plaintiffs' claim.

Mr. *Muhammad Shafi*, for the Appellants.

Lala *Hukam Chand*, for the Respondents.

JUDGMENT.—The genealogical tree (omitting certain unnecessary names) will be found appended to this judgment. The property in dispute is the estate of the late Muhammad Bakhsh, whose widow in 1888 gifted the bulk of it, 195 *ghumaons*, 7 *kanals* 13 *marlas*, to Ghulam Ghaus, her daughter's son, keeping 12 *ghumaons* only for her own maintenance. On her death, in 1905, the remaining 12 *ghumaons* also were mutated in favour of Ghulam Ghaus. Plaintiffs' Ghulam Kadir, Khaire and Dullah, sue for possession. Sundar Singh, defendant No. 2, is a party by reason of a mortgage of some of the land having been effected by Ghulam Ghaus in his favour.

The District Judge has dismissed the suit, holding that the gift was assented to, and that plaintiffs are now estopped from contesting, and that Ghulam Ghaus has held long adverse possession, and holding further that by custom Ghulam Ghaus, as daughter's son of the last male owner, has a right to succeed to the exclusion of collaterals so distantly related as the plaintiffs. The plaintiffs appeal.

KHAIRE KHAN *v.* GHULAM GHAUS.

In the first place, we may remark that the question of adverse possession does not arise; the case is clearly governed by Article 141 of the second Schedule of the Limitation Act, 1877, and the suit having been brought within 12 years of the death of the widow of the last male owner, is within time.

We will next deal with the question of custom, as, if the District Judge's finding on this point is to be upheld, there will be no need to consider other matters.

The parties are *Naru Rajputs* of the Phillour *tahsil* of the Jullundur District. The District Judge has decided in favour of the daughter's son on the strength of *Ranjhi Khan* v. *Musammat Kamun* (1) and an unpublished judgment of this Court, *Jamun* v. *Rahmi* (C. A. No. 971 of 1906). The latter judgment is a very short one, and simply follows *Ranjhi Khan* v. *Musammat Kamun* (1). In *Ranjhi Khan* v. *Musammat Kamun* (1), the dispute as to succession, was decided in favour of the daughters, who were held to be entitled to succeed in the absence of male descendants of their father's great-grand-father, on the strength of entries in the *Riwaj-i-am* and *Wajib-ul-arz*. But it is to be noted that the parties in that case were *Naru Rajputs* of the Hoshiarpur *tahsil*, and though it may be true, as is urged before us, that the Hoshiarpur *Naru Rajputs* originally came from Jullundur, we cannot presume that the tribal custom is now the same in both Districts. Though it is no doubt correct to say that persons carry their own customs along with them, it does not follow that they retain those customs unchanged after long residence amongst other tribes holding different customs. Therefore, taking *Ranjhi Khan* v. *Musammat Kamun* (1) to be a correct ruling though the learned Counsel for the appellants challenges it on the ground that it wrongly differs from *Musammat Sahibjan* v. *Karm Bakhsh* (2), and incorrectly states that the learned Judges, who delivered the last mentioned ruling, differed as to the meaning of the word *karabati* , we are unable to hold that it is applicable to the case of *Naru Rajputs* of the Jullundur district. We note that in a later decision relating to *Naru Rajputs* of the Hoshiarpur District *Musammat Jiwi* v. *Ganhiya* (3), the real meaning of the term *karabati* is further discussed, but it is unnecessary to follow the matters further, as we are not dealing with Hoshiarpur *Rajputs*.

We have no *Riwaj-i-am* to guide us in the present case, but we note that in Roe's "Tribal Law in the Punjab," we find on page 135 the remark:—"In Phillour all the tribes say that agnates of any degree exclude daughters" and even the resident son-in-law seems not be a recognized institution in this *tahsil* according to the above authority.

Various rulings have been cited for the respondents. Copies of several judgments referred to are on the record, but on examination they seem to afford no help to the responents. In Exhibit D, 4, it was held that collaterals up to the fifth degree excluded the daughter. Exhibit D, 5 favours collaterals even up to the seventh degree. Exhibit D, 6 was a case of gift by the male proprietor to a daughter. In Exhibit D, 7 the collaterals failed as they could not establish the degree of relationship. Exhibit D, 8 is a Hoshiarpur case, and here, too, the degree of relationship was not proved. In Exhibit D, 9 the case was remanded for a further inquiry as to custom; the final result of that inquiry has not been disclosed. As to such rulings as *Musammat Rabia* v. *Muhammad Bakhsh* (4) *Musammat Fatima* v. *Ghulam Muhammad Shah* (5) and *Mansa Ram* v. *Punnu* (6), which have been quoted in arguments before us, we fail to see how cases relating to the customs of weavers, *Syads* and *Brahmans* can assist us in deciding the present case. The oral evidence in the present case is also of no value, as the instances cited refer to gifts by the male proprietors or to contests between daughters and very near agnates.

The onus of proving that the daughter succeeds rests on the defendants, and we hold that they have failed to discharge the onus. We are, therefore, unable to uphold the decision of the learned District Judge as to custom.

That the widow had any power to make such gift has not been argued before us. So it remains only to see whether the plaintiffs are estopped from contesting.

(1) 179 P. R. 1889.
(2) 80 P. R. 1875.
(3) 98 P. R. 1891.
(4) 69 P. R. 1878.
(5) 172 P. R. 1889.
(6) 38 P. R. 1870

VENKAYYA *v.* CHIGURUPATI PEDDA NAGANNA.

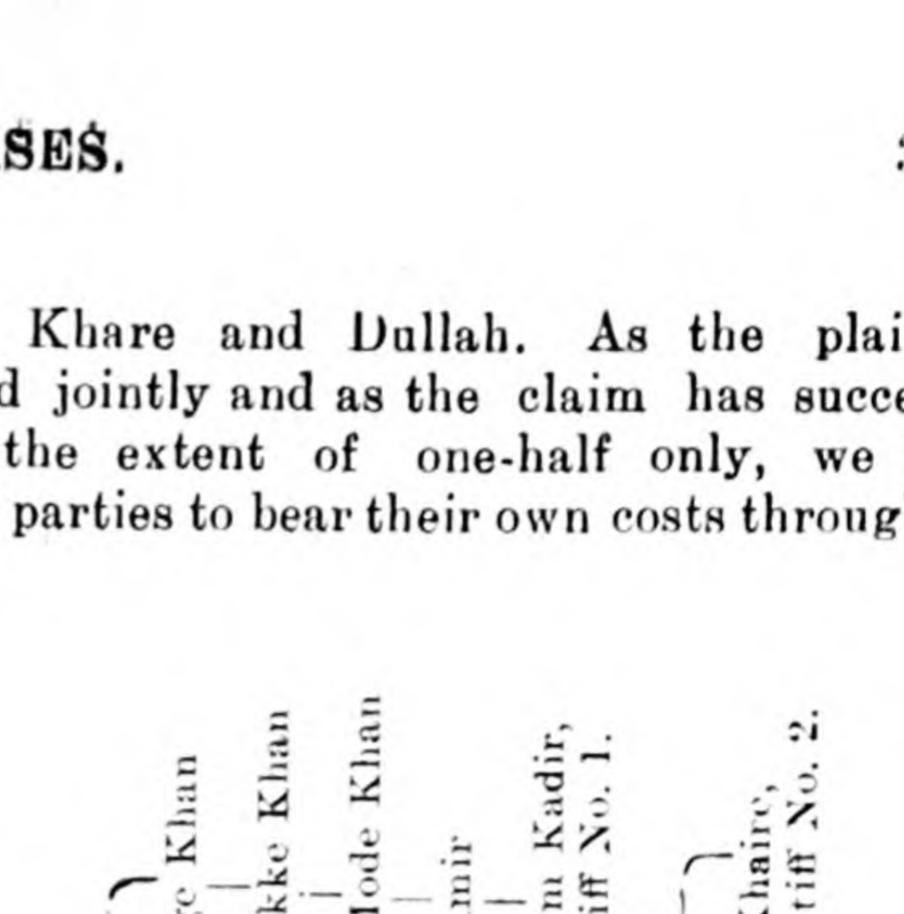
Nathe Khan was the nearest reversioner at the time of the gift, but the mutation proceedings (see pages 4-11 of the paper book) do not show that he assented; all that appears is that he reported the death of Ali Sher on 26th January, 1888. This was just prior to the gift by *Musammat* Khairan. *Musammat* Jiwan, mother of Dullah and Khaire, and grandmother of Ghulam Ghaus, no doubt, assented to the gift, but such assent could not bind her minor sons. Amir, father of Ghulam Kadir, is shown as objecting, but a former statement of his, dated 21st April 1888, is referred to by the *Niab-Tahsildar* as a statement of assent. That statement is not part of the mutation proceedings apparently. It has not been produced in the present case, and we are unable, therefore, to see what was the exact statement referred to or how far the *Naib-Tahsildar* was justified in saying Amir had assented. No assent of Amir is, therefore, proved.

Ao to any of the plaintiffs acting as *sarbarah* for Ghulam Ghaus while he was a minor, this relates only to the *lambardarship* and has nothing to do with the gift.

Turning to the mutation proceedings which took place on the death of *Musammat* Khairan (see page 14), we still find no assent so far as Ghulam Kadir is concerned, but the assent of Khaire and Dullah is clearly entered there and this, we consider, estops them altogether. They then consented to Ghulam Ghaus getting the residue of the estate which he had not already acquired by gift. It may well be that they then assented because Ghulam Ghaus was then betrothed to Dullah's daughter and that the engagement has since been broken off, but their assent was clearly given, and we fail to see how they can be allowed to change their position now that Ghulam Ghaus has been in possession and has acted as full owner, mortgaging a part of the estate. As to the remarks of the District Judge about a family arrangement, we note that no assent is proved except on the part of Dullah and Khaire and their mother, and we fail to see how their assent can be binding on Ghulam Kadir.

The result is that we find that Ghulam Kadir, whose share is one-half, is not estopped, but that the other plaintiffs are estopped. We so far accept theappeal as to give Ghulam Kadir a decree for possession as owner of one-half of the land in suit, dismissing the claim of Khare and Dullah. As the plaintiffs sued jointly and as the claim has succeeded to the extent of one-half only, we leave the parties to bear their own costs throughout.

Appendix to above Judgment.



Appeal partly accepted

(s. c. 2 M. W. N. 312.)

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 131 OF 1908.

March 8, 1911.

Present:— Sir Ralph Benson, Judge, and Mr. Justice Sundara Aiyar.

CHIGURUPATI VENKATA SUBBAYYA, *alias* VENKAYYA, MINOR, BY GUARDIAN AND MOTHER SESHAMMA — PLAINTIFF— APPELLANT

versus

CHIGURUPATI PEDDA NAGANNA AND OTHERS — DEFENDANTS—RESPONDENTS.

Evidence Act (I of 1872), s. 112 — Legitimacy — Burden of proof — Non-access — Proof of illegitimacy.

A. sued *B*, his father, and *C*., the adopted son of *B*., for partition. *B.* disowned *A*.'s paternity, and stated that his mother *D.* lived separately from him for a long time and that he had no access to *D.* during the

period when *A.* could have been conceived by her. *B.* married a first wife, and again married *D.* as he had no son by the former. They both quarrelled; subsequentiy, *D.* sued *B.* for maintenance, and *B.* in reply brought a suit for restitution of conjugal rights, whereupon they became reconciled to each other. Though *D.* lived in her mother's house she constantly visited *B.* in his house without the knowledge of the first wife. When *D.* was *enciente B.* executed a deed of settlement in favour of *C.* in which he did not disown the legitimacy of *D*:

Held, that under these circumstances, the onus of proving non-access within the meaning of section 112 of the Evidence Act lay on *B.* and the fact that he believed *D.* to be guilty of infidelity and produced witnesses to prove it, did not discharge the onus. *A.'s* legitimacy must, in these circumstances, be presumed.

Appeal against the decree of the Court of the Subordinate Judge of Kistna at Masulipatam, in Original Suit No. 5 of 1907, dated the 13th day of March 1908.

Mr. *P. Narayanamurti*, for the Appellant

Under section 112 of the Evidence Act, legitimacy must be presumed, and it rests upon the party who alleges illegitimacy to prove non-access. In this case, the plaintiff's mother and the first defendant lived in the same village only a furlong apart, and she used to visit him without the knowledge of the senior wife. The fact that the 1st defendant believed her to be guilty of infidelity does not amount to a proof of non-access within the meaning of the section. Courts should always presume legitimacy, and should be very strict in believing evidence against it [Taylor on Evidence, Vol. I, 106; 21 Ch. D. p. 681 ; 50 Eng. Rep. 552; *Archer* v. *Hudson* (1)].

Mr. *T. Prakasam*, for the 1st Respondent.

The first defendant was more than 70 years of age and having regard to the strained relations between the parties, it must be presumed he had no access to her.

Mr. *K. Sreenivasa Iyengar*, for the 2nd Respondent.

There are several issues in the case which remain untried. The case must go back to the lower Court, in case your Lordships hold the legitimacy of the plaintiff proved.

JUDGMENT.—The plaintiff is a minor suing his father, the 1st defendant, for partition. The suit has been dismissed on the ground that the 1st defendant was not the father of the plaintiff. It is admitted that the plaintiff is the child of the 1st defendant's wife. The Subordinate Judge has held that the 1st defendant had no access to his wife, the plaintiff's mother, for nearly three years before the plaintiff's birth. The onus of proving non-access lay heavily on the defendants, and we are clearly of opinion that it has not been discharged. Practically, the only evidence adduced to prove non-access is the testimony of the 1st defendant himself, but he is not a reliable witness. He said he actually saw his wife committing adultery with more than one person about three years before he gave evidence, which was more than two years after the plaintiff was born. This is incredible and there is no corroborative evidence. The other witnesses for the defendants merely say that the 1st defendant's wife was permanently residing in her parents' house for about two years before the plaintiff's birth, but this is no evidence of non-access; especially where the plaintiff's alleged residence was only a furlong from the defendant's house. The 2nd defendant has not been examined as a witness, and it is not shown that there were no others living in the 1st defendant's house whose testimony would be valuable evidence of the truth of the defendant's case. It is noteworthy that none of the defence witnesses is able to say anything against the plaintiff's mother's character. The 1st defendant's nephew gives evidence in the plaintiff's favour and says that his mother Seshamma was living with the 1st defendant until shortly before her confinement. The other witnesses for the plaintiff also give similar evidence. The village of the parties is split up into factions and it is not safe to act on the evidence of witnesses on either side. In Exhibit VI, a gift deed in favour of the 2nd defendant executed by the 1st defendant three months before the plaintiff's birth, the 1st defendant charges Seshamma with infidelity, but no reference is made to her pregnancy nor to non-access on his part. The 1st defendant had adopted the 2nd defendant in 1895 and made a gift of some properties to him. This probably irritated Seshamma, and she seems to have left

(1) 7 Beav. 551; 8 Jur. (N. S.) 761; 64 R. R. 152.

his house and gone to live with her parents. She sued him for maintenance in 1899. His defence to the suit was not a plea of unchastity on Seshamma's part, but a counter-suit for restitution of conjugal rights. The dispute was compromised. Seshamma agreed to go back and live with him and not to quarrel with her co-wife, and he agreed to make a gift of some lands to her. Whether Seshamma actually live with her husband until shortly before the birth of her child as she alleges or not, it is impossible to hold that non-access is proved in the case. We must reverse the finding of the lower Court on this point and its decree and remand the suit for trial on the other issues. The 1st respondent must pay the appellant's costs of this appeal. The other costs will abide.

Suit remanded.

(s. c. 2 M. W. N. 319; 9 M. L. T. 444.)

MADRAS HIGH COURT.

CIVIL APPEAL NO. 81 OF 1909.

March 17, 1911.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Sundara Aiyar.

VEMAREDDI RANGAREDDI—PLAINTIFF—APPELLANT

versus

YOKE J. ABBOY NAIDU—DEFENDANT—RESPONDENT.

Malicious prosecution—Charge of insult not sustainable—Magistrate acting bona file *- Sufficient protection.*

The plaintiff walked in view of the defendant, who was holding Court as a Magistrate, with his shoes on, and before he had gone a few yards, the defendant had him arrested and produced before himself. The parties were previously acquainted and on the plaintiff tendering an apology, he was let off. The present suit for malicious prosecution was brought nearly one year after the above events:

Held (1) that the facts did not of themselves show that the Magistrate did not act *bona fide* when he ordered the accused to be brought up before him;

(2) that the present suit, after the tender of an apology by the plaintiff, was not justifiable.

Appeal against the decree of the District Court of Nellore in Original Suit No. 8 of 1908.

FACTS.—Plaintiff is a landholder paying an assessment of Rs. 9,000 a year. The defendant is the Deputy *Tahsildar* and Magistrate of Kota in Nellore District. On one occasion, while the Magistrate was holding his Court and inquiring into a case, the plaintiff walked with his shoes on making a kind of creaking noise in front of him. When he had gone 40 yards, the Magistrate ordered that he should be arrested and brought before him. The Magistrate drew up proceedings against him under section 480, Criminal Procedure Code, charging him with an offence under section 228, Indian Penal Code, and on the plaintiff tendering an apology through a Pleader, he dropped the prceedings against him and allowed him to go. One year after, plaintiff brought the present suit for damages for malicious prosecution for Rs. 2,500. The District Court of Nellore dismissed the suit. Plaintiff appealed to the High Court.

Mr. *S. Varadachariar*, for the Appellant, The question of *bona fides* has to be judged not upon the extreme sensibilities of the particular individual concerned but upon the question whether the act done is such as to affect persons of ordinary temperament. The plaintiff had walked off 40 yards from the place where the defendant held his Court and he had known the Magistrate for more than ten years. These circumstances clearly show that the Magistrate did not act *bona fide*.

Mr. *S. Subramania Iyer*, for the Respondent. The plaintiff was walking up and down the Court and this certainly annoyed the Magistrate and led to proceedings being taken against him.

JUDGMENT.—We are of opinion that this appeal should be dismissed. The defendant, a Magistrate, acting under section 480, Criminal Procedure Code, charged the appellant with an offence under section 228, Indian Penal Code, committed by the appellant, a Reddi, by walking in view of the defendant with shoes on, while discharging his duties as a Magistrate. Mr. Varadachariar contends that the appellant's act would not be an offence under section 228, Indian Penal Code, and asks us further to hold that the Magistrate could not be regarded as having acted *bona fide* in supposing that the appellant's act could be regarded as an insult. We do not feel called upon to decide the former question as we are clearly of opinion that the lower Court is right in holding that the Magistrate acted *bona fide*. It is urged that the Magistrate knew the appellant for a long time and that he was not arrested until he had gone about 120 feet from the Court house. We cannot draw any inference against the Magistrate's *bona fides* from these facts, nor are we prepared to say that no reasonable man would regard the appellant's act as an insult. It may be that the Magis-

trate could have maintained the dignity of his Court without taking notice of the appellant's conduct. At the same time we cannot approve of the appellant's conduct in launching this suit nearly one year after he had thought fit to tender an apology to the Magistrate through his Vakil. The appeal is dismissed. The appellant must pay the respondent's costs. *Appeal dismissed.*

(s. c. 2 M. W. N. 321; 9 M. L. T. 503.)

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 1135 OF 1909.

March 15, 1911.

Present:—Mr. Justice Sankaran Nair and Mr. Justice Ayling.

GOTETI VENKANNA—PLAINTIFF—APPELLANT

versus

GOTETI CHINNA SABBA ROW AND OTHERS—DEFENDANTS – RESPONDENTS.

Parties—Non-joinder of parties—Objection—Proper course—Practice.

Where an objection on the score of non-joinder of parties is taken *for the first time* in the Appellate Court, the proper course for that Court is to add the necessary parties to the appeal and dispose of it, or remit the suit to the first Court for re-trial. It should not dismiss the suit.

Second appeal against the decree of the Temporary Subordinate Judge's Court of Vizagapatam, in Appeal Suit No. 336 of 1907, presented against the decree of the Court of the District Munsif of Chodavaram, in Original Suit No. 623 of 1906.

FACTS.—Plaintiff, 1st defendant and 2nd defendant are brothers. Defendants Nos. 3 to 6 were arbitrators appointed to settle the disputes among them, in respect of the division of the family properties. The arbitrators awarded the plaintiff a house and defendants Nos. 1 and 2, two plots of land. No partition deed was executed nor was the award filed in Court. Plaintiff brought the present suit to compel defendants Nos. 1 and 2 to execute a partition deed or defendants Nos. 3 to 6 to pass an award and file the same in Court. The District Munsif gave a decree but on appeal it was reversed on the ground that the suit was one really for partition and to such a suit, the son of the 1st defendant was a necessary party and the omission to make him one vitiated the suit. The plaintiff appealed to the High Court.

Mr. *V Ramesam*, for the Appellant:—There is nothing to be done in the case except the execution of a partition deed; why the Sub-Judge construes the suit to be one for specific performance is not understood. Even if it were, the son is not a necessary party [See *Srinivasa Reddi* v. *Sivarama Reddi* (1)]. This objection as to non-joinder was taken only in the Appellate Court and the proper course for the Sub-Judge was not to dismiss the suit but only to remit for re-trial after adding the necessary parties.

Mr. *P. Narayana Murti*, for the Respondents:—The suit is in effect one for partition and the son is a necessary party.

JUDGMENT.—The objection that the 1st defendant's son or sons ought to have been made parties was taken for the first time only in appeal. In the circumstances, the lower Court ought to have directed the sons to be made parties to the appeal and then disposed of it or, if necessary, remitted the suit to the first Court for re-trial. We accordingly set aside the decree, direct the Subordinate Judge to make the sons parties and, if they claim a fresh trial, to set aside the decree of the first Court and direct a re-trial; otherwise hear the appeal and dispose of it in accordance with law. Costs will abide the result. *Decree set aside.*

(1) 32 M. 320; 4 Ind. Cas. 506.

(s. c. 2 M. W. N. 325; 9 M. L. T. 510.)

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 192 of 1908.

March 14, 1911.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Sundara Iyer.

RAMANTHAN CHETTIAR AND OTHERS—DEFENDANTS – APPELLANTS

versus

VEERA NAGAPPA CHETTIAR END OTHERS—PLAINTIFFS - RESPONDENTS.

Lessor and lessee—Payment of premium—Possession to lessee—Conditional decree.

The right of a lessor to claim payment of a premium reserved under a lease does not depend upon his obligation to put the lessee in possession, as a matter of law. But Courts will not be justified in passing a decree for the payment of the premium alone without compelling the lessor at the same time to perform his obligation and to give possession, as is done in the case of sales.

Subramaniya Iyer v. *Poonan*, 27 M. 28; *Muthia Chetty* v *Sina Vellan Chetty* alias *Sinna Karuppan Chetty* 21 M. L. J. 236; 9 Ind. Cas. 1062, 9 M. L. T. 378; 2 M. W. N. 228, followed.

Appeal against the decree of the Court of the Temporary Subordinate Judge of Madura in Original Suit No. 57 of 1908, (O. S. No. 85 of 1907 on the file of the Subordinate Judge of Madura East.)

BAYYA SAO *v.* NARSINGA MAHAPATRO.

FACTS.—Plaintiff leased out to the defendants a large extent of land in Kanadu Kathan village in Madura, reserving a premium of Rs. 6,900 on the land so leased out; there was a brick-kiln belonging to one of the plaintiff's co-sharers and it remained unremoved at the date of the lease. As payment of the premium reserved under the lease, the defendant gave the plaintiff a *hundi* which was accepted by him. As the amount under the *hundi* was not paid to plaintiff, the present suit was brought to recover the amount of premium reserved under the lease. The Sub-Judge passed a decree for the plaintiff, though it was contended before him by the defendant that as he was not put in possession of the land leased out, the plaintiff should not have a decree for the amount claimed. The defendant appealed to the High Court.

Mr. *K. Sreenivasa Aiyangar*, for the Appellants.—The obligation to give possession and right to claim payment of the premium are correlative in their nature and arise under the same contract. The view of the Sub-Judge that the remedy for breach of either was by independent suits is erroneous, and in this case, if the defendant was left to a separate remedy by suit, he would probably get into complications with other persons. In case of sales, this Court held, in *Subrahmania Ayyar* v. *Poovan* (1) and *Natessan Chetty* v. *Vegu Chetty* (2), that the two may be tried in the same suit, and a conditional decree could be passed. There is no reason why the like principle should not be extended to *leases also.*

Mr. *T. Ranga Ramanujachari*, for the Respondents.—The defendant was put into such possession as the nature of the case admits. In this case, the defendant knew on the date of the lease that there was a brick-kiln on the land leased. In such cases, the two covenants are independent and not correlative and the remedy for breach of either is by separate suits.

JUDGMENT.—The Subordinate Judge find that the defendants have not yet, as a matter of fact, been put in possession of the portion of the land used as a brick-kiln. The plaintiff's witness No. 2 says that he and the co-parceners are willing to put the defendants in possession. The evidence does not show that the plaintiff's right to recover the money on the *hundi* was made conditional on putting the defendants in possession; nor can it be laid down as a matter of law that he is not entitled to recover on the *hundi* before putting the defendants in possession. At the same time, there can be no doubt that it is the plaintiffs' duty under the lease deed to give effective possession to the defendants. We do not feel compelled to give the plaintiff a decree without compelling them at the same time to perform their obligation under the lease. This course was followed with respect to correlative obligations under a sale deed in *Subramania Iyer* v. *Poovan* (1) See also *Muthia Chetty* v. *Sina Vellon Chetty* alias *Sinna Karuppan Chetty* (3). We shall, therefore, modify the decision of the lower Court by directing that on the plaintiffs' putting the defendants in possession of the plot used as a brick-kiln within 6 months from this date they do recover the amount due under the *hundi* from the defendants. The appellants must pay the costs of the respondents in this appeal. The Subordinate Judge has omitted to award interest from the date of plaint up to the date of his decree. The plaintiffs will have interest during that period at 9 per cent. per annum. There will be no order as to costs on the memorandum of objections.

Decree modified.

(1) 27 M. 28.

(2) 20 M. L. J. 20, 3 Ind. Cas. 701; 6 M. L. T. 313.

(3) 2 M. W. N. 228; 9 M. L. J. 378; 21 M. L. J. 236; 9 Ind. Cas. 1062.

MADRAS HIGH COURT.

FIRST CIVIL No. 175 OF 1908.

March 7, 1911.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Sundara Aiyar.

BAYYA SAO—APPELLANT

versus

NARSINGA MAHAPATRO AND OTHERS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 83—Tender of mortgage money after suit by mortgagee—Tender in one Court while mortgagee's suit pending in another Court—Invalidity—Duty of mortgagor to put mortgagee in possession—Tender made without putting mortgagee in possession, effect of—Civil Procedure Code (Act V of 1908), O. XXIV, r. 1.

Sections 67, 86 and 88 of the Transfer of Property Act should be read with section 83.

After one Court has taken cognizance of a suit by a mortgagee for the enforcement of his mortgage, the mortgagor cannot deposit the mortgage amount in another Court under section 83 of the Transfer of Property Act.

When a suit has once been instituted, payment into Court is regulated by Order XXIV, rule 1, of the Civil Procedure Code, 1908, and the circumstance

BAYYA SAO *v.* NARSINGA MAHAPATRO.

that the mortgagor was not aware of the institution of the mortgagee's suit at date of his deposit under section 83, would not affect the mortgagee's right to proceed with his suit or to enforce his rights as they stood at the date of the suit.

Quære:—Whether a mortgagor can, subsequent to the mortgagee's suit, deposit the mortgage amount in the very Court in which the suit is pending.

Where, under the terms of a mortgage-deed, the mortgagor is bound to put the mortgagee in possession of the mortgaged properties, the former cannot deposit the mortgage amount in Court before first giving possession to the mortgagee.

Ramsenji v. *Krishnaji*, 26 B. 312, referred to

Tani Bhagvan v. *Hari bin Bharani*, (1887 , P.J. 315 and *Mulhar Gopal Kulkarni* v. *Anandram* Valad *Kunkam Chand*, (1889) P. J. 51, referred to.

Section 83 of the Transfer of Property Act presupposes that the mortgrgor, when he proposes to take action under section 83, has a valid right to redeem and is not attempting to exercise the right of redemption in a manner contrary to the provisions of the contract between the parties.

Appeal against the decree of the District Court of Ganjam in Original Suit No. 29 of 1905, dated the 30th September 1907.

JUDGMENT.—The facts necessary for the decision of this appeal may be briefly stated. Defendants Nos. 1 to 11 are related to one another but are not members of an undivided family. Defendants Nos. 1 to 3 belong to one family; defendants Nos. 4 to 7 to another, and defendants Nos. 8 to 11 to a third family. The other defendants in the suit are only formal parties. The eleven defendans, who are the owners of an *Inam* village, executed three registered usufructuary mortgage-deeds in 1885 in favour of the plaintiffs, according to the terms of which the debt was to be discharged out of the usufruct of certain lands by the end of harvest of the year Krodhi (1904-1905). In the year 1899-1900, further sums were borrowed under Exhibits E,D,C and A. These amounts were also to be paid up at the time stipulated for the discharge of the previous bonds, and if the defendants failed to do so, the mortgaged lands were to continue in the possession of the plaintiffs for a further period of five years. The terms of Exhibits A,C,D,E are not exactly similar. Exhibits A an D provide that the lands should remain in the possession of the plaintiffs for a period of five years from the 15th Palgunna Suddha of Crodhi (the 21st March 905), if the amounts due thereunder were not paid by that date. Exhibits C and E provide for the execution of mortgage bonds in case of non-payment before the 15th Palgunna Suddha of Crodhi (the 21st March 1905) entitling the plaintiffs to hold possession of the lands as security for their debt for a period of five years, and sets out the terms on which they were to hold them. But it is evidently understood by these documents also that the defendants would not be entitled to get possession before the end of the further period if they failed to pay the debts before the time fixed for payment. These defendants took possession of the lands about the close of May 190 5 according to the finding of the lower Court. On the 27th January 1905, the representatives of the three families sent to the plaintiff the notice Exhibit II, stating that the time fixed in the bonds of 1885 up to which the plaintiffs were entitled to be in possession of the mortgaged lands would expire with that year's paddy crop, that they were prepared to pay the amounts due under Exhibits C ,D, and E and that the accounts with respect to the amounts due under them should be settled through mediators. It may be noticed that no reference is made in this document to the mortgage-bond, Exhibit A, the position taken up by the defendants apparently being that the plaintiffs had not lent the amount mentioned in that document, and that nothing was, therefore, due to them from the defendants on it. The suit is for the recovery of possession of the lands which the plaintiffs claim to be entitled to hold till the discharge of debts due to them under Exhibits A,C,D and E for mesne profits from the date of dispossession. The defendants contended that they are entitled to redeem the mortgages before the expiration of five years, and that the plaintiffs are not, therefore, entitled to possession. They also plead that nothing is due to the plaintiffs under Exhibit A as the consideration due on that document was not paid to them by the plaintiffs. Subsequent to the institution of this suit which was on the 2nd August 1905, the defendants put in petitions on the 25th August 1905 under section 83 of the Transfer of Property Act in the District Munsif's Court of Sompet depositing the amounts due under Exhibits C, D and E. Only the second plaintiff appeared in answer to the notice given of this petition, and he declined to receive the amount deposited in Court in full satisfaction of the debt. The defendants contended that the plaintiffs were

not entitled to interest on Exhibits C, D and E after their refusal to receive the amount deposited.

The principal question, before the lower Court were, whether interest on the bonds in favour of the plaintiffs ceased in consequence of the tender made in the District Munsif's Court, whether the bond, Exhibit A, was not supported by consideration and whether the plaintiffs were entitled to remain in possession of the lands for five years from the end of Krodhi the (4th April 1905). The District Judge decided the last question in favour of the defendants and directed that the plaintiffs should receive the amount deposited for Exhibits C D and E from the District Munsif's Court of Sompet. He also held that the plaintiffs were not entitled to interest after the deposit. With regard to the consideration for Exhibit A he came to the conclusion that only Rs. 100 out of the total amount of Rs. 300 was paid on the 17th May 1903 and he gave the plaintiffs a decree for that amount and interest and further interest till date of payment and directed that in case of failure by the defendants to pay the amount by the 30th December 1907, the plaintiff should be placed in possession of the lands mortgaged under it. He held that though the suit was rightly instituted by the plaintiffs when it was brought, the parties might have amicably arranged their disputes without persisting in the litigation and he, therefore, ordered that the defendants should pay the plaintiffs the full stamp duty paid by them on the plaint and one half of the subsequent costs.

The decree, in so far as it disallowed the plaintiff's claim for possession, is not appealed against. The appellant impeached the judgment of the lower Court on three points. *First*, the finding that the Rs. 200 out of the consideration for Exhibit A was not paid; *secondly*, the finding that the tender under section 83 of the Transfer of Property Act was valid as against the plaintiffs and disentitled them to subsequent interest; *thirdly*, the order about costs.

We are of opinion that the finding of the District Judge on the question of the payment of the consideration for Exhibit A is incorrect. Four witnesses swear that the consideration was paid. The defendants denied the payment, not only of the amount of Rs. 200 under consideration, but also of the remaining amount of Rs. 100. Before us the contention that no consideration at all was paid for Exhibit A is not supported and in fact one of the defendants admits the payment in his deposition. Although Exhibit A is dated the 21st March 1900 and recites that the consideration was paid on that date, no payment was made then. The sum of Rs. 100 was paid on the 17th May 1903 when the plaintiffs executed in the defendants's favour the letter, Exhibit I, in which they promised to pay the remaining amount "for meeting any disputes which may arise in respect of your village." It is admitted that though there were at that time some disputes between the defendants and their *zemindar*, no suit was instituted by him and that the amount was not required for the purpose mentioned in Exhibit I. The defendants say that in consequence they made no demand for the amount. In Exhibit II (dated the 27th January 1905) they made no allusion to the non payment of the consideration for Exhibit A but ignore that bond altogether. The plaintiffs produce Exhibit B to prove the payment of Rs. 200 on the 15th August 1904. It purports to be executed by three of the defendants. The plaintiffs' second witness attested it. The writer gives evidence in support of it. The bond was in the possession of the defendants till the date of Exhibit I but was then given over to the plaintiffs. No explanation is given why, in the circumstances, the defendants, if they did not want the sum of Rs. 200, on account of disputes between them and the *zemindar* not coming to a head, did not make any reference in Exhibit II to the fact that only Rs. 100 was due under Exhsbit A or that nothing was due, as they now say. They were not able to pay the amounts due te the plaintiffs under their mortgage-bond. They appear to have been in needy circumstances and it appears to us to be probable that they would have demanded a payment of the Rs. 200 as the plaintiffs were bound to pay the amount to them whether they required it for the contemplated litigation with the *zemindar* or not. Reliance is placed for the respondents on the circumstance that the plaintiffs did not get back Exhibit I from the defendants on the date of Exhibit B, although provision is made for its return in Exhibit I. Exhibit B stated that the letter was

lost, and, therefore, Exhibit B was written. Whether Exhibit I was really missing on the date of Exhibit B or not, we do not think that very much importance can be attached in the circumstances to the non-return of Exhibit I to the plaintiffs. The District Judge is of opinion that Exhibit B is not genuine. His conclusion is rested largely on a comparison of the signatures of the defendants in Exhibit B with their signatures in other documents. The signatures are in the Uriya language. It is noteworthy that the fifth defendant, examined as the defence fourth witness, when shown his signature in Exhibit B, did not definitely deny it. He said, "I cannot say whether the signature in this is mine or not, unless I know the contents of the document, I cannot say whether the signature in this is mine or not. I can recognise my signatures. .....The signature in this is not mine." The witness was forty-three years old at the time of his examination. The first defendant said that he could not say which were his signatures and which not, even if spectacles were given him, as his eyesight was defective. The 10th defendant on being shown the signatures in Exhibits A, B, and C said, "The signature in Exhibit C resemble mine." These statements of the defendants throw considerable doubt on their testimony. Under the circumstances we are unable to attach weight to the Judge's conclusion based on the signatures, The plaintiffs are apparently in easy circumstances, and we do not think they are likely to have forged the signatures of four persons, three of whom had executed several documents in their favour for the small sum of Rs. 200. On the other hand, the defendant's denial of the receipt of Rs. 100 which one of them when in the box, admitted having received, disentitles them to credit. Mr. Seshagiri Iyer contended that Exhibit B was not produced in time. This may be so, but no objection appears to have been taken to its being received in evidence, and the lower Court does not make any reference to this circumstance. We are, therefore, of opinion that the whole consideration due for Exhibit A was paid by the plaintiffs. The next question is, whether the tender under section 83 of the Transfer of Property Act subsequent to the suit was valid in law so as to disentitle the plaintiffs to interest after the deposit. We have come to the conclusion that the deposit is not valid. Section 83 of the Act, no doubt, lays down that, "at any time after the principal money has become payable and before a suit for redemption of the mortgaged properties is barred, the mortgagor may deposit in any Court; in which he might have instituted such suit, to the account of the mortgagee the amount remaining due on the mortgage." It does not say that the deposit must be made before a suit is instituted by the mortgagee to enforce his rights under the mortgage by sale, foreclosure or otherwise. But, we are of opinion that it could not have been intended to make such a material departure from the ordinary rules relating to tender as would be involved in holding that, after one Court has taken cognizance of a suit for the enforcement of a mortgage, the mortgagor has the right to deposit the mortgage-amount in another Court. Under sections 86 and 88 the Court in a suit for foreclosure or sale is to direct an account to be taken of what will be due to the plaintiff for principal and interest on the mortgage and for his costs of the suit on a date to be fixed by the Court according to those sections. Under section 67, a mortgagee, "at any time after the mortgage-money has become payable to him, and before a decree has been made for the redemption of the mortgaged property, or the mortgage-money has been paid or deposited as hereinafter provided," (*i. e.*, under section 83), has a right to obtain an order for foreclosure or sale. "A suit to obtain an order that a mortgagor shall be absolutely debarred of his right to redeem the mortgaged property is called a suit for foreclosure." These sections must be read together with section 83. There is no doubt that the general rule is that a tender of money must be made before the creditor institutes a suit for its recovery. (*See* Harris on Tender, pages 58 and 159, where the learned author quotes numerous cases which show that the law on the point is quite settled). The same rule is ordinarily applicable to mortgage debts also. [*See* pages 163 and 164 of the same book and *Briggs* v. *Calverly* (1) per Lord Kenyon, C. J., and also Coote's Law of Mortgages Volume I page 765]. In England a special Statute, VII Geo, II. Chap. 20, is in force by which a mortgagor may tender the amount and ask for a stay of the action before the hearing. No such provision is made in section 83. It is

(1) 8 Terms Rept 629.

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SRINAGAR, Kashmir

very likely that it would not have been made if it were intended that a deposit could be made after an action brought for the mortgage-money. It will be noticed that, according to the English Statute the mortgagor is to ask for stay of the action, that is, to take a step with respect to the mortgagee's action. The Indian Legislature must, no doubt, have been aware that, according to section 83, the deposit need not be necessarily in the Court trying an action to enforce the mortgage and it is very unlikely that some specific provision would not have been made with respect to the continuance of the mortgagee's suit, if the mortgagor could take action in another Court under section 83 of the Act. Moreover, when a Court, having plenary powers over the subject-matter of a cause, has already taken cognizance of it, it will not conduce to convenience that another tribunal with restricted jurisdiction should be invested with the right to deal with it: at any rate, clear words would be used to indicate such an intention. It is unnecessary to decide whether a mortgagor could, subsequent to the mortgagee's suit, deposit the mortgage-amount in the very Court in which the suit is pending although on the language of the section it might not be easy to make a distinction. But, it seems to us clear that it could not have been intended to enable the mortgagor to make a deposit under the section in a different Court from that in which the mortgagee's suit is pending. It is hardly necessary to point out that, according to the construction contended for by the respondent, there would be nothing to prevent the mortgagor from proceeding under section 83, even after a decree for sale has been passed. No case has been cited to us, nor are we aware of any, against the view we are inclined to hold, and on general principles, we think appellant's contention should prevail. We are of opinion that when a suit has been instituted, payment into Court is regulated by Order XXIV, rule 1, of the new Procedure Code corresponding to section 376 of the old Code. We do not think that the circumstance that the defendants were not aware of the institution of the suit when their application in the Sompet Munsif's Court was made would affect the plaintiffs' right to proceed with their suit and enforce their rights as they stood on the date of the suit.

There is a further ground on which we think that the deposit in this case is not valid. The mortgagors took possession of the property in May 1905 without discharging the mortgages, although according to the provision of Exhibits A, C, D and E, the mortgagees were entitled to remain in possession of the property as security for the amounts due on the bonds. They were not justified in doing so. They were bound to restore possession to the plaintiffs and to allow them to remain in possession before making a deposit under section 83. In similar circumstances, the Bombay High Court held, in *Ramsonji* v. *Krishnaji* (2), that the deposit was premature and invalid. In that case the mortgagor made the deposit without putting the mortgagee in possession of which he was entitled if the debt was not paid on a certain date. Chandavarkar, J., in delivering the judgment of the Court observes:—The mortgagor having committed a default the mortgagee became entitled to possession on that date. The mortgagee did not, however, get possession until the 3rd April, 1898, but before that date, *i.e.*, on the 19th March 1898, the mortgagor had deposited the mortgage amount in Court under section 83. But the mortgagor could not defeat the right of possession which had accrued to the mortgagee by making a tender of the mortgage amount on the 19th March 1898 as according to the consent decree, the right to redeem could accrue only after the mortgagor had delivered possession to the mortgagee. The tender made on the 19th March was, under the circumstances, premature and the provisions of sections 83 and 84 cannot apply to the facts of the case.

Following the Full Bench ruling in *Tani Bhagwan* v. *Hari* Bin *Bawani* (3) and *Mulhar Gopal Kulkarni* v. *Anandram* wald *Kunkam Chand* (4), we reverse the decree of the lower Appellate Court.

We think, concurring with the Bombay High Court, that section 83 presupposes that the mortgagor, when he proposes to take action under section 83, has a valid right to redeem and is not attempting to exercise the right of redemption in a manner

(2) 26 B. 312.
(3) (1887) P. J. 315.
(4) 1889, P. J. 51.

contrary to the provisions of the contract between the parties.

We are also of opinion that the order of the lower Court as to costs cannot be maintained. A mortgagee is entitled to his costs unless there are special reasons disentitling him to them.

Moreover, in the view we have taken of the other questions dealt with above, the plaintiffs are clearly entitled to the whole of their costs in the lower Court. The decree of the lower Court must further be modified by directing the defendants to pay the whole amount due under Exhibit A with interest on Rs. 200 from 16th August 1904, up to the date of payment in the manner calculated by the lower Court and by further directing them to pay interest on the bonds Exhibits C, D and E, up to the date of payment calculated in the same manner. The time for payment is extended up to the end of six months from this date. The appellant is entitled to costs of this appeal, calcutated on the amount awarded by us.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1144 OF 1909.

March 30, 1911.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Sundara Aiyer.

PATTANUR VALANGERI EDATHIL RAIM NAMBIAR AND OTHERS—APPELLANTS

versus

KALLIAT THAYLLATH VITTIL NARAYANAN NAMBIAR AND OTHERS—RESPONDENTS.

Malabar Law—Lands set apart for private temples of a tarwad—*Whether* tarwad *properties—Trust.*

Lands set apart for private temples attached to a *tarwad* cannot be regarded as *tarwad* properties. They are trust properties which can be held by the *tarwad* only for purposes of the trust.

Rupa Jagashet v. *Krishnaji Govind*, 9 B. 169, followed.

Ruling of Sudder Court in Appeal No. 64 of 1861, dissented from.

Quære:—Whether, where a temple was founded by the *tarwad* for the benefit of the family, the members for the time being can put an end to the trust so as to affect those who may be subsequently born in the family.

Second appeal against the decree of the District Court of North Malabar in A. S. Nos. 500 and 529 of 1907, presented against the decree of the District Munsif of Cananore, in O. S. No. 632 of 1904.

Mr. *M. Kunjunni Nair*, for the Appellants.

Messrs. *J. L. Rosario* and *V. Ryru Nambiar*, for the Respondents.

JUDGMENT.—In this case the plaintiffs and defendants Nos. 2 to 5 belonged to two houses, Pattanur Edam and Koloth. The plaintiffs instituted the suit to recover certain lands from the first defendant and defendants Nos. 3 to 18. The two houses above mentioned and another house called Natarkandi were divided branches of a *tarwad* called Pattanur Velangiri Edam. The Natarkandi branch became extinct according to the plaintiffs in 898. The contesting defendants claimed the lands under a *kanom* from the Natarkandi *tarwad* in 1893 and a sale which followed it in 1898, their case being that the properties belonged exclusively to their vendors. The plaintiff's case, as stated in the plaint, was that the lands claimed in the suit belonged to five temples whose names are given in paragraph No. 3 of the plaint. The temples themselves, it is stated, belonged to the Velangiri Edam *tarwad*. The plaint alleges that the lands being indivisible, it was agreed at the partition of the original *tarwad* into the three branches mentioned above, that they should be managed by the senior most member of all the three members of the branches and that he should conduct the affairs of the temples out of the income of the said properties. The District Munsif passed a decree in the plaintiff's favour for a portion of the properties claimed. On appeal, the District Judge dismissed the suit; he found that the plaintiffs had not succeeded in proving that the plaint property was set apart for the temples. The learned Pleader for the appellants has not been able to raise any legal objection to this finding, and we are bound to accept it. On this finding, we are of opinion the second appeal must fail.

Mr. Kunjunni Nair contends that, notwithstanding the findings, his clients are entited to recover the lands as the joint property of all the three branch *tarwads*, urging that, on the extinction of the Natarkandi branch, the two other *tarwads* become entitled to them by survivorship. We are clearly of opinion

that the case as set forth in the plaint is, that the properties belonged to the temples and not to the three *tarwads* beneficially. It is urged that there is no distinction between temple property and *tarwad* property as the temples themselves belonged to the *trawad*. The temples are claimed as private temples in which the public have no interest, but we cannot accept the contention even in the case of private temples claimed as belonging to a *tarwad* that the properties admittedly set apart for the temples can be regarded as *tarwad* properties. Assuming that the public have no rights in the temples, it cannot be doubted that the properties must continue to be regarded as trust property until, at any rate, all the beneficiaries concerned, that is, all the members of the three families to which the temples or the endowments are attached, revoke, assuming that they could do so [*see* the judgment of this Court in Second Appeal No. 1077 of 1892 and *Rupa Jagashet* v. *Krishnaji Govind* (1).]

We are unable to agree with the ruling of the Sudder Court relied on by Mr. Kunjunni Nair, in Appeal No. 64 of 1861, where the learned Judges who decided that case would seem to have held that a *karnavan* was entitled to dispose of property belonging to a *tarwad* temple in the same manner as he could deal with property belonging to the *tarwad* itself. That ruling was not followed by this Court in Second Appeal No. 1077 of 1892 referred to above. The Subordinate Judge, from whose decision Second Appeal No. 1577 was preferred, had refused to follow the Sudder Court ruling and this Court adopted his view though the ruling in A. S. No. 64 of 1861 was not expressly dissented from. It may be open to doubt whether, when a temple had been founded by a *tarwad* for the benefit of the family, the members for the time being can put an end to the trust so as to affect those who may be subsequently bron in the family, but it is unnecessary in this case to express an opinion on that point.

It is not alleged in this case that the allotment of the lands to the temples was ever revoked by the members of the three *tarwads*. We, cannot, therefore, accept the argument that the allegation in the plaint that the lands belonged to the temples was tantamount to an assertion that they were the joint property of the three *tarwads*. And we must refuse to go into the question whether the plaintiffs could sustain a claim to the lands as the joint property of the three *tarwads* and not the property of the *devaswams*.

We must, therefore, dismiss this second appeal with the costs of the first respondent.

The Appellate Court in its judgment gave the contending defendant all his costs in the Munsif's Court. The omission in the Appellate decree to include the half of the commission to be paid by him must be rectified.

Appeal dismissed.

(1) 9 B. 169.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No 25 OF 1908.

March 9, 1911.

Present:—Mr. Justice Mookerjee and Mr. Justice Caspersz.

BHABATARAN ROY—DEFENDANT—APPELLANT

versus

BEHARI LAL MOOKERJEE—PLAINTIFF—RESPONDENT.

Hindu Law—Debuttar *property—Treating absolute* debuttar *as secular property—Whether character of property changed.*

If a certain piece of land is really absolute *debuttar*, the mere fact that the *shebaits* have chosen to divide it as if it was secular, does not alter the true character of the land.

The plaintiff and his brother were originally *shebits* of a certain idol, and in execution of a decree the plaintiff purchased his brother's share in the property, He now sued to eject the defendant's tenants in occupation of the land:

Held, that the Court was bound to decide the question of the true character of the land, because unless the plaintiff could establish his title to the property the defendants were entitled to retain possession thereof.

Appeal from the decree of the Sub-Judge of Hooghly, dated September 24th, 1907, reversing that of the Munsif of Arambagh, dated April 11th, 1907.

Babu *Hara Kumar Mitra*, for the Appellant.

Babu *Bipin Behari Mookerjee*, for the Respondent.

JUDGMENT.—This is an appeal on behalf of the defendants in an action in ejectment. The subject matter of the litigation is described by the plaintiff as the *debuttar* property of an idol Radha Ballav Jieu, of whom he claims to be a *shebait*. The plaintiff states that he and his brother were the original *shebaits*, and that in execution of a

decree for money obtained by him against his brother he has purchased his share in the property. He now seeks to eject the defendants' tenants in occupation of the land, after service of notice to quit. The defendants resist the claim and deny that the plaintiff has acquired any valid title by his purchase at the execution sale.

The Court of first instance found that the property was *debuttar* and consequently inalienable, and in this view dismissed the suit. Upon appeal the Subordinate Judge has held that the question of the true character of the land cannot be raised by the defendants. In this view, he has made a decree in favour of the plaintiff.

Upon the present appeal, it has been argued on behalf of the defendants, that the Subordinate Judge was bound to decide the question of the true character of the land, because, unless the plaintiff can establish his title to the property, the defendants are entitled to retain possession thereof. In our opinion, this contention is well-founded and must prevail. The defendants are in occupation of the land as tenants. Their tenancy can be terminated only by their landlord. If the property is absolute *debuttar*, as the defendants assert, the *shebaits* are the landlords they alone can determine the tenancy. If the plaintiff has purchased what is *debuttar* land, in execution of a decree obtained against one of the *shebaits* personally, he has not acquired any valid title to the property. In support of this position it is sufficient to refer to the decisions of this Court in the cases of *Bishen Chand* v. *Nadir Hossein* (1) and *Ramkrishna Mahapatra* v. *Padma Charan Deb* (2). It has been suggested, however, by the learned Vakil for the respondent that, although the land has been described as *debuttar*, it is really secular property subject to a religious charge as in the case of *Ashutosh Dutt* v. *Doorga Churn Chatterjee* (3). But the materials on the record are not sufficient to enable us to decide the true character of the land. The Subordinate Judge seems to have held that the judgment in the partition suit amongst the members of family is conclusive upon the point, that view is clearly unsustainable. If the land is really absolute *debuttar*, the mere fact that the *shebaits* have chosen to divide the lands as if they were secular, does not alter their true character. A *shebait* by an act which amounts to a breach of trust cannot alter the nature of the endowment. Before the plaintiff can succeed, therefore, he must establish tha he has acquired a valid title to the land and as he himself described the land to be *debuttar*, the burden lies heavily upon him to prove that its true nature is otherwise.

We may add that this is not a case of transfer by one *shebait* of his office and of the endowed property to a *co-shebait*, because the parties have proceeded on the assumption that there is no complete or absolute endowment; consequently, we need not consider whether the cases of *Mancharam* v. *Pranshankar* (4); *Narayana* v. *Ranga* (5); *Nirod Mohini* v. *Siba Das* (6) and *Gobinda Kumar Roy* v. *Debendra Kumar Roy* (7) may be reconciled with each other, or with the decision of the Judicial Committee in *Rajah Vurmah* v. *Ravi Vurmah* (8) and *Gnanasambanda* v. *Vlu Pandaram* (9).

The result is that this appeal is allowed, the decree of the Subordinate Judge reversed and the case remitted to him in order that he may decide whether the land is absolute *debuttar* as alleged by the appellants or secular property, merely subject to a relgious charge as alleged by the respondent. As the true bearing of the question does not appear to have been appreciated in either of the Courts below, the Subordinate Judge will be at liberty to take such further evidence as he may think proper; such evidence may be taken either by himself or, under his direction, by the Court of first instance. The costs of this appeal will abide the result.

Appeal allowed.

(1) 15 C. 329; 15 I. A. 1.
(2) 6 C. W. N. 663.
(3) 6 I. A. 182; 5 C. 438; 5 C. L. R. 296.
(4) 6 B. 298.
(5) 15 M. 183.
(6) 36 C. 975; 3 Ind. Cas. 76, 13 C. W. N. 1034.
(7) 12 C. W. N. 98.
(8) 4 I. A. 76; 1 M. 235.
(9) 27 I. A. 69; 23 M. 271.

SHAGUN CHAND *v.* SHIBBI.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 54 OF 1910.
April 20, 1911.
Present:—Mr. Justice Banerji.
SHAGUN CHAND—DEFENDANT—APPELLANT
versus
Musammat SHIBBI—PLAINTIFF—RESPONDENT.

Civil Procedure Code (Act XIV of 1882), *s.* 335—*Application by a person other than the judgment-debtor to be restored to possession of a portion of a house sold in execution of decree—Application dismissed for want of evidence—Suit to establish the right—Limitation Act (XV of* 1877), *Sch. II, Art.* 11.

A house was sold in execution of a mortgage decree. *S.*, who was not a party to the decree, applied under section 335 of the Code of Civil Procedure, 1882, to recover possession of a room in the house. Her application was dismissed because she did not adduce any evidence. Three years afterwards she sued for recovery of the room referred to above:

Held, that her suit was barred by Article 11 of the Second Schedule to the Limitation Act, 1877.

Sarat Chandra Bisu v. *Tarini Pershad Pal Choudhry*, 34 C. 491; 11 C. W. N. 487, distinguished.

Sardhari Lal v. *Ambika Pershad*, 15 C. 521; 15 I. A. 123, *Rahim Bux* v. *Abdul Kader*, 32 C. 537; *Lachmi Narain* v. *Martindel*, 19 A. 253; *Bibi Aliman* v. *Dhakeshwar Pershad Narain Singh*, 1 C. L. J. 296, referred to.

Second appeal from the decision of the Additional Subordinate Judge of Saharanpur, dated the 24th November, 1909.

Mr. *S. A. Haider*, for the Appellant.
Mr. *G. L. Agarwala*, for the Respondent.

JUDGMENT.—The question in this appeal is whether the suit of the plaintiff-respondent is barred by the provisions of Article 11 of the second Schedule to Act XV of 1877. The facts are these:—

Tulshi and Munshi, sons of one Kashmiri, inherited certain property from their father, which they mortgaged to one Niadar. He obtained a decree for sale and in execution thereof applied for sale of the mortgaged property, which consisted of a house. During the pendency of the execution proceedings the respondent, *Musammat* Shibbi, the mother of the mortgagors, brought a suit against Niadar for a declaration that she had a right of residence in her husband's house and that it could not be sold in execution of the decree obtained by Niadar. On the 23rd of June 1904, her suit was dismissed by the Court of first instance. She preferred an appeal. Before the disposal of the appeal the property was sold by auction, and the appellant, Shagun Chand, purchased it. On the 20th of December 1904, he obtained formal delivery of possession. On the 21st of the same month, *Musammat* Shibbi made an application, under section 335 of the Code of Civil Procedure, 1882, to be restored to possession of a room in the house. The Court issued the usual notice and fixed a date for the hearing of the application. On that date, Pleader for *Musammat* Shibbi stated that his client did not wish to adduce any evidence. Thereupon the Court passed an order in the following terms: "The applicant has not adduced any evidence. The application is accordingly dismissed." This order was passed on the 21st of January 1905. On the 13th of April 1905, the appeal preferred by the respondent, *Musammat* Shibbi, from the decree of the Court of first instance dismissing her claim in the suit brought by her was decided in her favour. It was declared that she was entitled to occupy the *kotha* in the house which she had been using and that it should not be sold in execution of Niadar's decree until provision for her residence elsewhere was made. Thereupon, on the 1st of May 1908, *i. e.*, after the lapse of more than three years from the date on which her application under section 335 was dismissed she brought this suit out of which this appeal has arisen for possession of the *kotha* of house sold by auction in execution of Niadar's decree referred to above. It was urged on behalf of the auction-purchaser defendant, that the claim was barred under Article 11 of the second Schedule to Act XV of 1877, as it had not been brought within one year of the decision under section 335 of the Code of Civil Procedure.

The Courts below have overruled this plea, but it has been repeated in the appeal before me. I am of opinion that the contention is well-founded. As has already been stated, the plaintiff made an application under section 335 of the Code of Civil Procedure, the Court heard the application, but as no evidence was adduced to support it, the Court dismissed it. The order of dismissal was conclusive unless a suit was brought within one year of the date of it. As the present suit was brought after more than three years, it is clearly governed by the provisions of Article 11 and is time-barred. The Courts below have relied on the case of *Sarat Chandra Bisu* v. *Tarini Pershad Pal*

Chowdhry (1) and this case has been cited by the learned Vakil for the respondent in support of his argument that it was not necessary for the plaintiff to bring a suit within one year of the date of the order under section 335, inasmuch as no inquiry was made by the Court in that case. In my judgment, the ruling referred to is not applicable to the circumstances of the present case. In that case the petitioner applied to withdraw his petition and, therefore, the Court dismissed it for default of prosecution. It was held that as there was no inquiry within the meaning of section 335, the order of dismissal was not conclusive and the suit was not barred. That is not the case here. In the present instance the Court fixed a date for hearing. On that date, the Court was prepared to decide the case but the plaintiff's Pleader stated that she did not wish to adduce evidence and, therefore, for want of evidence, the application was dismissed. It cannot be said, under these circumstances, that there was no investigation or inquiry. The application was not withdrawn by the plaintiff, but she adduced no evidence in support of it. As observed by their Lordships of the Privy Council in *Sardhari Lal* v. *Ambika Pershad* (2), "The Code does not prescribe the extent to which the investigation should go; and though in some cases it may be very proper that there should be as full an investigation as if a suit were instituted for the very purpose of trying the question, in other cases it may also be the most prudent and proper course to deliver an opinion on such facts as are before the Subordinate Judge at the time, leaving the aggrieved party to bring the suit which the law allows to him. The order is not conclusive; a suit may be brought to claim the property notwithstanding the order; but then the Law of Limitation says that the plaintiff must be prompt in bringing his suit. The policy of the Act evidently is to secure the speedy settlement of questions of title raised at execution-sales, and for that reason a year is fixed as the time within which the suit must be brought." This case is similar to that of *Rahim Bux* v. *Abdul Kader* (3). In that case also, as in the present, the claimant failed to adduce any evidence notwithstanding that he had been allowed an opportunity to do so. It was held that the order was conclusive and that the suit should have been brought, under Article 11, Schedule II, of the Limitation Act, within one year of the order dismissing the application. I may also refer to the case of *Lachmi Narain* v. *Martindel*, (4), which was a case under the Rent Act, but the same principle was applied.

The learned Vakil for the respondent referred to *Bibi Aliman* v. *Dhakeshwar Pershad Narain Singh* (5). That case, is in my opinion, against him rather than in his favour. In that case the learned Judges observed.—"The fact that the claimant did choose to instruct any Pleaders or adduce any evidence in support of her case on the day of hearing is not sufficient to take her case out of the statute."

As the plaintiff in the present case preferred to make an application under section 335 of the Code of Civil Procedure, 1882, and as that application was dismissed, the order of dismissal was conclusive between the parties, unless a suit was brought to establish her right within one year of the date of it. As the present suit was brought after the laps of more than one year, it is time-barred. I accordingly allow the appeal, set aside the decrees of the Courts below and dismiss the plaintiff's suit with costs.

Appeal allowed.

(1) 34 C. 491; 11 C. W. N. 487.
(2) 15 C. 521; 15 I. A. 123.
(3) 32 C 537.
(4) 19 A. 253.
(5) 1 C. L. J. 296.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 484 OF 1910.

April 27, 1911.

Present:—Mr. Justice Karamat Hussian and Mr. Justice Chamier.

SUDARSHAN DAS—DEFENDANT APPELLANT

versus

RAM PRASHAD AND OTHERS—PLAINTIFFS—RESPONDENTS.

Mortgage – Suit for redemption and for surplus profits —Account—Suit filed in Munsif's Court—Amount decreed after taking account for a sum exceeding Rs. 1,000 *– Jurisdiction—Limitation to recover surplus profits— Limitation Act (IX of* 1871*), Sch. I, Art.* 105 *—Limitation Act (XV of* 1877*), Sch. II, Art,* 105.

Plaintiffs sued for redemption of a mortgage executed in 1854 and prayed that an account be taken of the income received from the mortgaged property and a decree given them for any surplus profits which

SUDARSHAN DAS *v.* RAM PRASHAD.

might be found due to them. The Munsif found that Rs. 9,701-7-2 surplus profits were due to the plaintiffs and decreed this amount in their favour:

Held, that the Munsif had jurisdiction to pass the decree.

Madho Das v. *Ramji Patak*, 16 A. 286; *Sudarshan Das* v. *Ram Prashad*, 33 A.97; 7 A.L.J.963; 7 Ind. Cas. 385, followed.

Held, further, that the plaintiffs were entitled to only so much of the surplus profits as were not barred under the Limitation Act, 1871.

Second appeal from the decision of the Additional Subordinate Judge of Aligarh, dated 8th June 1910.

Mr. *Peare Lal Benerji*, for the Appellant.

Mr. *Govind Prashad*, for the Respondents.

JUDGMENT.—This was a suit by the respondents for redemption of a mortgage made on 15th September 1854. They prayed that an account might be taken of the income received from the mortgaged property and they claimed a decree for any surplus profits which might be found due to them, estimating the surplus at Rs. 100. The Munsif went into the account and found that the surplus profits due to the respondents amounted to Rs. 9,701-7-2 and passed a decree for redemption and for recovery of the amount just mentioned subject to the payment of the requisite Court-fee. On appeal, the Additional Subordinate Judge held that the surplus profits due to the present respondents amounted only to Rs. 2,960-6-1, and he varied the decree of the Munsif accordingly. In second appeal to this Court the first point taken is, that the Munsif had no jurisdiction to pass a decree for an amount exceeding Rs. 1,000. In our opinion, the question is concluded by the decision of this Court in *Madho Das* v. *Ramji Patak* (1), followed in *Sudarshan Das* v. *Ram Parshad* (2). We consider that we ought to follow these decisions notwithstanding that there is a decision to the contrary by the Calcutta High Court. The second point taken is, that the suit for recovery of surplus mesne profits was barred under the Limitation Act of 1871, and that the right to recover those profits was not revived by the Limitation Acts of 1877 and 1908. It seems to us that the Act of 1871 certainly applies to the claim to recover so much of the surpuls profits as accrued prior to the 1st of October 1874. Article 105 of Schedule II of the Limitation Act of 1871 provided a period of 3 years for a suit by a mortgagor after the mortgage had been satisfied to recover surplus collections received by the mortgagee, and time began to run under that Article from the date of the receipt of surplus collections. Article 105, Schedule II, of the Limitation Act of 1877, provided a period of 3 years for a similar suit, but time began to run under that Article from the date when the mortgagor re-entered on the mortgaged property. It has been held by this Court that Article 105 of the Act of 1877 did not apply to a suit for redemption, and that that Article contemplated a suit other than a suit for redemption. Accepting this view, we hold that the present suit, which is for redemption, is not governed by the corresponding Article in the first Schedule to the present Limitation Act, and that, so far as the claim was not barred by the Limitation Act of 1871, it is within time. The Limitation Act of 1877 came into force on the 1st of October 1877. The respondents are, therefore, entitled to all surplus profits, the recovery of which was not barred by the Act of 1871, that is to say, the surplus profits which accrued on and after the 1st of October 1874. The result is that the surplus profits previous to the end of 1281 *Fasli* cannot be recovered. These profits with interest amount to Rs. 336-3-11. Both sides have objected to certain items in the account prepared by the lower Appellate Court. That Court dealt with the various items on the evidence on the record. We are not satisfied that any material evidence was overlooked. We must, therefore, accept the decision of that Court in regard to those items. The result is that we allow the appeal in part, and reduce the amount decreed to the respondents by the sum of Rs. 336-3-11. Parties will pay and receive proportionate costs in all three Courts, and costs in this Court will include fees on the higher scale. The cross-objections are dismissed with costs.

Appeal allowed.

(1) 16 A. 286.
(2) 33 A. 97; 7 A. L. J. 963; 7 Ind. Cas. 385.

GHULAM HUSSAIN *v.* GANGA SINGH.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 79 OF 1911.

April 29, 1911.

Present:—Sir Arthur Reid, KT., Chief Judge.

GHULAM HUSSAIN—PLAINTIFF—APPELLANT

versus

GANGA SINGH AND OTHERS—DEFENDANTS RESPONDENTS.

Punjab Pre-emption Act (II of 1905) ss. 13 (1), seventhly, *and* 13 (2) (a)—*Owner of a shop, whether entitled to claim pre-emption—Pre-emptor executing an agreement to sell his own property, effect of.*

The fact that shops are excluded from pre-emtion by section 13 (2) *(a)* of the Punjab Pre-emption Act does not disentitle the owner of a shop from claiming pre-emption by virtue of being its owner.

"Immoveable property" in section 13 (1), *seventhly*, of the Act includes a shop.

While a pre-emptor may lose his right of pre-emption if he parts with the property as owner of which he claims the right, a mere agreement to sell such property does not destroy his right.

Second appeal from the order of the Additional Divisional Judge, Amritsar Division at Jullundur, dated 19th October 1910, reversing that of the Munsif, 1st Class Amritsar, dated 15th December 1909, decreeing plaintiff's claim.

R. S. Lala *Sukh Dial*, for the Appellant.

Lala *Lajpat Rai*, for the Respondents.

JUDGMENT.—The lower Appellate Court has dismissed the suit and set aside the decree in plaintiff-appellant's favour on the ground that immoveable property in section 13 (1), *seventh'y*, of the Pre-emption Act does not include a shop.

No authority for this conclusion has been cited, but it has been said that because a shop is excluded from pre-emption, its possession cannot give a right of pre-emption. We have to consider the terms of the Act—not what the terms should have been. Had the intention of the Local Legislature been to adopt the rule laid down by the lower Appellate Court, it would have been very easy to frame section 13 (2) in such a manner as to convey the intention.

The words "in respect of the sale of" indicate clearly that a shop cannot be acquired by pre-emption, not that the possession of a shop is not a qualification for pre-emption. Had the words "the sale of" been omitted, there would have been force in the lower Appellate Court's argument. As it is, there is no force in it, and I have no hesitation in holding that immoveable property in section 13 (1), *seventhly*, includes a shop.

There is no force in the contention of the Pleader for the respondents that the property in suit was a shop at date of sale or suit, or in the contention that there has been no finding on the question of the existence of a custom of pre-emption. There remains the contention that the plaintiff-appellant has lost his right by reason of a sale by him of the property, as owner of which he sued for pre-emption, after his decree had been set aside by the lower Appellate Court. He admittedly sold half the property at the time alleged and executed an agreement to sell the other half.

Sanwal Das v. *Gur Parshad* (1) and *Dhanna Singh* v. *Gurbaksh Singh* (2) are cited for this contention.

The *dicta* relied on go no further than that a pre-emptor may lose "his so-called right" because he has himself parted with the property by reason of the possession of which he claimed the right or because the original vendee has transferred the property claimed to a person who has a right of pre-emption in respect thereof, either equal or superior to those of the claimant.

These *dicta* do not go far enough for the contention that sale by the pre-emptor of half the property in suit and an agreement to sell the other half, derogates from his right or disentitles him to a decree, and no other authority has been cited.

The plaintiff-respondent is still owner of property entitling him to a decree for pre-emption and the possibility that he may, after obtaining a final decree, cease to be owner of that property does not destroy his right. It is quite possible that the sale may not be completed.

No other defence to the suit has been pleaded. For these reasons, I decree the appeal and restore the decree of the Court of first instance with costs.

Appeal decreed.

(1) 90 P. R. 1909; 4 Ind. Cas. 179; 159 P. W. R. 1909.

(2) 91 P. R. 1909; 48 P. L. R. 1909; 4 Ind. Cas. 337; 161 P. W. R. 1909.

PUNJAB CHIEF COURT.
CIVIL REVISION No. 2695 OF 1908.
May 11, 1911.
Present:—Mr. Justice Kensington.
JHANDA RAM AND OTHERS—PLAINTIFFS—PETITIONERS
versus
TODA MAL AND OTHERS—DEFENDANTS—RESPONDENTS

Negotiable Instruments Act (XXVI of 1881), *ss.* 30, 93, 98 (c)—*Notice of dishonour to the drawer—Damage—Burden of proof—Issue.*

In a suit by the holder of a dishonoured *hundi* where no notice of dishonour has been given to the drawer, the burden of proving that the party charged could not suffer damage for want of notice is on the plaintiff and there should be a definite issue on the point.

Pet tion, under section 70 (1) (*a*) of Act XVIII of 1884 as amended by Act XXV of 1899, for revision of the order of the District Judge, Lyallpur, dated 4th July 1908, reversing that of Munsif, 2nd class, Lyallpur, dated 8th May 190-, decreeing claim.

Pundit *Sheo Narain*, for the Applicants.

Mr. *Nanak Chand*, for the Respondents.

JUDGMENT.—This is a suit by the holders of a dishonoured *hundi* against the drawer. The Munsif gave the plaintiffs a decree for the amount of the *hundi*, but this has been reversed by the lower Appellate Court and the plaintiffs' suit has been dismissed on the ground that they omitted to give notice of dishonour to the drawer.

It has been found by both the lower Courts that formal notice of dishonour was not given to the drawer as required by sections 30 and 93 of the Negotiable Instruments Act XXVI of 1881. At the same time, the Munsif found that the drawer must have been aware of the fact that payment of the *hundi* had been refused by the drawees, and this finding is not obviously incorrect. The lower Appellate Court has taken the view that the absence of formal notice to the drawer is a fatal bar to the plaintiffs' claim. There might be something to be said for this view if sections 30 and 93 of the Act are referred to alone, but the Act is somewhat loosely drawn and the lower Appellate Court has omitted to observe that by a furthar qualifying, section namely, section 98, clause 3, notice of dishonour is not required when the party charged could not snffer damage for want of notice. This matter was referred to by the Munsif, who erroneously assumed that the defendants were required to show that thay received damage through want of notice. The more correct view is that the burden of proof as to want of damage is thrown upon the plaintiffs and reasonable opportunity should have been given to the plaintiffs to prove their point on a definite issue drawn with reference to section 93 (*c*) of the Act. The lower Appellate Court has gone wrong in not recognising that the omission to frame an issue on the point has put plaintiffs at a disadvantage. It is asserted before me that the plaintiffs would have had no difficulty in establishing the point if they had not been misled by the manner in which this part of their case was dealt with by the Munsif.

I am of opinion that the plaintiff's contention is correct to that extent. When the lower Appellate Court found that notice was obligatory, it should have recognised that plaintiffs were entitled to show that the obligation was of a qualified nature. The case should not have been disposed of without giving plaintiffs a porper opportunity and the omission of the lower Appellate Court to deal with the statutory qualification amounts to a material irregularity.

The revision is accordingly allowed and the decree of the lower Appellate Court is set aside. The case is remanded to that Court for fresh decision after giving plaintiffs the opportunity to which they are entitled by law. It will be open to the lower Appellate Court to take evidence on the point and to decide it itself, or if the Court should consider a remand to be absolutely necessary, it should frame the issue upon which it requires a finding by the Munsif before being in a position to finally dispose of the appeal.

Costs of the revision to be costs of the cause. Counsel's fee Rs. 16.

Ravision allowed.

PUNJAB CHIEF COURT.
CIVIL REVISION No. 2039 OF 1910.
May 16, 1911.
Present:—Mr. Justice Chevis.
AMOLAK RAM—DECREE-HOLDER—PETITIONER
versus
SHANU RAM AND OTHERS—JUDGMENT-DEBTOR—RESPONDENTS.

Limitation Act (XV of 1877), *Sch. II, Art.* 175(1)—*Civil*

BANKU BEHARI SIKDAR *v.* GOPAL CHANDRA NEOGY.

Procedure Code (*Act XIV of* 1882), *s.* 368—*Application of the article and section to execution proceedings--Estoppel—Pre-emptor denying* locus standi *of deceased vendee's sons to appeal—Whether he can give them a* locus standi *to execute his decree.*

Article 175C of the Limitation Act (XV of 1877) and section 368 of the Civil Procedure Code (Act XIV of 1882) do not apply to execution proceedings.

In a pre-emption suit, the vendee died before decree. By inadvertence, the decree was passed against the dead vendee. An appeal by the sons of deceased vendee was dismissed on the ground, taken by the pre-emptor, that as their father had died before the decree was passed, they had no *locus standi* to appeal. Later on, the pre-emptor attempted to get the decree executed against the same sons:

Held, that the pre-emptor was legally,—at any rate equitably,—estopped from executing his decree against the sons, as he could not be allowed to confer on the sons a *locus standi* in execution proceedings which he had denied them in their appeal.

Petition, under section 70 (*a*) of Act XVIII of 1884 as amended by Act XXV of 1899, for revision of the order of the Divisional Judge Multan Division, dated the 10th February, 1910, reversing that of the Munsif, 1st class, Sinawan, Muzaffargarh District, dated the 22nd May 1909, dismissing suit in default.

Mr. *Vishnu Singh*, for the Petitioner.

Lala *Durga Das*, for the Respondents.

JUDGMENT.—Plaintiff sued and got a pre-emption decree. But by inadvertence the decree was passed against a dead man, the vendee having died before the decree was passed. His sons appealed and plaintiff got their appeal dismissed on the ground that as their father had died before the decree was passed, they had no *locus standi*.

Later on, plaintiff applied to get the same sons of the vendee made legal representatives of the deceased vendee, and then executed his decree. On appeal, the learned Divisional Judge has directed the land to be given back to the vendee's sons holding (1) that in the face of the order of his predecessor dismissing their appeal, the decree cannot be executed against them and (2) that the application to bring them on the record as parties was beyond time.

I do not think Article 175C of the second Schedule to the Limitation Act is applicable to execution proceedings. The penalty laid down in section 368, Civil Procedure Code of 1882, for not applying in time is that the *suit* shall abate, which seem to me not applicable to execution proceedings. And Counsel for the respondents does not attempt to uphold the Divisional Judge on this point.

On the other point, however, I think the Divisional Judge's view is correct from the standpoint of equity, whatever the correct legal decision may be. Plaintiff stifled the appeal by denying the *locus standi* of the vendee's sons and now he wishes to give them again the *locus standi* which he then denied them in order to execute his decree against them.

I should say the plaintiff is legally estopped from pursuing his present course; if he is not legally estopped, still, as the Divisional Judge's decision seems to me in accordance with equity, I will not interfere on revision.

This application fails and is dismissed with costs.

Petition dismissed.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL NO. 2367 OF 1908.

February 8, 1911.

Present:—Mr. Justice Mookerjee and Mr. Justice Teunon.

BANKU BEHARI SIKDAR AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

GOPAL CHANDRA NEOGY—DEFENDANT—RESPONDENT.

Landlord and tenant—Suit by landlord against tenant for certain sum payable by him out of rent to third person by assignment—Whether such suit is for rent or damages—Alternative right.

The aggregate rent for a lease was fixed at Rs. 970, out of which the tenant undertook to pay to the superior landlord or his lessor Rs. 470, and the remainder Rs. 500 direct to the lessor. The tenant undertook to obtain receipts for the sum of Rs. 470 and make them over to his lessor and then to get receipts from the latter:

Held, that the whole of the sum, Rs. 970, represented the rent payable for the tenancy.

When a tenant fails to pay the sum which he undertook to pay to the landlord of the lessor, if upon the terms of the contract such sum may be rightly treated as rent, it is open to the lessor either to recover it as rent or to institute a suit for damages for breach of contract. If the lessor choose to treat it as rent, he has to commence his action within the period of limitation prescribed by the Bengal Tenancy Act, and the decree which he obtains may be enforced against the tenure with the results mentioned in the Act. If, on the other hand, he brings a suit for damages for breach of covenant in the contract of tenancy, though he obtains a longer period of time for purposes of limitation, the decree which he secures is a personal decree in execution of which the right, title, and interest merely of the judgment-debtor in the property can be sold.

BANKU BEHARI SIKDAR *v.* GOPAL CHANDRA NEOGY.

The mere fact that the lessor adopted one of the courses in a previous litigation does not debar him from following a different and alternative course in a subsequent litigation.

Appeal from the decree of the District Judge of 24-Pergannahs, dated July 7th, 1908, modifying that of the Sub-Judge of Alipur, dated February 21st, 1908.

Babus *Dwarka Nath Chakravarti* and *Bipin Behari Ghosh* (Senior) for the Appellants.

Babu *Nil Madhab Bose* and *Bipin Chandra Mallik*, for the Respondent.

JUDGMENT.—The events antecedent to the litigation which has culminated in this appeal may be briefly narrated. The plaintiffs-appellants are landlords and represent one Prosanno Kumar Kundu, who granted a lease on the 24th September 1883 to the defendants in respect of an area of 884 *bighas* and 15 *cottahs*. The terms of the contract, in so far as they are material for the purposes of the decision of the question raised before us, are set in the following extracts from the *kabuliat*: "As I prayed for a *darmaurasi chakidari* settlement in respect of all the lands of the said *Chak*, you on fixing the annual aggregate *jama* at Rs. 970-10 15 *gds.* and taking Rs. 500 from me by way of *salami* and I also on admitting the said quantity of land and the amount of *jama*, execute this *kabuliat* to the effect that as Rs. 470-10-15 *gds.* is annually due to you in the *sarkar* of the *malik zeminda s* of the said *Chak* on account of revenue thereof. I out of my said fixed *jama* of Rs 970-10-15 *gds.* shall pay Rs. 470 10-15 *gds*, in your name in the *sarkar* of the *maliks zemindars* year by year according to the demand of every *kist*, and secure *da hilas* in your name, and on making over those *dakhilas* to you, I shall take *dakhilas* from you for the said money. I shall pay the remaining Rs 500 as your profit in your *sarkar* year by year according to the under-mentioned instalments and take *dakhilas* thereof. If I default payment of any instalments, I shall pay the defaulted amount together with interest thereon at the rate of one per cent., per mensem. If I default payment of any instalment of the amount of Rs. 470-10-15 *gds.*, which I shall pay in the *sarkar* of the *malik zamindars* year by year and *kist* by *kist* according to your assignment, then I shall pay the necessary costs and interest on the defaulted instalment from my own pocket and you will not have any concern thereto."

The case for the plaintiffs is, that the defendant defaulted to pay to the superior landlord the amount due in respect of the last instalment of the Bengali year 1307 and for the whole of the years 1308 and 1309, with the consequence that the superior landlord got a decree against the plaintiffs. The plaintiffs allege that they paid the superior landlords on the 12th February and 13th March 1906 the sum of Rs. 3,236. The claim, however, is laid at a much smaller sum because the plaintiffs allege that they realised by execution of a decree for rent obtained against the defendant a sum of Rs. 763. The plaintiffs, therefore, seek to recover the difference, Rs. 2,773, together with interest thereon. The deduction which is allowed by the plaintiffs is on account of the sums realised in execution of a decree in a suit for rent instituted by them against the defendant on the 15th April 1906. In this suit they claimed to recover from the defendant rent for the year 1309 at the rate of Rs. 500 per annum as also rent for the three succeeding years at the rate of Rs. 972. The defendant resists the claim substantially on the ground that a suit for damages of this description is not maintainable, that the only remedy of the plaintiffs is by way of a suit for recovery of the amount which the defendant undertook to pay to the superior landlord as rent and that if such a suit is now commenced, it would be successfully met by the plea of limitation.

The Court of first instance held that the suit as framed was maintainable and made a decree in favour of the plaintiffs for 9/16th of Rs. 3,236. On appeal, the learned District Judge held that the sum which the defendant undertook to pay to the superior landlord of the plaintiff was recoverable by law in the event of default in the payment of that as rent, and that consequently the major portion of the claim was unsustainable. The learned District Judge has, however, allowed the plaintiffs the sums spent by them as costs of the litigation with the superior landlord. The result has been that a decree has been made in favour of the plaintiffs for a very small sum and a substantial portion of the claim has been dismissed.

The plaintiffs have now appealed to this Court, and on their behalf it has been contended that the sums claimed by them are recoverable as damages, that the suit has been properly framed, and that it is not barred by limitation or by the provisions of section 43 of the Code of Civil Procedure.

This contention has been strenuously controverted on behalf of the defendant and it has been argued by the learned Vakil who has appeared on their behalf that the plaintiffs are entitled to claim the sum which the defendant undertook to pay to their superior landlord only as rent and that the claim for rent is barred by limitation as also by the provisions of section 43 of the Code.

The first point, therefore, which requires consideration is as to the nature of the sum which the plaintiffs are entitled to recover from the defendant by reason of his default to pay the sum which he undertook to pay to the superior landlord of the plaintiffs.

In support of the view that the plaintiffs are entitled to recover this sum as rent, reliance has been placed upon the terms of the contract between the parties and upon the decision of the Court in the case of *Basanta Kumari* v. *Ashutosh Chuckerbutty* (1). On behalf of the opposite party reliance has been placed upon the cases of *Hemendra Nath Mukerjee* v. *Kumar Nath Roy* (2) and *Gobinda Mohan Tagore* v. *Jarao Kumar* (3).

Before we deal with the various decisions to which reference has been made, it is necessary to examine the terms of the contract between the parties. As we have already stated, the aggregate rent for the lease was fixed at Rs. 970-10-15 *gds.* out of which the tenant undertook to pay to the superior landlord of his lessor Rs. 470-10-15 *gds.*, and the remainder Rs 500 direct to the lessor. Throughout the lease, the aggregate rent is described as Rs. 970-10-15 *gds.* and there can, in our opinion, be no room for controversy that the whole of the sum represented the rent payable for the tenancy. The two sums of Rs. 500 and Rs. 470-10-15 *gds.*, represent, in our opinion, portions of the aggregate rent which the lessee undertook to pay to the lessor. This is clearly shown by the circumstance that the sum of Rs. 470 10-15 *gds.* was payable by the lessee to the superior landlord of the lessor on behalf of the latter. In fact any other arrangement was impossible. There was no privity of contract between the lessee and the landlord of the lessor. Is is not shown that he was a party to this arrangement or that he had in any way adopted it. Any payment, therefore, by the lessee to the superior landlord of the lessor can be made only on behalf of the latter, and he expressly undertook to obtain receipts for this sum and made them over to his lessor and then to get receipts from the latter. This clearly shows that this sum of Rs. 470-10-15 *gds.* was in its essence payable to the lessor although, as a matter of fact, for the purposes of convenience of the lessor, it was paid on behalf of the lessor into the hands of the superior landlord. Much reliance has been placed by the learned Vakil for the respondent upon the circumstance that in the schedule to the lease the instalments given refer only to the sum of Rs. 500 directly payable by the lessee to the lessor. But the lease specifies that the sum of Rs. 470-10 15 *gds* was to be paid by the lessee to the landlord of the lessor in the instalments specified in the lease of the lessor. It was, consequently, unnecessary to specify in this instrument the instalments in which that sum was payable. At any rate, the mere circumstance that mention was made in the schedule of the instalments in so far as the sum payable to the lessor directly was concerned, would not conclusively show that this portion, Rs. 500, constituted rent and that the remainder bore a different character. It has been suggested to us, however, that the view we take is contrary to the decision of the Judicial Committee in the case of *Gobinda Mohan Tagore* v. *Jarao Kumar* (3) and of the decision of this Court in the case of *Ratnessur Biswas* v. *Huris Chunder* (4) and *Hemendra Nath Mukerjee* v. *Kumar Nath Roy* (2). In our opinion, these cases do not lay down any inflexible rule of law applicable to the case before us. In fact, an examination of the terms of the contract in each of the cases to which reference has been made shows that they are distinguishable. The question whether the sum which the lessee has undertaken to pay to the superior landlord of his lessor bore the character of

(1) 27 C. 67; 4 C. W. N. 3.
(2) 9 C. W. N 96; 32 C. 169.
(3) 33 C. 140; 33 I. A. 30; 3 C. L. J. 7; 10 C. W N. 201; I M. L. T. 8.

(4) 11 C. 221.

rent has been raised either in connection with the decision of the question of the frame of the suit as in *Rutenessur Biswas* v. *Haris Chander* (4), or the question of limitation applicable to a suit for recovery of the sum as in *Hemendra Nath Mukerji* v. *Kumar Nath Roy* (2) and *Girish Chandra Das* v. *Kunj Behri Malo* (5), or the question of the forum of the appeal against a decree in a suit for recovery of the sum as in *Basanta Kumari* v. *Ashutosh Chuckerbutty* (1), or the question of the mode of realisation of such sum as in *Gobindra Mchan Tagore* v. *Jarao Kumari* (3). In each instance, the test which has been applied is, whether such sum is rent within the meaning of the term as defined in the Bengal Tenancy Act; in other words, whether upon a true construction of the contract in each case, it can be maintained that the sum is lawfully payable or deliverable in money or kind by a tenant to his landlord on account of the use or occupation of the land held by the tenant. In none of the cases was it disputed that the sum was payable on account of the use or occupation of the land held by the tenant. But in some of the cases the view was maintained that though payable on account of the use or occupation of the land held by the tenant, it was not payable or deliverable to the landlord and was not consequently rent within the term as defined in the Bengal Tenancy Act. It may be conceded that there was room for difference of opinion as to the true nature of the sum in some of the cases, particularly in the case before their Lordships of the Judicial Committee, namely, *Jotindru Mohan Tagore* v. *Jarao Kumar* (3). In that case their Lordships were called upon to decide whether the sum which the lessee had undertaken to pay to the Collector as revenue was recoverable by the summary procedure prescribed by the Patni Regulation of 1819. It was held that the terms of the lease indicated that substantial difference was made between the sum payable by the lessee to the lessor and the sum payable by the latter to the Collector on account of revenue and that intention would not be imputed to the parties that this latter sum was to be recoverable by the summary procedure as was the case with regard to the sum payable by the lessee to the lessor. But their Lordships of the Judicial Committee went on further to lay down that this latter sum was not rent, because it was not payable by the lessee to the lessor. That decision, it must be taken, was dependent upon the terms of the particular contract between the parties, terms entirely different from those to be found in the lease before us. We are, therefore, not prepared to hold, upon the authority of the decision of the Judicial Committee, that in the case before us the sum of Rs. 470-10-15 *gds.*, payable by the defendant to the landlord of the plaintiff, was not rent within the meaning of the Bengal Tenancy Act. We agree in the view taken by the learned District Judge that this portion of the aggregate rent was rent and could be recovered by the lessor in the manner in which rent might be recovered. This conclusion, however, does not dispose of the question raised before us. The learned Vakil for the plaintiff-appellant has contended that, although the sum might be treated as rent and might at the option of the landlord be recovered as such, that does not preclude the landlord from suing the tenant for compensation for breach of covenants in the lease. In our opinion, this contention is well-founded, and is supported by the judgment of Mr. Justice Rampini in the case of *Hemedara Nath Mukerjee* v. *Kumar Nath Roy* (2) and of Mr. Justice Hill in the case of *Basanta Kumari* v. *Ashotosh Chuckerbutty* (1). We are not, however, prepared to accept the view indicated by Sir Francis Maclean, C. J. in the case of *Hemendra Nath Mukerjee* v. *Kumar Nath Roy* (2) and *Girish Chandra Biswas* v. *Kunj Behari Malo* (5), that the only remedy open to the landlord in the event of a breach of contract is by way of a suit for damages. The true view, in our opinion, is that when the tenant has failed to pay the sum which he had undertaken to pay to the landlord of the lessor, if upon the terms of the contract such sum may be rightly treated as rent, it is open to the landlord either to recover it as rent or to institute a suit for damages for breach of contract. There is obviously no inconsistency in this position. If the landlord choose to treat it as rent, he has to commence his action within the period of limitation prescribed by the Bengal Tenancy Act, and the decree which he obtains may be enforced against the tenure with the results mentioned in the Bengal Tenancy Act If, on the other hand, he brings a suit for

(5) 35 C. 693; 12 C. W. N. 628.

damages for breach of convenant in the contract of tenancy, though he obtains a longer period of time for purposes of limitation, the decree which he secures is a personal decree in execution of which merely the right, title and interest of the judgment-debtor in the property can be sold. But it has been contended in the case before us, that, as on a previous occasion the landlord treated this sum of Rs. 470-10-15 *gds.* as rent, it is not open to him in the present case to maintain an action for damage; and our attention has been drawn to the circumstance that on the 12th April 1901, the landlords sued for rent in respect of the years 1304 to 1307 at the full rate of Rs. 470-10-15 *gds.* and that subsequently on the 15th April 1906 they sued again for rent of 1309 at the rate of Rs. 500 and of 1305 to 1312 at the full rate of Rs. 970. It has been argued upon these facts that the landlords cannot now take up a position inconsistent with what they assumed in the two previous litigations just mentioned. In our opinion, there is no force in this contention. If, as we have held, the landlords have an alternative remedy either to treat the sum as rent and recover it as such or to maintain a suit for damages, the mere fact that they adopted one of these courses in a previous litigation does not debar them from following a different and alternative course in a subsequent litigation.

The learned Vakil for the respondent has finally contended that even if this view be accepted, section 43 of the Code of Civil Procedure presents an insuperable bar to the maintenance of the present suit. It is opinted out that before the 15th April 1906 when the previous suit was instituted, the plaintiffs had satisfied rent-decrees obtained by their lessor against them, and that consequently it was their duty to include in that litigation the claim which they have put forward in the present suit. Now section 43 of the Code of Civil Procedure of 1882 provides that every suit shall include the whole of the claim which the plaintiff is entitled to make in respect of the cause of action, but if the plaintiff omits to sue in respect of or intentionally relinquishes any portion of his claim, he shall not afterwards sue in respect of the portion so omitted or relinquished. Section 45 then provides that subject to the rules contained in Chapter II and in section 44, the plaintiffs may unite in the same suit several causes of action against the same defendant or the same defendant jointly. This latter section, it will be observed, authorizes the plaintiff to unite in the same suit several causes of action against the same defendant: but it does not render it obligatory upon him to do so. Consequently, the only question which requires consideration is, whether the claim for damages now before us arises out of the same cause of action as the claim for rent included in the suit of 1906. In our opinion, the question ought to be answered in the negative. It cannot be disputed that different causes of action may arise out of the same transaction, though it may be conceded that questions of considerable nicety may arise, whether causes of action which arise out of the same transaction are really different causes of action as is indicated by the decision of this Court in the cases of *Anderson Wight & Co.*, v. *Kalagarla Surji Narain* (6) and *Duncan Brothers & Co.*, v. *Jeetmull Greedharee Lall* (7), as also by the decision of the Bombay High Court in *Raja Bahadur Shivlal Motilal* v. *Rajeerappa Pampanna* (8). But the case before us is, in our opinion, reasonably free from difficulty. The cause of action, in so far as the claim for rent is concerned, was enforceable under the Bengal Tenancy Act and if a decree for rent were obtained, the result would be, as we have already explained, that the landlord would be entitled to sell the tenure under the provisions of the Bengal Tenancy Act. The claim for damages, on the other hand, can be enforced only as a money-claim and if a decree is obtained, it would be a personal decree against the defendant. It would, in our opinion, be unreasonable to hold that it was obligatory upon the plaintiff to combine two such causes of action on the ground that the claim of the plaintiff was in respect of the same cause of action. The learned Vakil for the plaintiffs-appellants contended on this part of the case that the causes of action are distinct because they arose at different times and he suggested that in so far as the claim for rent included in the suit of 1906 was concerned, it arose on the dates mentioned in the contract between the parties, and in

(6) 12 C. 339.
(7) 19 C. 372.
(8) 11 Bom. L. R. 46; 1 Ind. Cas. 319.

so far as the claim for damages was concerned, it arose only on the date when the plaintiffs were obliged to satisfy the decree obtained by their superior landlord. It would be difficult, however, to maintain this view, having regard to the decision of this Court in the case of *Girish Chander Biswas* v. *Kunj Behary Malo* (5), where it was ruled that Article 116 of the Second Schedule of the Limitation Act is applicable to cases of this description. It is not necessary for us, however, to decide this point because whether Article 116 or Article 120 be held applicable, it is obvious that the claim is not barred by limitation. We may further observe that the decision of the learned Judges of the Madras High Court in the case of *Eswara Dass* v. *Venkata Roy* (9) shows clearly how the provisions of section 43 may be held inapplicable to cases of this description, if its terms are strictly construed. The conclusion, therefore, at which we arrive upon an examination of the whole case is that although the entire sum of Rs. 970 is rent within the meaning of the Bengal Tenancy Act, it is not obligatory upon the plaintiffs to sue to recover Rs. 470-10-15 *gds.* which the defendant undertook to pay to their superior landlord, but that they have an alternative remedy by way of a suit for damages for breach of covenants in the contract, that the suit as framed has been properly constituted and that it is not open to the objection of limitation or the objection that it is barred under section 43 of the Code of Civil Precedure.

The result, therefore, is that this appeal is allowed, the decree of the District Judge set aside and that of the Court of first instance restored with costs both here and in the Court of Appeal below.

Appeal allowed.

(9) 21 M. 236.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 570 OF 1908.

March 31, 1911.

Present:—Mr. Justice Mookerjee and Mr. Justice Caspersz.

DEO NARAIN SINGH—JUDGMENT-DEBTOR—APPELLANT

versus

Sri BHAGWAT NAIK—DECREE-HOLDER—RESPONDENT.

Limitation Act (XV of 1877), Sch. II, Art. 179—Execution of decree—Limitation—Fresh starting point—Issue of notice—Civil Procedure Code (Act XIV of 1882), s. 248—Application not in accordance with law.

The issue of a notice under section 248 of the Civil Procedure Code is sufficient to save a decree from the bar of limitation, under Article 179 of the Second Schedule to the Limitation Act of 1877, even though it is issued upon an application which is not in accordance with law.

Gopal Chunder v. *Gosain Das*, 25 C. 594 (F. B.): 2 C. W. N. 556; *Khoshal Chunder Roy* v. *Ukiladdi*, 3 Ind. Cas, 47: 14 C. W. N. 114; *Dhonkal Singh* v. *Phakkar Singh*, 15 A. 84 and *Hari Ganesh* v. *Yamunabai*, 23 B. 35, relied upon.

Appeal from the order of the Sub-Judge of Saran, dated August 29, 1908.

Babus *Dwarka Nath Chakravarti* and *Lakshmi Narain Singh*, for the Appellant.

Babus *Mohendra Nath Roy* and *Joy Gopal Ghosha*, for the Respondent.

JUDGMENT.—This appeal is directed against an order by which the Court below overruled the objection of the judgment-debtor and allowed execution to proceed on the basis of a decree made on the 11th March 1897. The sole objection of the judgment-debtor is, that execution ought not to issue upon the present application as the first application for execution, made on the 17th February 1900, is of no avail. It is argued that the first application was not made in accordance with law, inasmuch as the decree-holder asked for the arrest of the judgment-debtor who did not reside within the jurisdiction of the Court where the application for execution was made. In answer to this contention, it has been argued on behalf of the decree-holder that as a notice under section 248, Civil Procedure Code, was issued, no question of limitation arises. It appears from an examination of the record that upon the application made on the 17th February 1900, the Court made an order on the 19th February for the issue of a notice under section 248. This notice was actually issued on the 24th February, although it could not be served, because the Serving Officer report-

ed that the identifier was not present and several persons bearing the name of the judgment-debtor lived in the village. Under these circumstances, the question arises, whether the issue of a notice under section 248 gave a fresh starting point for the purposes of limitation under Article 179 of the second Schedule of the Limitation Act. It has been ruled by this Court, in the cases of *Gopal Chunder* v. *Gosain Das* (1) and *Khoshal Chunder Roy* v. *Ukiladdi* (2), that the issue of a notice under section 248 is sufficient to save a decree from the bar of limitation, even though it is issued upon an application which is not in accordance with law. The same view appears to have been taken by the Allahabad High Court in the case of *Dhonkal Singh* v. *Phakkar Singh* (3), and by the Bombay High Court in *Hari Ganesh* v. *Yamunabai* (4). It is not necessary for us to decide whether time runs from the date of the order for the issue of notice or from the date of actual issue thereof. Upon this point, there appears to be some divergence of judicial opinion. The cases of *Kadaressur Sen* v. *Mohim Chandra Chackravarti* (5), *Ratan Chund* v. *Debnath* (6) and *Bappu* v. *Kanaran* (7) support the view that time runs from the date of the actual issue whereas the cases of *Udit Narain* v. *Ramportab Singh* (8); *Govind* v. *Dada* (9) and *Damodar* v. *Sonaji* (10) indicate that time runs from the date of the order for issue of notice. In the case before us, from whichever date time may be taken to run, no question of limitation arises. The result, therefore, is that the order made by the Court below is affirmed and this appeal dismissed with costs. We assess the hearing fee at 5 gold *mohurs*.

Appeal dismissed.

(1) 25 C. 594; 2 C. W. N. 556.
(2) 14 C. W. N. 114; 3 Ind. Cas 47.
(3) 15 A. 84.
(4) 23 B. 35.
(5) 6 C. W. N. 656.
(6) 10 C. W. N. 303; 4 C. L. J. 530.
(7) 16 M. L. J. 548; 1 M. L. T. 395.
(8) (1881) 1 A. W. N. 120.
(9) 28 B. 416.
(10) 27 B. 622.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 170 OF 1910.

February 18, 1911.

Present:—Mr. Justice Mookerjee and Mr. Justice Teunon.

WARISH MUNSHI—DECREE-HOLDER—APPELLANT

versus

APTABUDDIN BEPARI—JUDGMENT-DEBTOR—RESPONDENT.

Civil Procedure Code (*Act V of* 1908), *ss.* 47, 102—*Second appeal—Execution of decree—Suit of nature cognizable by Small Cause Court and valued at below Rs.* 500.

No second appeal lies against an order in execution of a decree in a suit, valued at less than Rs. 500, of the nature cognizable by a Court of Small Causes.

Chand Monee Dasya v. *Santo Monee Dasya*, 24 C. 707; 1 C. W. N. 534, *Nemai Chand Kanji* v. *Deno Nath Kanji*, 2 C. W. N. 191, *Hira Lal* v. *Chandra Kanto Ghose*, 26 C. 539; 3 C. W. N. 403 and *Bhuban Mohun* v. *Raja Peary Mohan Mukerjee*, 3 C. W. N. 399 26 C. 324, distinguished.

Lala Kandha Pershad v. *Lala Lal Behary Lal*, 25 C. 872, *Shyama Charan Mitter* v. *Debendra Nath Mukerjee*, 27 C. 484; 4 C. W. N. 269, *Dindayal* v. *Patra Khan*, 18 A. 181, *Narayan Parmanand* v. *Nagindas Bhaidas*, 30 B. 113; 7 Bom L. R. 543 and *Mavula Ammal* v. *Mavula Maracovi*, 20 M. 212; 17 M. L. J. 376, relied upon.

Appeal from the order of the Subordinate Judge of Faridpur, dated January 15th, 1910, affirming that of the Second Munsif of Bhanga, dated June 29th, 1909.

Babu *Jnanendra Nath Sarkar*, for the Appellant.

Babu *Surendra Chander Sen*, for the Respondent.

JUDGMENT.—This appeal is directed against an order by which the Court of appeal below, in concurrence with the Court of first instance, has set aside an execution-sale. A preliminary objection has been taken to the hearing of the appeal on the ground that it is barred under the provisions of section 102 of the Code of Civil Procedure, 1908. That section provides that no second appeal shall lie in any suit of the nature cognizable by Courts of Small Causes when the amount or value of the subject-matter of the original suit does not exceed five hundred rupees. In the case before us, the decree under execution was made in a suit of which the value was less than Rs. 500. Consequently, if section 102 is applicable, the second appeal is incompetent. The learned Vakil for the appellant decree-holder has, however, contended, upon the authority of the decision of this Court in the cases of

Chand Monee Dasya v. *Santo Manee Dasya* (1), *Nemia Chand Kanji* v. *Deno Nath Kanji* (2); *Hira Lal* v. *Chandra Kanto Ghose* (3) and *Bhuban Mohun* v. *Raja Perya Mohan Mukerjee* (4), that a second appeal is allowed by the law because the order of the Court of first instance was made under section 47 of the Code of 1908 and determined whether the appellant was the representative of the original decree-holder and whether it was competent to him to execute the decree. The cases relied upon, however, are clearly distinguishable. They merely affirm the proposition that when the Court of first instance has decided a question which arises between the parties to the suit or their representatives in interest and such question relates to the execution, discharge or satisfaction of the decree, the order is one under section 47 of the Code and is consequently a decree subject to the provisions for appeal. But it does not appear that in any of these cases the decree was obtained in a suit in which the claim was valued at less than Rs. 500 and the nature of the suit was such as to make it cognizable by a Court of Small Causes. On the other hand, cases of *Lala Kandha Pershad* v. *Lala Lal Behari Lal* (5), *Shyama Charan Mitter* v. *Debendra Nath Mukerjee* (6), *Dindayal* v. *Patra Khan* (7), *Naryan Parmanand* v. *Nagin Das Bhaidas* (8), *Mavula Ammal* v. *Mavula Maracovi* (9), conclusively show that a second appeal is not allowed in cases of this description. As was pointed out by this Court in the case of *Anund Chunder* v. *Sidhy Gopal* (10), the term suit is not used in a restricted sense; it includes not merely the proceedings in the suit up to the stage of decree but comprehends also the proceedings in execution of the decree. We are not prepared to dissent from this view which has been adopted in the cases mentioned, as also in *Sri Bullov* v. *Baburam Chattopadhya* (11). But the learned Vakil for the appellant has suggested that al hough the term suit may be comprehensive enough to include proceedings in execution of the decree made therein yet, in the case before us, that principle has no application, because here the judgment-debtor seeks to prevent the confirmation of the sale which has taken place and which but for his objection would be confirmed in due course. In our opinion, the distinction upon which reliance is placed is without any substance. Execution cannot be completed till the sale has been confirmed and the result of the order of the Courts below has been to set aside the sale so as to render it inevitable for the decree-holder, if the decree had not been satisfied, to take out execution afresh. Under these circumstances, it cannot be contended that the order in controversy is not an order in a proceeding in execution of a decree and thus an order in the "suit." We are, therefore, of opinion, both upon principle and upon the authorities mentioned, that the present appeal is incompetent. We may add that one of the questions, decided by the Court below, relates to the status of the appellant, namely, whether he could rightfully claim to be the representative of the original decree-holder. That is, at any rate, clearly a question for decision in the course of execution proceedings. The result, therefore, is that this appeal is dismissed with costs. We assess the hearing fee at one gold *mohur*.

Appeal dismissed.

(1) 24 C. 767; 1 C. W. N. 534.
(2) 2 C. W. N. 691.
(3) 26 C. 539; 3 C. W. N. 403.
(4) 3 C. W. N. 399; 26 C. 324.
(5) 25 C. 872.
(6) 27 C. 484; 4 C. W. N. 269.
(7) 18 A. 181.
(8) 30 B. 113; 7 Bom. L. R. 543.
(9) 30 M. 212; 17 M. L. J. 376.
(10) 8 W. R. 112.
(11) 11 C. 169.

ALLAHABAD HIGH COURT.
FIRST CIVIL APPEAL No. 420 OF 1909.
April 27, 1911.
Present:—Mr. Richards, K. C., Chief Justice, and Mr. Justice Banerji.
Sheikh INAYAT HUSAIN—DEFENDANT—APPELLANT
versus
Musammat AZIZ BANNO—PLAINTIFF—RESPONDENT.

Adverse possession—Co-heirs—One heir managing property—Other heir minor—Brother and sister.

A Muhammadan brother and sister inherited together property left by their deceased father. The sister's name was not recorded in the revenue papers to the extent of the share legally inherited by her nor did she get profits proportionate to that share The sister was a minor at the time of her father's death and her brother used to manage the property. She lived in the same house with her brother and died in that house:

Held, that under these circumstances it could not be said that the sister was excluded from her legal share and that the brother was in adverse possession.

BHURE LAL *v.* SECRETARY OF STATE FOR INDIA.

First appeal from the decision of the Subordinate Judge of Saharanpur, dated the 3rd September 1909.

Mr. *Muhammad Ishaq*, for the Appellant.

The Hon'ble Nawab *Abdul Majid* (with him Mr. *Muhammad Ishaq Khan*), for the Respondent.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff and *Musammat* Aziz Bano for partition and possession of the share which she alleges that she inherited from her mother *Musammat* Naim-un-nissa. *Musammat* Naim-un-nissa was one of the four daughters of Gulam Muhammad by his second wife, Zami-un-nissa. Gulam Muhammad had three sons by his first wife and a fourth son by his second wife. That son is the appellant Inayet Hussain, who was the principal defendant in the case. The plaintiff claims the whole of what she alleges was the share of Naim-un-nissa by virtue of her right of inheritance and also under an assignment from her father. Naim-un-nissa inherited the property in four ways. She inherited a share from her father Gulam Muhammad who died in 1861. She also inherited certain shares from her sisters, Said-un-nissa and Taslim-un-nissa, both of whom predeceased her. She also inherited a share from her mother Zamir-un-nissa who died in 1908. There is no dispute as to the share alleged to have been inherited by Naim-un-issa from her mother. As to the remainder of the property, the defence was, that the plaintiff, or her mother, was never in possession and that the defendant was in possession adversely to them. He relied upon the fact that in the revenue papers a certain share, not equivalent to the share to which Naim-un-nissa would be legally entitled under the Muhammadan Law, was recorded and that it was not shown that Naim-un-nissa was getting profits in excess of the recorded share. The facts found by the Court below are not disputed in the argument addressed to us by the learned Vakil for the appellant. He contends that, upon those facts, we should hold that the defendant's possession was adverse. We do not agree with him, Naim-un-nissa was a minor at the date of her father's death. The property was managed by her brother Inayet Hussain, the appellant before us. She lived in the same house with Inayet Hussain and died in that house. Admittedly, she got a portion of the income derived from the property. Under these circumstances, it cannot be said that she was excluded from her legal share and the defendant was in adverse possession. We accordingly dismiss the appeal with costs including fees on the higher scale.

Appeal dismissed.

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 132 OF 1910.

April 18, 1911.

Present:—Mr. Justice Richards and Mr. Justice Tudball.

BHURE LAL BRAHMAN—PETITIONER—APPELLANT

v.

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—OPPOSITE PARTY—RESPONDENT.

Regulation V of 1799, ss. 5, 7—Rejection of application to be put in possession of the estate of the deceased—Appeal.

During the course of a proceeding under Regulation V of 1799, the appellant applied under sections 5 and 7 of the Regulation that the property of the deceased intestate might be handed over to him on the ground that he was the heir. The Court dismissed the application:

Held, that the order rejecting the application was not appealable.

First appeal from the order of the District Judge of Jhansi, dated the 5th of April 1910.

Mr. *Hamilton*, for the Appellant.

Mr. *Ryves*, for the Respondent.

JUDGMENT.—Certain proceedings were brought under the provisions of Regulation V of 1799 with regard to the estate of one Jas Ram, deceased. In the course of these proceedings Bhure Lal applied under the provisions of sections 5 and 7 of the Regulation that the property of the deceased intestate might be handed over to him on the ground that he was the heir. The Court apparently was not satisfied that Bhure Lal had made out his title and dismissed his application. Hence the present appeal. A preliminary objection was raised by the Government Advocate that no appeal lies. The Regulation itself makes no provision for an appeal. The Counsel for the appellant admits that, unless the order of the Judge is a decree within the

meaning of that expression in section 2 clause 2 of Act V of 1908, no appeal lies. A *decree* is there defined as follows: "Decree means the formal expression of an adjudication which, so far as regards the Court expressing it, conclusively determines the rights of the parties with regard to all or any of the matters in controversy in the suit and may be either preliminary or final." In the present case there was no suit at all nor was there any conclusive determination of any matter within the meaning of the section. It is quite obvious that the plaintiff's proper course is to bring a suit to recover possession of the property, if so advised. We dismiss the appeal with costs including in this Court fees on the higher scale.

Appeal dismissed.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 307 OF 1910.

December 15, 1910.

Present:—Mr. Justice Mookerjee and Mr. Justice Coxe.

RAKHAL CHANDRA TEWARY—JUDGMENT-DEBTOR—APPELLANT

versus

MANMATHA NATH MITTER AND OTHERS—DECREE-HOLDERS—RESPONDENTS.

Appeal—Three suits—One judgment—Separate orders—No consolidation—One appeal, irregular.

One appeal from three distinct orders recorded in three distinct execution cases which were decided by one judgment, as the objections taken in the several cases were of the same description, is incompetent and irregular when there was no order of consolidation of the cases.

Royal Insurance Co. v. *Akhoy Coomar Dutt*, 6 C. W. N. 41; *Panchanda* v. *Vaithinatha*, 29 M. 333; *Mariamnissa* v. *Joynab*, 33 C. 1101; 10 C. W. N. 934; 4 C. L J. 149; *Damodar* v. *Sheoram*, 29 A. 730 and *Laharia* v. *Debia*, 33 A. 51 (F. B.), relien upon.

Enayetoollah, v. *Radha*, 15 W. R. 395; *Kashi Prasad* v. *Secretary of State*, 29 C. 140; *Gopal Lall Tagore* v. *Tilluch Chunder*, 3 W. R (P. C.) 1; 10 M. I. A. 183, *Doorga Pershad* v. *Tara Pershad*, 3 W. R. (P. C.) 11; 10 M. I. A. 203 and *Soorendra Pershad* v. *Nundun Misser*, 21 W. R. 196, referred to and explained.

Chatterput v. *Gopi Chand*, 4 C. W. N. 446; 26 C. 750, distinguished.

Appeal from the order of the District Judge of 24-Pergannahs, dated March 23rd, 1910, affirming that of the Third Munsif of Diamond Harbour, dated February 18th, 1910.

Babu *Susil Madhab Mallik*, for the Respondents.

JUDGMENT.—This appeal is directed against an order by which the Court of appeal below has dismissed an appeal preferred against three distinct orders in three different execution proceedings. The appellant was the judgment-debtor under three decrees passed in as many different suits for rent. His objections in the execution cases were overruled in the original Court; but as the objections taken in the several cases were of the same description, one judgment was delivered. It is clear, however, from the order sheet that distinct orders were recorded in the different cases. The appellant preferred one appeal against these three orders. Objection was taken by the decree-holder that the appeal was incompetent, and that under the law three different appeals ought to have been preferred, one against each order. The learned District Judge has given effect to this objection and held that the appeal was irregular and could not be entertained. This view has been controverted with much persistence by the appellant who has argued this case in person and he has relied upon a number of judicial decisions to show that his contention is well-founded. We have carefully examined those authorities and arrived at the conclusion that not one of them supports the argument of the appellant.

The case of *Enayetoolah* v. *Radha Churn Roy* (1), and *Kashi Prosad Singh* v. *The Secretary of State* (2), show that if two suits have been consolidated and if one decree has been made, the decree can be attacked by one appeal although it disposes of what was originally two distinct suits. The decisions of the Judicial Committee in the cases of *Gopal Lall Tagore* v. *Tillck Chunder Rai* (3), and *Doorga Pershad Roy* v. *Tara Pershad Roy* (4), point in the same direction. The case of *Soorendro Pershad Dobey* v. *Nundun Misser* (5), shows that such consolidation cannot be forced upon the litigants and that two suits can be consolidated only by consent of all the parties concerned. It is further clear that if suits have not been consolidated, the decrees must be treated as distinct decrees, the validity of which can be questioned only by

(1) 15 W. R. 395.
(2) 29 C. 140.
(3) 3 W. R. 1 (P. C.); 10 M. I. A. 183.
(4) 3 W. R. 11 (P. C.); 10 M. I. A. 203.
(5) 21 W. R. 196.

distinct appeals. It is sufficient, in support of this proposition, to refer to the case of *The Royal Insurance Company* v. *Akhoy Coomar Dutt* (6), which dealt with an application for leave to appeal to Her Majesty in Council against the decision of this Court in the case of *Royal Insurance Company* v. *Akhoy Coomar Dutt* (7). The same view is supported by the observations of the learned Judges of the Madras High Court in *Panchanada Velan* v. *Vaithinatha Sastrial* (8). [See also *Mariamnessa Bibee* v. *Joynab Bibee* (9); *Damodardas* v. *Sheoramdas* (10); *Zaharia* v. *Debia* (11)]. The case of *Chhatrapat Singh* v. *Gopi Chand* (12) is clearly distinguishable, as there in the original Court, the application for execution appears to have been made in respect of two different decrees held by the same decree-holder against the same judgment-debtor. No objection was taken to this procedure and the order which was made in execution was treated as one order covering the whole matter in controversy. We must, therefore, hold that there is no authority in support of the position taken up by the appellant. That position is undoubtedly inconsistent with what has been the settled practice in this Court for many years past; in our opinion, it is also inconsistent with first principles. The Code allows appeals against decrees and orders and clearly contemplates separate appeals from separate decrees and orders. In the case before us, there was no consolidation. Distinct orders were made in the Court of first instance and the only method by which their propriety could have been challenged was by way of distinct appeals. This course the appellant resolutely refused to adopt. We may further add that the learned District Judge mentions in his judgment that he was willing to treat the appeal preferred to him as directed against one of the orders in question at the option of the appellant. The appellant, however, would not accept the offer and declined to make the election; he insisted upon the appeal being treated as one against all the three orders. This position is, as we have stated, entirely untenable. The only course open to us, therefore, is to dismiss the appeal with costs. We assess the hearing fee at two gold *mohurs*.

Appeal dismissed.

(6) 6 C. W. 41.
(7) 5 C. W. N. 337.
(8) 29 M. 333; 16 M. L. J. 63.
(9) 33 C. 1101; 10 C. W. N. 934; 4 C. L. J. 149.
(10) 29 A. 730; A. W. N. (1907) 245; 4 A. L. J. 589.
(11) 33 A. 51; 7 A. L. J. 861; 7 Ind Cas. 156.
(12) 4 C. W. N. 446; 26 C. 750.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1283 OF 1909.

May 6, 1911.

Present:—Sir Arthur Reid, KT., Chief Judge, and Mr. Johnstone.

AZIM AND OTHERS—PLAINTIFFS—APPELLANTS

versus

ISMAIL AND ANOTHER—DEFENDANTS—RESPONDENTS.

Custom—Adoption—Arains *of Jullundur City—Step-son, not of adoptor's got, cannot be adopted.*

A sonless *Arain* of Jullundur City cannot adopt a step-son who does not belong to the same *got* as himself.

Second appeal from the order of the Divisional Judge, Shahpur Division, dated 6th October 1909, reversing that of the District Judge, Lyallpur District, dated the 20th March 1909, decreeing plaintiff's claim.

Rai Sahib Pandit *Sheo Narain*, for the Appellants.

Khwaja *Kamal-ud-din*, for the Respondents.

JUDGMENT.—The question for consideration is whether a sonless *Arain* of Jullunder city can adopt his step-son who is not of his *got*.

The lower Appellate Court has held that he can, relying on the fact that no religious principle underlies customary adoptions by a Mahomedan, and two instances. The plaintiffs appeal.

The first instance cited by the lower Appellate Court was a decision by an officiating District Judge, who cited three instances for the conclusion that a gift of ancestral immoveable property to daughters and a step-son was good against collaterals.

The second was a gift to a step-son maintained by a Subordinate Civil Court. Both decisions were in 1898. In the first case the step-son had been brought up as a son, and married by the step-father. The instances cited by the Court were of step-sons inheriting with sons. Some only of the collaterals sued, and the instances cited were very possibly of sons who had developed affection for the step-sons.

In the second instance the burden of establishing a custom entitling the plaintiff collateral to oppose a gift of occupancy rights to a step-s

was laid on the plaintiff following *Didaru* v. *Banna* (1).

The instance of 1874 referred to by the Court of first instance was of a suit by a son against a step-son, on the allegation that his father had given land to the step-son, on condition of the latter paying some debts of the donor which the donee failed to pay. The decision was based on the failure to fulfil the condition.

The *Riwaj-i am* is against the step-son and the plaintiffs are the brother and two nephews of the step-father, the adoptor. In *Ilahia* v. *Qasim* (2), it was held that the defendants, *Arains* of the Jullundur Tahsil, had failed to prove that a sonless proprietor could give ancestral estate to his sister's son of another *got*, in the presence of male agnates.

Rukna v. *Ghaus* (3), was to the same effect, the Tahsil of the Jullundur District in which the property was situate not being specified.

In *Ralla* v. *Budha* (4), a case between *Arains* of the Nawashar Tahsil, Jullunder, it was held that the burden of proving a custom making the adoption of a daughter's son, without the consent of sons of a brother, valid against them was on the party setting up the custom.

It was further held that, when a sonless man in any land-holding group which recognizes a power to adopt asserts that he is competent to adopt a non-agnate in the presence of near agnates without their consent, the presumption at the outset is against the power.

Sita Ram v. *Raja Ram*(5), *Hayat Mohammed* v. *Alla Bukhsh* (6) and *Chajju* v. *Dalipa* (7) cited for the respondents do not help them, and they obtain no assistance from the *dicta* of *Ralla* v. *Budha* (4) cited above.

The respondents have failed to discharge the burden of establishing the custom set up by them, and the appellants' suit must be decreed.

We decree the appeal and restore the decree of the Court of first instance, with costs of all Courts. Judgment pronounced.

Appeal allowed.

(1) 31 P. R. 1896.
(2) 24 P. R. 1905; 42 P. L. R. 1905.
(3) 55 P. R. 1905; 122 P. L. R. 1905.
(4) 50 P. R. 1893 (F. B.)
(5) 12 P. R. 1892.
(6) 19 P. R. 1903; 25 P. L. R. 1903.
(7) 61 P. R. 1906, 124 P. L. R. 1906.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2624 OF 1907.

December 21, 1910.

Present:—Mr. Justice Mookerjee and Mr. Justice Coxe.

KHODA BAKSH—DEFENDANT—APPELLANT

versus

SADER PRAMANIK—PLAINTIFF—RESPONDENT.

Landlord and tenant—Non-transferable occupancy-holding—Sale in execution—Decree for share of rent by co-sharer landlord—Sale, whether irregular or null—Legality of transaction—Law as understood when transaction took place.

A non-transferable occupancy-holding cannot be sold at the instance of a landlord who has obtained a decree for rent for his share only.

Bhiram Ali Sheikh Sikdar v. *Gopi Kanth Shaha*, 24 C. 355; 1 C. W. N. 396 and *Sadagar Sircar* v. *Krishna Chandra Nath*, 26 C. 937; 3 C. W. N. 742, referred to.

But if a sale in execution of a decree by one of several joint landlords for his share of the rent takes place in fact, it is not necessarily a nullity but is merely irregular and till the sale has been successfully impeached by appropriate proceedings in execution, it must be treated as a valid sale and cannot be set aside by a separate suit.

Durga Charan Mandal v. *Kali Prosama Sarkar*, 26 C. 727; 3 C. W. N. 586 *Sheikh Murullah* v. *Sheikh Burullah*, 9 C. W. N. 972 and *Ashutosh Sikdar* v. *Behari Lal Kirtama*, 35 C. 61; 11 C. W. N. 1011; 6 C L. J. 320, referred to.

Appeal from the decree of the Sub-Judge of Dacca, dated June 29th, 1907, affirming that of the Munsif of Manikganj, dated May 2nd, 1906.

Babus *Tark Chandra Chakravarti* and *Ramani Mohan Chatterjee*, for the Appellant.

Babu *Mukund Nath Roy*, for the Respondent.

JUDGMENT.

MOOKERJEE, J.—This is an appeal on behalf of the defendants in an action commenced by the plaintiff-respondent for recovery of possession of land on establishment of title. The plaintiff claims as the tenant of an occupancy-holding, which had been purchased so far back as the 9th September 1893, by the decree-holder himself in execution of a decree for rent obtained on the 10th April 1891, by one of several joint landlords in respect of the share of rent separately payable to him. The sale was confirmed on 13th November 1893, and possession delivered to the purchaser on the 9th March 1895. The plaintiff commenced this action on the 10th July 1905, to eject the defendants who had been inducted into the land by

the landlord purchaser at the execution-sale. The defendants resisted the claim on the ground that the result of the execution-sale was to destroy the right of the plaintiff and that consequently at the date of the suit he had no subsisting title to enforce. In reply, the plaintiff contended that the occupancy-holding claimed by him was non-transferable and that consequently the sale in execution of the decree obtained by one of several joint landlords could not have passed any title to the auction-purchaser.

The Court of first instance decreed the suit on the ground that as the holding was non-transferable, the title of the plaintiff had not been effected by the execution sale held at the instance of one of several joint landlords whose decree could operate only as a money-decree. This decision has been affirmed on appeal by the Subordinate Judge.

The defendants have now appealed to this Court and on their behalf the decision of the Subordinate Judge has been assailed on two grounds, namely, *first*, that the validity of the sale ought to be tested with reference to the law as it was understood at the time when the execution-sale took place, and *secondly*, that if the sale be deemed invaild, it could not bo treated as a nullity, and that it must be set aside under section 244, Civil Procedure Code, before the plaintiffs could claim to recover possession from the defendants. In my opinion, the first of these contentions is untenable and must be overruled but the second is well founded and must prevail.

In so far as the first of these contentions is concerned, reliance has been placed by the learned Vakil for the appellant upon the decision of the Judicial Committee in *Abdul Aziz* v. *Appayasami* (1). This case, in my opinion, is clearly distinguishable. There the Court was called upon to interpret the effect of a judicial sale, to determine whether the effect had been to transfer the entire interest in the joint family property or merely the life-interest of the temporary holder. The question was obviously one of intention; the test to be applied was to determine what the decree-holder had intended to bring to sale and what the auction-purchaser had understood that he purchased. Under these circumstances, their Lordships of the Judicial Committee ruled that the Court must be deemed to have intended to sell, and the purchaser to buy, the right, title and interest of the judgment-debtor as then understood, namely, as one which ceased at the death of the debtor, and that this was so notwithstanding the fact that the interpretation of the law which then prevailed, had been subsequently overruled. This case, therefore, is not an authority for the broad proposition formulated by the learned Vakil for the appellants that the legality of a transaction must be determined in all cases with reference to the law as it is understood at the time when the transaction takes place. In fact, the decision of a Full Bench of this Court in *Balaram Gantia* v. *Mangta Das* (2) and the subsequent decision of the Judicial Committee in *Vasudeva Mudaliar* v. *Srinivasa Pillai* (3) show conclusively that such a position cannot be maintained. Even if it is conceded, however, that the legality of the sale in the present instance ought to be tested with reference to the law as it was understood at the time when the sale took place in 1893, it is obvious that there is no foundation for the suggestion made by the learned Vakil for the appellants that the law as understood at that time was different from what is now accepted as the law. It is obvious from the decision in *Beni Madhub Roy* v. *Jaod Ali Sircar* (4) that as early as 1890, it was well-understood that the effect of a decree obtained by one of several joint landlords for the share of rent separately payable to him was different from the effect of decree obtained by the entire bcdy cf landlords for the whole rent payable by the tenants. It is also clear from the decision in *Bhiram Ali Shaik Sikdar* v. *Gopi Kanth Shaha* (5), which was based upon the decision of the Full Bench in *Nurendro Narain Roy* v. *Ishan Chunder Sen* (6), that as early as 1896 it was accepted as settled law that a holding which was not transferable by custom or usage could not be validly sold in execution of a money-decree. It cannot consequently be suggested that when it was affirmed by this Court in 1899 in the case of *Sadagar Sircar* v. *Krishna Chandra Nath* (7)

(1) 31 I. A. 1; 27 M. 131.

(2) 34 C. 931; 6 C. L. J. 237; 11 C. W. N. 959.

(3) 30 M. 426; 17 M. L. J. 444; 11 C. W. N. 1005; 4 A. L. J. 625; 6 C. L. J. 379; 2 M. L T 333; 9 Bom. L. R. 1104.

(4) 17 C. 390.

(5) 24 C. 355; 1 C. W. N. 396.

(6) 22 W. R. 22.

(7) 26 C. 937; 3 C. W. N. 742.

that a non-transferable occupancy-holding could not be sold at the instance of a landlord who had obtained a decree for rent for his share only, any new principle of law was enunciated. The decision in *Sadagar Sircar* v. *Krishna Chandra Nath* (7) is, in fact, a logical sequence of the earlier decisions to which reference has been made. [*Afraz Molla* v. *Kulsumunnessa Bibee* (8)]. It cannot, therefore, be seriously suggested that in 1893, when the sale took place, the law was understood differently from what is now accepted as the law. The first contention of the appellant consequently fails.

In so far as the second contention advanced on behalf of the appellant is concerned, it has been argued upon the authority of the decision in *Durga Charan Mandal* v. *Kali Prosanna Sarkar* (9) and *Sheikh Murullah* v. *Sheikh Burullah* (10), that a sale in execution of a decree by one of several joint landlords for his share of the rent is not necessarily a nullity. Those decisions show that the sale of a non-transferable holding in execution of such a decree is a voidable sale which may be annulled if proceedings are taken in that behalf under section 244, Civil Procedure Code; in other words, till the sale has been successfully impeached by appropriate proceedings, it must be treated as a valid sale. This view is also supported by the decision of a Full Bench of this Court in *Ashutosh Sikdar* v. *Behari Lal Kirtania* (11). There the question was raised whether an execution sale held in contravention of the provisions of section 99 of the Transfer of Property Act was a nullity. It was argued that a sale in contravention of an express statutory provision must be treated as *ipso facto* void, and that it was superfluous to take any proceedings to cancel it; in other words, that the judgment-debtor was entitled to ignore the sale as if it had never taken place. This contention was overruled by the Full Bench, and it was laid down that a sale so held was merely voidable and could remain in full force till avoided by appropriate proceedings. Proceedings for reversal of the sale have to be taken, in any event, before the confirmation, if the judgment-bebtor is aware that the sale has taken place; and objection must be taken before the sale itself if the judgment-debtor is aware of the attachment and the issue of sale proclamation, [*Majid Hossein* v. *Raghubur Chowdhury* (12)]. If the judgment-debtor is not aware of the sale before it has been confirmed, he may apply under section 244, Civil Procedure Code, as soon as he is apprised of the sale, and may, if a proper case is made out, avail himself of the benefit of section 18 of the Limitation Act. But, it has been argued by the learned Vakil for the respondent, that the decision in *Peary Mohan Mukerjee* v. *Jote Kumar Mookerjee* (13), shows that a sale of a non-transferable holding in execution of a money-decree is a nullity. An examination of the judgment in the case mentioned, however, shows that it cannot be treated as an authority for any such comprehensive proposition. There the validity of the execution sale was challenged in the course of proceedings under section 244, Civil Procedure Code. Although, therefore, the learned Judges observed that the sale of a non-transferable holding did not pass any title to the purchaser, they could not be held to have decided that the sale was a nullity and needed not to be impeached by appropriate proceedings under section 244. It is needless, for our present purposes, to consider what the position would be if the judgment-debtor, in spite of the sale, continues in possession and is sued in ejectment by the auction purchaser. It is sufficient to observe that there is divergence of judicial opinion upon this point. The cases of *Bhiram Ali* v. *Gopi Kant Shaha* (5), *Chandramoni* v. *Halimunnessa* (14) and *Durga Charan* v. *Karanmat Khan* (15) affirm the proposition that an objection to the validity of an execution sale may be raised by way of defence in a regular suit, although the objection is one within the scope of section 244, Civil Procedure Code, which accords with the view taken in *Thathu Naick* v. *Kondu Reddi* (16) and *Venkataramana Chariar* v. *Meenatchisundaramaiyer* (17). On the other hand the cases of *Dwarka Nath Pal* v. *Tarini Sankar Roy* (18); *Durga Charan* v. *Kali Prasanna* (9) and *Murulla* v. *Burulla* (10) support the view that the validity of the sale cannot be im-

(8) 4 C. L. J. 68; 10 C. W. N. 176.
(9) 26 C. 727; 3 C. W. N. 586.
(10) 9 C. W. N. 972.
(11) 35 C. 61; 11 C. W. N. 1011; 6 C. L. J. 320.
(12) 27 C 187.
(13) 11 C. W. N. 83.
(14) 9 C. L. J. 464; 4 Ind. Cas. 68.
(15) 7 C. W. N. 607.
(16) 32 M. 242; 5 M. L. T. 248; 1 Ind. Cas. 221.
(17) 19 M. L. J. 1; 4 M. L. T. 285; 1 Ind. Cas. 931.
(18) 34 C. 199; 11 C. W. N. 513; 5 C. L. J. 294.

peached collaterally, which accords with the principle recognised in *Nemagauda* v. *Paresha* (19), *Surnamoyi Dasi* v. *Ashutosh Goswami* (20) and *Bastiram* v. *Futtu* (21). But whatever controversy there may be as to the position of the judgment-debtor, when he happens to be the defendant, there is no room for reasonable doubt that when he sues the auction-purchaser in ejectment he cannot ignore the sale as a nullity. It is clear, therefore, that the plaintiff in the case before us, is not entitled to recover possession before he has got the sale annulled by a proceeding under section 244, Civil Procedure Code.

It has, however, been mentioned to us that the Court in which the present suit was commenced was the Court in which the execution proceedings took place, and that consequently the plaint in this case might be treated as an application under section 244, Civil Procedure Code, on the authority of the decision in *Aziruddin Hossein* v. *Ramanugra Roy* (22), the principle whereof has now received legislative recognition in section 47 of the Code of 1908. Effect might possibly have been given to this contention and the case remanded for determination of the precise point of time when the plaintiff first became aware of the sale, had it not been that such a course is bound to prove infructuous for an obvious reason. It is clear that, if the plaint is treated as an application under section 244 and an attempt is now made to have the sale annulled, the proceeding must take place in the presence of the landlord decree-holder. The landlord, however, is not a party to the suit, and if he is now sought to be added as a party, the proceeding, would be successfully met by the plea of limitation; for, inasmuch as these proceedings were commenced so far back as the 10th July 1905, if the landlord is now brought on the record, he would be entitled to resist the application on the ground that, in so far as he was concerned, the proceeding was commenced on the date when he was made a party. In this view, the proceeding would be plainly barred by limitation. No advantage, therefore, can possibly accrue to the plaintiff by a remand.

(19) 22 B 640.
(20) 27 C. 714.
(21) 8 A. 146.
(22) 14 C. 605.

The result, therefore, is that this appeal is allowed, the decree of the Court below set aside and the suit dismissed.

As, however, the objection upon which the suit has failed was not formulated in the Court below precisely in the form in which it has been presented here, each party will bear his own costs throughout the litigation.

COXE, J.—On the first point I agree. On the second I think that we are bound by the decisions in *Sheikh Murulla* v. *Sheikh Burulla* (10); *Durga Charan Mandul* v. *Kali Prasanna Sarkar* (9), *Majid Hussain* v. *Raghubar* (12), and even in *Peary Mohan Mukerjee* v. *Jote Kumar Mukerjee* (13), cited by my learned brother, to hold that an objection by an occupancy *ryot* that his holding was not saleable in execution of a money-decree, came within the scope of section 244 of the Civil Procedure Code, 1882, and could not, therefore, be decided by a separate suit, in which the raising of the objection was by the plaintiff. Although the Munsif has found that the sale was obtained without the knowledge of the plaintiff, he does not find that either the decree or the sale was obtained by fraud. In these circumstances, I agree that the suit must fail.

Appeal allowed.

(s. c. 9 M. L. T. 354.)

MADRAS HIGH COURT.

FIRST CIVIL APPEAL NO. 30 OF 1908.

January 3, 1911.

Present—Sir Ralph Benson, Judge, and Mr. Justice Munro.

EALAMANCHILI CHINNA BASAVAYYA—PLAINTIFF - APPELLANT

versus

EALAMANCHILI BAPAMMAD AND ANOTHER - DEFENDANTS—RESPONDENTS.

Will—Execution—Prior Will—Genuineness.

On 'st August 1904, the testator executed a Will and two days later another Will was set up as having been excuted by him under circumstances which made it highly improbable that he had executed it:

Held, that the latter Will was not genuine.

Appeal against the decree of the Court of the District Judge of Kistna, in O. S. No. 66 of 1905, dated the 18th day of September 1909.

JUDGMENT.—There is no doubt a mass of oral evidence in support of the suit

Will, but there is also oral evidence for the defence to the effect that no Will was executed at the time the suit Will is said to have been executed and we think the probabilities favour the truth of the defence evidence. The suit Will is dated the 3rd August 1904. On the 1st August, the testator had executed a Will more favourable to his widow and less favourable to the plaintiff and, in our opinion, no satisfactory explanation has been given why the testator so soon changed his mind. Again, it is extremely curious that none of the persons who had to do with the first Will took any part in connection with the second. It is only natural that they should again have been invited and it is the plaintiff's case that they were invited. The plaintiff's further statement that they one and all refused to have anything to do with a second Will is difficult to believe, except on the supposition that they thought the Will was forgery. In the first Will the testator begins by saying that he is about 80 years old. In the suit Will, he gives his age as about 70. That the testator should have made such different statements regarding his age in two Wills executed at an interval of two days is improbable, and the difference points to his having had nothing to do with the suit Will. A copy of the first Will was at once sent to the Collector and clearly the testator thought it important that this should be done. No copy of the suit Will was, however, sent and nothing in writing regarding it appears till Exhibit B which is dated the 29th September 1904. Again, it is not explained why the testator did not destroy the first Will. One witness says the testator said his wife had the Will. But there is no evidence that the testator made any attempt to get it, and plaintiff's witness No. 2 states that the testator did not ask for it and that no inquiries were made about it. Agreeing with the District Judge that the suit Will is not genuine, we dismiss the appeal with costs.

Appeal dismissed.

(s. c. 9 M. L. T. 356.)

MADRAS HIGH COTRT.

SECOND CIVIL APPEAL No. 1945 OF 1908.

February 23, 1911.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Ayling.

KUPPIER *alias* VENKATA SUBBIER AND OTHERS—DEFENDANTS—APPELLANTS

versus

KOTA CHINNARAMIER AND OTHERS—PLAINTIFF AND DEFENDANTS—RESPONDENTS.

Hindu Law—Alienation—Widow—Consent—Next reversioner at date of alienation—Next reversioner at date of widow's death—Impeaching alienation—Estoppel.

An alienation by a widow with the consent of the next reversioner at the time the alienation was made, cannot be questioned by the person who happens to be the next reversioner at the time of the widow's death.

Bajrangi Singh v. *Manokarnika Baksh Singh*, 30 A. 1; 3 M. L. T. 1; 12 C. W. N. 74; 9 Bom. L. R. 1348; 6 C. L. J. 766; 5 A. L. J. 1; *Rangappa Naik* v. *Kamti Naik*, 31 M. 366; 18 M. L. J. 309; 3 M. L. T. 355, followed.

The consent of the next reversioner cannot be treated merely as evidence of legal necessity.

Pilu Appa v. *Babaji Naru*, 34 B. 165; 11 Bom. L. R. 1291; 4 Ind. Cas. 584, dissented from.

Second appeal against the decree of the District Court of Chingleput in Appeal Suit No. 404 of 1907, presented against the decree of the Court of the District Munsif of Trivellore in Original Suit No. 576 of 1906.

JUDGMENT.—One of the issues in this case was whether the plaintiff was estopped from questioning the alienation in favour of the defendants under Exhibit I. The District Munsif found this issue in favour of the plaintiff but the District Judge's finding on the point cannot be said to be satisfactory. But, before settling the points on which we think we ought to have a clearer finding, it is necessary that we should state the effect of the rulings as we understand them, as to what would constitute estoppel under circumstances like those of the present case preventing the reversioner claming the estate on the death of a Hindu widow from questioning an alienation made by the widow with the consent of the person who was the next reversioner at the time the consent was given. The law, as laid down by the Judicial Committee in *Bajrangi Singh* v. *Manokarnika Baksh Sirgh* (1), is that if the next reversioner either at the time of the alienation or after

(1) 30 A. 1 (P. C.); 3 M. L. T. 1; 12 C. W. N. 74; 9 Bom. L. R. 1348; 6 C. L. J. 766; 5 A. L. J. 1.

such alienation, consents to or ratifies the transaction, such transaction cannot be re-opened by the person who happens to be the nearest reversioner at the time of the widow's death. The consent of the person entitled to the reversion would by itself validate the alienation apart from any question of legal necessity. If the person who was not the next reversioner at the time of the alienation would be estopped by the conduct of the next reversioner, there can be no question but that the latter would be estopped by his own conduct. So far the law is clear and has not been doubted, at least in this Presidency; see *Rangappa Naick* v. *Kamti Naick* (2). But it is argued on behalf of the plaintiff (the respondent in this appeal) that the ruling of the Privy Council must be understood as being applicable only to cases in which the alienation by a widow was made for consideration, though not for legal necessity. There seems to us to be no warrant for this argument. No doubt the Bombay Courts interpret the decision of the Privy Council to mean that the consent of the next reversioner should be treated only as evidence of legal necessity. See *Pilu Appa* v. *Babaji Naru* (3). But this, as we have said, is not the view of the law which has found favour in this Presidency.

It is next argued on behalf of the respondents that, according to the law as laid down by the learned Chief Justice and Sankaran Nrir, J., in *Rangappa Naik* v. *Kamti Naick* (2), and again by the learned Chief Justice and Miller, J., in *Muthu Veera Mudaliar* v. *Vythilinga Mudaliar* (4), an alienation by a widow of a portion only of her husband's estate without justifying necessity would not be validated by consent of the next reversioner. On the other hand, Wallis, J., in the first case propounded a different view. We propose, therefore, not to decide this question of law at present as we have no finding of the lower Appellate Court on the point.

As regards the finding of the learned District Judge on the question of consent or ratification, he says there is no evidence of consent on the part of the plaintiff. In this he is wrong; for instance, there are the statements in Exhibit V that the plaintiff had been given some land by the widow so that he might perform her funeral obsequies, the recital in that document that the widow has already sold the lands comprised in *pattah* 13 to the father of the first defendant and the plaintiff exchanged some of his own lands with land sold to the defendant in addition to the circumstances alluded to by the District Munsif in his judgment. It is for the District Judge to say whether he believes the evidence relied on to prove consent on the part of the plaintiff and what weight he would attach to the evidence and the circumstances we have just mentioned. All that we are pointing out to the learned Judge is that there is evidence from which he might infer, if he so chooses, consent on the part of the plaintiff. We must ask the District Judge to return a revised finding on the question whether the plaintiff gave his consent to and ratified the sale to the defendants and if so, when. He will also find whether at the time of the consent or ratification, the widow had divested herself of all or practically all the estate. The finding should be submitted within six weeks and seven days will be allowed for filing objections.

(2) 31 M. 366; 18 M. L. J. 309; 3 M. L. T. 355.
(3) 34 B. 105; 4 Ind. Cas. 584; 11 Bom. L. R. 1291.
(4) 36 M. 206; 3 M. L. T. 122; 19 M. L. J. 88; 3 Ind. Cas. 476.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 453 OF 1910.
May 2, 1911.
Present:—Mr. Justice Banerji and
Mr. Justice Griffin.
MAGGAN LAL AND OTHERS—PLAINTIFFS—APPELLANTS
versus
ANAND SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Two simultaneous mortgages—Suit on one of them—Mortgagee of the other not made party, effect of—Redemption.

Two mortgages of Rs. 50 and Rs. 96 respectively were executed on the same day in respect of the same property in favour of the ancestors of the plaintiffs and the defendant who were members of a joint Hindu family. Subsequently, at a partition, the bond of Rs. 50 was allotted to the defendant and that of Rs. 96 was allotted to the plaintiffs. The defendant

brought a suit for sale of the property on the basis of the mortgage bond allotted to him. He did not make plaintiffs a party to the suit. In execution of the decree obtained in the suit defendant purchased a portion of the mortgaged property himself: *Held*, in a subsequent suit brought by the plaintiffs on the basis of the mortgage bond of Rs. 96, that the whole of the mortgaged property was liable to be sold and that the defendant had only a right to redeem.

Second appeal from the decision of the Subordinate Judge of Shahjahanpur, dated 21st of February, 1910.

Mr. *Govind Prashad* (with him Mr. *Benode Behari*), for the Appellants.

Dr. *Satish Chandra Banerji* (with him Messrs *Gokul Proshad* and *Mahammad Ishaq*), for the Respondents.

JUDGMENT.—This and the connected Appeal No. 454 of 1910 arise out of suit brought by the plaintiffs-appellants for sale upon a mortgage dated 25th July 1878 by which a principal sum of Rs 96 was secured. It appears that on the date above mentioned, two mortgage deeds were executed by the defendant Anand Singh in favour of Hari Ram and Sham Lal, the predecessors-in title of the plaintiffs and of the defendant Misri Lal. One of the mortgages was for Rs. 50 and the other was for Rs. 96, and in both the mortgages the rights and interest of the mortgagor in the same property were hypothecated. It has been found by the lower Appellate Court that the mortgagor owned 13 *biswansis* and odd in the village Bitroi though his name was recorded only in regard to a portion of the said share. The mortgagees were members of a joint family. A partition subsequently took place, under which the bond for Rs. 50 was allotted to the share of Misri Lal. and the bond now in suit was allotted to the plaintiffs. Misri Lal brought a suit on his bond for Rs. 50 and got a decree for sale. The plaintiffs were not joined as parties to that suit. He caused a part of the mortgaged property to be sold, the extent of which was 5 *biswansis* and odd and himself purchased it. In the present suit the plaintiffs offered to redeem Misri Lal on the ground that they had not been joined as defendants to Misri Lal's suit and prayed that the whole of the mortgaged property, after excluding 2 *biswansis* and odd, which was subject to a prior mortgage, might be sold for the realization of the amounts of both the mortgages. They further prayed that if they did not redeem the mortgage held by Misri Lal, the unsold portion of the mortgaged property might be sold for the realization of the amount of their mortgage. It was alleged on behalf of Misri Lal that at the time when the two bonds were divided it was agreed between the parties that each of them would be entitled to sell only half of the mortgaged property for the realization of the amount of the bond which fell to his share. This allegation was found by the Court of first instance not to have been proved, and the correctness of that finding was not challenged in the appeal preferred by Misri Lal. Both parties appealed. The lower Appellate Court, whilst finding that neither mortgage had priority over the other, and that both mortgages were executed in favour of the members of the same family and in fact represented one transaction, held that as part of the property had been sold for realization of a part of the debt, it could not be sold for recovery of the remainder of the debt, and accordingly made a decree in the plaintiffs' favour for sale of the unsold portion of the mortgaged property. The plaintiffs are dissatisfied with this decree, and have accordingly appealed. We think that the conclusion at which the lower Appellate Court arrived is not correct. It is true that, according to its finding, the two mortgages were parts of one and the same transaction, but the debt was subsequently apportioned between the parties who were originally mortgagees and the bond for Rs. 50 was obtained by Misri Lal, and the other bond for Rs 96 by the plaintiffs. As the plaintiffs were no parties to the suit brought by Misri Lal, the sale of a part of the mortgaged property for the realization of the amount payable to Misri Lal cannot prejudice the rights of the plaintiffs to proceed against the whole of the property which is hypothecated for the debt due to them. Therefore, the plaintiffs are entitled to sell the whole of the 10 *biswansis* odd which they seek to sell. Misri Lal is the purchaser of a part of the property, and as such would have the right to discharge the amount of the plaintiffs' mortgage and have the property which he himself has purchased. If, however, he does not do so, the equities which subsist between the parties would be fully met if it is directed in the decree that in the event of the plaintiffs' mortgage not being discharged by the defendants, the plaintiffs would be entitled to sell first of all the

portion of the property which has not been purchased by Misri Lal, and if the proceeds of that sale prove insufficient to satisfy the mortgage, then to sell the portion of the property purchased by Misri Lal for recovery of the balance. To this course Mr. Gobind Prasad on behalf of the plaintiffs agrees. We accordingly allow the appeal and vary the decree of the Court below by directing that the defendants, Anand Singh, Parshadi Lal, and Misri Lal, do pay to the plaintiffs the amount found to be due to them by the Court below within six months from this date, and that in the event of such payment not being made, 5 *biswansis*, 6 *kachwansis* 7½ *tanwansis zemindari* share not purchased by Misri Lal be first sold for the realization of the said amount, and if the proceeds of the sale prove insufficient for the discharge of the amount of the decree, the share purchased by Misri Lal be sold by auction. The plaintiffs will have their costs in all Courts including in this Court-fees on the higher scale.

Appeal allowed.

(s. c. 9 M. L. T. 423; 21 M. L. J. 550.)

MADRAS HIGH COURT.

FIRST CIVIL APPEALS NOS. 76 AND 102 OF 1908.

February 6, 1911.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Sundara Aiyar.

IN APPEAL NO. 76.

KURRIYIL PARKUM PUTHA KARGI KATTAYI—DEFENDANT—APPELLANT

IN APPEAL NO. 102.

KURUNGOT THATATHIL THRI-HAIKAL NALLUGOT PEYYAPRATH KUNHI PARVATHI KITTILAMMAH—DEFENDANT—APPELLIANT

versus

VARANAKAT ILLATH GANAPATHI NAMBODRI AND OTHERS—PLAINTIFFS AND DEFENDANTS—RESPONDENTS.

Title for land—Title not proved—Burden of proof—Admission—Effect of attestation—Claim petition—Order thereon, effect of—Judgment-debtor not a necessary party—Civil Procedure Code (Act VIII of 1859), s. 246, scope of.

A. sued *B.* and others for recovery of two plots of land on the ground that the lands were held under a demise. *B.* pleaded that the lands were held under *Kanom*:

Held, that the onus of proving the title by demise was on *A.* who asserted it and an attestation by *B.* of an instrument affecting the plots did not amount to an admission of *A.*'s title by *B.*

A judgment-debtor is not necessarily a party to the proceedings under section 246 of the Code of 1859; it must be shown that the judgment-debtor was served with notice of the claim in order that he may be held bound by the order of the Court.

Moidin Kutti v. *Kunhi Kutti Ali*, 25 M. 721; *Krishnasami Naidu* v. *Somasundaram Chettiar*, 30 M. 335; 17 M. L. J. 95; 2 M. L. T. 116 and *Vadapalli Narasimhan* v. *Dronam Raju Seetharama Murthi*, 31 M. 163; 3 M. L. T. 256; 18 M. L. J. 26, referred to.

Under section 246, the right of a claimant to some interest in property in the possession of the judgment-debtor could not be investigated nor could the Court raise an attachment where the judgment-debtor had a possessory interest in the property.

Consequently, where the claimant's right to an equity of redemption was allowed but the judgment-debtor's *otti* rights were directed to be sold under section 246: *Held*, that the order was not one which the judgment-debtor was bound to impeach by a suit within one year or 12 years after it was passed.

Appeals against the decree of the District Court of North Malabar in Original Suit No. 14 of 1906, dated the 6th January 1908.

Mr. *Ramachandra Aiyar*, for the Appellant.

Mr. *Rosario*, for the Respondents.

JUDGMENT.

APPEAL NO. 76 OF 1908.

This is the ninth defendant's appeal against the judgment in the same suit, Original Suit No. 14 of 1906. The appeal relates to two plots B and D in the Commissioner's plan Exhibit O. The plaint alleges that the ninth defendant, the party in possession, held the lands under the second and third defendants, the demisees under Exhibit A. There is no allegation, none specific, as to how and when these plots passed into the possession of the ninth defendant. The ninth defendant in his written statement (paragraph 3) denies the plaintiff's title and asserts that prior to 1882 the plots in question were held by various persons under one Korambil *tarwad* to which he says the *jenmam* title belonged, that in that year he obtained a *Kanom* (Exhibit XII in the case) from that *tarwad* and subsequently purchased its *jenmam* right under Exhibit XV in 1888. From the evidence of plaintiff's only witness in the case, it would appear that the plaintiff's case is that the ninth defendant had no possession of these plots prior to the demise Exhibit IV (*a*) in 1887, executed by Kunhi Lakshmi Amma, the demisee under Exhibit A to the ninth defendant's sister and brother-in law. This demise admittedly included the disputed plots along with other lands. The plaintiff says that the ninth defendant obtained possession of the disputed plots only after the death

of his sister, Vachi, one of the demisees under Exhibit IV (*d*); the plaintiff thus attempts to prove that the ninth defendant obtained possession through the demisees under Exhibit IV (*d*). There is no oral evidence on plaintiff's part to show who was in possession of these plots before the date of Exhibit IV (*d*); it is contended for the respondents that they were comprised in Exhibit N, the judgment in Original Suit No. 634 of 1856 and in Exhibit J, a *Kanom Kaichit*, executed by one Raman to Kunhi Lakshmi in the year 1870. The similarity of the description of item No. 3 in Exhibit N and the property described in Exhibit J to the description of item No. 1 in Exhibit IV (*d*) lends support to this contention. There is no evidence, however, to prove whether Raman ever got possession of these plots or if he did, how long he remained in possession. The ninth defendant, on the other hand, has produced Exhibits VI and XI prior to Exhibits XII and XV, already referred to, to prove that the lands were held by or under the Korambil *tarwad* from and prior to 1863 and his case is supported by his second and third witnesses of whom the second witness is the *jenmi*. The third witness, a neighbour, speaks to the 9th defendant's possession for a period of twenty-five years. The ninth defendant swears to his possession of the plots as the fourth defence witness. The evidence of possession on the ninth defendant's side is far superior to the meagre evidence on plaintiff's side. The District Judge observes that Exhibit VI, supposing it to refer to the plots in question, is hardly an admission for the purposes of this case as the suit to which it refers was dismissed, but it records an admission of Kunhi Raman Nair of the family of the demisees under Exhibit A that the plots belonged to the Korambil *tarwad*. The lower Court does not really record any finding on the question of possession and its decision is based on the finding that the ninth defendant failed to prove his title.

With respect to the question of title, two circumstances seem mainly to have influenced the lower Court. The first is that plot D as shown in the plan Exhibit O is not continuous with plot B but in the ninth defendant's title-deeds, the boundaries of both plots are given together as two *thaks*, thus showing in the view of the lower Court that the two *thaks* adjoin each other. But, even if they adjoin each other, the southern boundary of plot B should have been mentioned as DI, and the northern boundary of D as B. We think the lower Court has attached too much importance to this point. The other circumstances relied on is, that Exhibit IV (*d*) which admittedly includes these plots was attested by the ninth defendant who now claims under the Korambil *tarwad*. Assuming that he may be presumed to have been aware of the contents of Exhibit IV (*d*), it is possible that it was thought desirable to strengthen the title already obtained under Exhibits XII and XV by obtaining a demise in the name of the ninth defendant's sister from the rival *jenmi*. The plaintiffs are unable to point to any other plots as those really obtained by the ninth defendant under Exhibits XII and XV. On the whole, we are inclined to think that the lower Court's finding on the question of the ninth defendant's title is incorrect, but, however, that may stand, the *onus* is on the plaintiff to establish his title and that the ninth defendant came into possession under his demisees. This, in our opinion, he has failed to do. The decision of the lower Court with respect to plots B and D is reversed and the decree must be modified accordingly. The plaintiff must pay the ninth defendant's costs on these items in this and in the lower Court.

APPEAL No. 102 OF 1908.

The third defendant has preferred this appeal against the decree of the District Court of North Malabar decreeing redemption of a *Kanom* demise of the year 1870 made in favour of one Kunhi Lakshmi Kittilamma, the mother of the second and third defendants, by Eswaran, the twelfth defendant's predecessor-in-title. The first defendant is the brother of Kunhi Lakshmi. Exhibit A is the demise sued on and it is executed by Iswara Vadyan as the *jenmi* of the properties. It does not appear that there was any counterpart or *Kaichit* executed by the demisee, but admittedly the demise was accepted by Kunhi Lakshmi and possession was held under it, at any rate, up to the year 1878. The twelfth defendant assigned his rights to the plaintiff in 1899 (Exhibit C). The property originally belonged to the Kurungot Thadam *tarwad* of which the first defendants

is the present manager. It is the second and third defendants' case that it is held by them as the heirs of Kunhi Lakshmi, who would seem to have been in possession of it on Putravakasam tenure. The properties, therefore, seem to belong to the children of Kunhi Lakshmi, who are entitled to hold them as *Tavali* property with the incidents of such property under the *Marumakkathayam* law. There seems to be a dispute between the second and third defendants with respect to the question whether the second defendant has any right to the property. But this dispute is immaterial for the disposal of this case. The plaintiff alleges *inter alia* that the property is held under the demisee by the second and third defendants and defendants Nos. 4 to 10 under them. The first defendant did not put in an appearance. The second and third defendants while admitting the demise, deny the plaintiff's right to redeem. They contend that the plaintiff had no *jenmam* right over the property on the date of the demise but only a *kanom* interest for an amount much smaller than the amouut acknowledged by Exhibit A to have been received by Iswara Vadyan from Kunhi Lakshmi, that the *jenmam* right vested in the Kurungot *tarwad* till 1878 when it was sold in Court auction in execution of a decree against the *tarwad* and purchased on behalf of Kunhi Lakshmi by a *benamidar* (Exhibit II) who executed a conveyance later on in the same year to Kunhi Lakshmi (Exhibit II) and that Iswara Vadyan's right to redeem was terminated in law on the date of the said auction-sale as Kunhi Lakshmi then became the owner of the equity of redemption and at the same time held a submortgage from Iswara Vadyan for a much larger amount than that due to him on his own mortgage. They further alleged that in 1872, when the property was attached in execution of a decree against Iswara Vadyan as his *jenmam*, the Karnavan of Kurungot *tarwad* put in a claim petition under section 246 of Act VIII of 1859 asserting that the *jenmam* right belonged to his *tarwad* and that Iswara Vadyan had only a *kanom* right. The Principal Sadder Amin's Court at Tellicherry upheld the claim and released the *jenm* right from attachment and held that Iswara Vadyan had only a *otti* right which was directed to be sold and that no suit having been instituted by Iswara Vadyan within one year after the order on the claim petition, Exhibit I, dated 23rd March 1872, the plaintiff as the assignee of Iswara Vadyan's right cannot claim to redeem the demise as *jenmi*.

The principal questions raised in the lower Court were those covered by issues Nos. 2, 4, 5, 6, 7 and 8. Of these, the second issue refers to the plaintiff's title to redeem either on *jenmam* or any other title that he may have. The sixth and seventh issues raised the question whether in consequence of the order Exhibit I on the claim petition of 1872 referred to above, the plaintiff is debarred from setting up his *jenm* title assuming that he was the *jenmi* before. The lower Court held that the order Exhibit I not having been questioned by a regular suit within one year after it was passed, the plaintiff cannot now claim to redeem as *jenmi*. But it held that the plaintiff has an irredeemable *otti* right and is entitled as such to maintain this suit for redemption. The learned Vakil for the appellant contends that the view of the lower Court that the plaintiff is entitled to an irredeemable mortgage cannot be sustained, and the question of the nature of the plaintiff's right over the properties, assuming that he cannot set up a *jenmam* claim, was argued before us at some length. Mr. Rosario for the respondents attacks the District Judge's finding with respect to the conclusiveness of the order, Exhibit I and contends that the plaintiff is not estopped from relying on his *jenmam* right. He also urges that the demisee under Exhibit A, Kunhi Lakshmi and her heirs, must be held, by having accepted the demise and held possession under it, to be estopped from disputing the plaintiff's *jenmam* title.

We propose first to deal with the former of these contentions. We have come to the conclusion that the lower Court's view on the contention cannot be maintained. The claim petition was put in and the order Exhibit I passed under section 246 of Act VIII of 1859. A decree was obtained by a third party against Iswara Vadyan and the property was attached for the judgment-debt as Iswara Vadyan's *jenm*. It is not quite clear whether notice of the petition was issued to Iswara Vadyan, the judgment-debtor. At the hearing of the order, the parties are stated to be decree-holder, the judgment-debtor and the claimant, *viz.*, the manager of

the Kurungot *tarwad*. The District Judge finds on the testimony of the defence 1st withness that notice was served on him but we are not prepared to accept his evidence as satisfactory. His knowledge of the proceedings is very meagre. He cannot say whether the decree-holder or the claimant had any Vakil or whether witnesses were examined but he professes to be able to remember the single fact that the judgment-debtor was present. He says in re-examination that he attended the hearing of the petition because he used to help the claimant in some of his suits. His evidence, even if accepted, does not prove that Iswara Vadyan was present as a party to the proceedings, as he merely says that the judgment-debtor was giving instructions to the decree-holder's Vakil which he might have done even if no notice was issued to him of the claim. The order shows that the claimant and the decree-holder were represented by Vakils, but it does not say that the judgment-debtor put in an appearance, nor does it say that he did not appear either in person or by Vakil, a statement ususally made when notice is issued to a party to appear in any cause. It seems to be reasonable to infer that no notice was issued to the judgment-debtor especially as section 246 of Act VIII of 1859 makes express reference to "the summoning of the original defendant." The lower Court seems to have been influenced in its conclusion by its opinion that it was a case in which notice should heve been given to the judgment-debtor as he was interested in the result of the proceedings. We must hold, on the evidence and the probabilities of the case, that notice of the claim was not issued to the judgment-debtor, Iswara Vadyan. Mr. Ramachandra Aiyar contends on behalf of the appellant that the judgment-debtor must be taken to have been necessarily a party to,and to be bound by, an order made section 246 of Act VIII of 1859 and relies on the words of the section which says that the Court shall ..... proceed to investigate the same with the like powers *as if the claimant had been originally made a defendant in the suit* and also with such powers as regards the summoning of the original defendant as are contained in section 220. It is urged that the claim must be regarded, on this language, as if it were a proceeding in the original suit and that as the judgment-debtor was a party to the original suit he must be regarded as having been a party to the claim proceedings also. But this contention does not seem to be quite consistent with the latter part of the sentence which expressly confers power on the Court to summon the original defendant, a provision that would be hardly necessary if the judgment-debtor was to be necessarily treated as a party. The corresponding section in the latter Acts X of 1877 and XIV of 1882 made a variation in the language used in section 246 of Act VIII of 1859 and provided that "the Court shall proceed to investigate the claim or objection with like power as regards the examination of the claimant or objector and in all other respects as if he were a party to the suit, and not "as if the claimant was a party to the original suit." The Bombay High Court, in *Shivapa* v. *Dod Nagaya* (1), was of opinion that the later Acts merely expressed in clearer language the meaning of section 246 of the Code of 1859, (see pags 118). According to that decision "the material fact for inquiry is, whether the claimant held possession and the fact of possession may be investigated in a proceeding between the decree-holder and the claimant only. The power given by the section to summon the original defendant also shows this." Judicial Committee of the Privy Council, in *Sardhari Lal* v. *Ambika Pershad* (2), observe.—"It is not suggested that there can be any person against whom an order can be passed under section 280 except the decree-holder himself." In *Nettietom Perengoryprom* alias *Panisherry Damodhen* v. *Tayanbury Parameshwaren Nambudry* (3) by Morgan, C. J., and Holloway, J. in *Moidin Kutti* v. *Kunhi Kutti Ali* (4) by the Chief Justice and Benson J; in *Imbichi Koya* v. *Khakkunnat Upakki*(5) and *Mannu Lal* v. *Harsukh Das* (6), also it was held that the judgment-debtor is not necessarily a party to the proceedings under section 246 of the Code of 1859. In the latter case it was considered that it would be necessary to show that the judgment-debtor was summoned; that the fact that he was a party in name would not

(1) 11 B 114.
(2) 15 I. A. 123; 15 C. 521.
(3) 4 M. H. C. R. 472.
(4) 25 M. 721.
(5) 1 M. 391,
(6) 3 A. 233.

be enough to bind him by the order made on the claim petition. Under the later Codes of 1877 and 1882, it has been held almost unanimously in a number of cases that it must be shown that notice of the claim was served on the judgment-debtor before he can be held to be bound by the order of Court: [See *Moidin Kutti* v. *Kunhi Kutti Ali* (7), *Krishnasami Naidu* v. *Somasundarm Chettiar* (7), *Vadapalli Narasimham* v. *Dr.nam Raju Seetharama Murthi* (8) and *Sadaya Pillai* v. *Amurtha Ghari* 9) where attention is drawn to the difference between the language of section 246 of the Code of 1859 and the corresponding section of the later Codes.] We are inclined to hold that the judgment-debtor cannot be regarded as necessarily a party to an investigation under section 246 of Act VIII of 1859. We are confirmed in this opinion by the conclusion we have arrived at with respect to the meaning and scope of section 246 of the Code of 1859.

The respondent contends that under section 246, the Sudder Amin's Court was entitled to inquire only into the question whether Iswara Vadyan or Kurungot *tarwad* was the party in possession of the property, that the question whether Iswara was only an *ottidar* or whether he had a valid *jenm* right was beyond the scope of the section and that, therefore, he was not bound to establish his *jenm* right within one year after the date of the order Exhibit I. The question raised by the claimant was whether a *jenm* deed obtained by Iswara in 1863 from the Karnavan of the *tarwad* was obtained under circumstances which would make it binding on the *tarwad* or not, the genuineness of the deed which was filed as Exhibit A in the claim proceedings but is not produced in this suit not being contested.

For the purpose of deciding this question, it is necessary to examine a little closely the provisions of section 246. The claim which a person could prefer under it was one referring to or objecting to the sale of the attached property as not liable to be sold in execution of the decree. The investigation to be made by the Court was whether the property was actually or constructively in the possession of the judgment-debtor or of some other person (constructive possession meaning to include possession on one's behalf by a trustee); and the order to be passed was one releasing the property from attachment or allowing the claim referring or objecting to the sale of the property. A comparison of the section with sections 278 to 282 of the later Codes of 1877 and 1882 throws much useful light on the construction of section 246 of the Act of 1859. Section 278 enacts that if "any claim be preferred or objection made to the attachment of any property ..... This allows a claim being made to property attached and not merely a claim referring to the *sale* of attached property; and the ground of the claim or objection is "that such propery is not liable to *such* attachment *i. e*; the particular attachment objected to" and not that the property in question is "not liable to be sold in execution of the decree as in section 246. The distinction is made clearer by section 279 which says "that the claimant or objector must adduce evidence to show that at the date of the attachment he *had some interest in* or was possessed of the property attached." The investigation by the Court thus includes the question whether the claimant, whether he has possession or not, had some interest in the property at the date of the attachment. The distinction is pursued by the enactment of section 282 which lays down that "if the Court is satisfied that the property is subject to a mortgage or lien in favour of some person not in possession and thinks fit to continue the attachment, it may do so subject to such mortgage." There is nothing in section 246 of the Code of 1859 corresponding to this provision. Section 283 enacts that "the party against whom an order is passed under sections 280, 281 or 282 may institute a suit to establish *the right which he claims* to the property in dispute ....." not as in section 246 the right claimed under the section objecting to the sale of the attached property. Under section 281, no doubt, the claim is to be disallowed, if the judgment-debtor has a possessory interest in the property but this must be taken in conjunction with sections 279 and 582 which show that the claim of a mortgagee or lien-holder not in possession must be maintained. If the judgment-debtor is not in legal or constructive possession, the property is to be released from attachment according to section 246. The corresponding section 280 adds the words *wholly or to such*

(7) 30 M. 335; 17 M. L. J. 95; 2 M. L. T. 116.
(8) 31 M. 163; 3 M. L. T.256; 18 M. L. J. 26.
(9) 8 M. L. T. 417; 8 Ind. Cas. 157.

extent as it thinks fit" carrying out the opinion expressed in *Deanuth Biswas* v. *Issur Ghine* (10) that under section 246 also part of the property attached could be released—no express provision is made in section 280 or 281 with regard to investigation of any right of the judgment-debtor in the property not accompanied by possession either directly or through a tenant or other person paying rent. It may be that the principal laid down in *Chidambara Patter* v. *Ramasami Patter* (11) will allow of such investigation being made, and rights of the judgment-debtor without possession, physical or through a tenant being allowed to be sold, such a view would be in consonance with the provision in section 282 that a claim of mortgage or lien without possession on the part of the claimant may be recognized by the Court.

The above comparison leads clearly to the conclusion that the Court under section 246 could only make an order releasing the property from attachment or disallow the claim which must be one objecting to the sale of the property in execution. We are not aware of any case holding that under section 246 rights of a claimant to some interest in property in the possession of the judgment-debtor could be investigated or that the Court could raise an attachment where the judgment-debtor had a possessory interest in the property. Mr. Rosario cited several cases in which the contrary view was maintained *Khelat Chander Mitter* v. *Bhuggabutty Churn* (12); *Maharajah Dheraj Mahtabchand Bahadoor* v. *Hurdeo Narainsahoo* (13), *Cheriyarakal* alias *Arakel Kunhi Kutti Ali* v. *Vayaka Karambath Imbichi Ammah* (14), *Shivapa* v. *Dod Nagaya* (1); see also *Dayachand Nemchand* v. *Hemchand Dharamchand* (15) per Westrop, C. J., at page 522. Mr. Ramachandra Aiyar argued that the Kurungot *tarwad* must be treated as having been in possession of the equity of redemption and that we must take it that the Sadar Amin found that it was in possession of it. But such a claim in an equity of redemption is not, as already observed, within the purview of section 246 as it would not be an objection to the sale of the property. Moreover, Exhibit I does not show that the claimant asserted that the *tarwad* was in possession of the equity of redemption. Iswara Vadyan had purchased the *jenm* right. The land was in the actual possession of the Putravakasam holders but their rights had been sold in Court auction. There is no positive evidence except Exhibit A that they had attorned to Iswara, but we must take it, as between the *tarwad* and Iswara Vadyan, that the *tarwad* had no possession especially as there was no *purapad* or rent payable to the *jenmi*. The sale of the *jenm* right was sufficient, in the circumstances, to vest in Iswara Vadyan such legal possession of the equity of redemption as it was capable of. It is unnecessary to refer to cases cited at the bar relating to investigation of claims under the section in the later Codes, which support the interpretation we place on section 246. For the above-mentioned reasons, we hold that the order Exhibit I, was not one which Iswara Vadyan was bound to impeach by a suit within one year or twelve years after it was passed. We also agree with the contention of the learned Vakil for the respondent that defendants Nos. 2 and 3 are estopped from contesting in this suit the plaintiff's *jenm* right to the property. Iswara Vadyan purchased the *jenm* right from the Karnavan of the Kurungot *tarwad* on 27th December 1863 (Exhibit A in the claim case). The *otti* rights of the *Tavazhi* of second and third defendants had been sold in auction previously to the *jenm* sale and purchased by Iswara. Kunhi then in 1870 accepts from him the *kanom* demise Exhibit A in which the property is declared by him to be his *jenm*. It is impossible to believe that, at the time of demise, when no one had impeached the validity of his *jenm* deed Iswara Vadyan would have agreed to execute Exhibit A if Kunhi Lakshmi who was full conversant with the facts had not agreed to acknowledge him as the *jenmi* and agreed to hold the land under him on that footing. Kunhi Lakshmi by her conduct induced Iswara to execute Exhibit A as she would have otherwise been bound to surrender the lands to him as the auction-purchaser of her *Tavazhi*'s rights. We cannot agree with the contention that any express admission of *jenm* right by the demisee otherwise than by the acceptance of

(10) 14 W. R. 52.
(11) 27 M. 67.
(12) 14 W. R. 143.
(13) 16 W. R. 119.
(14) 6 M. H. C. R. 416.
(15) 4 B. 515.

the demisee was necessary in the circumstances of the case to estop her from denying the plaintiff's *jenm* right.

In the view we take on the questions discussed, it is unnecessary to consider the contention that the *otti* right that Iswara Vadyan first purchased in auction was not redeemable. The defendants did not specifically in this suit allege that the *jenm* sale to Iswara was not binding on the Kurungot *tarwad* but relied solely on Exhibit A

In the result, this appeal must be dismissed with costs. Time for payment of mortgage-money and value of improvements is extended till the re-opening of the District Court.

Appeal dismissed.

(s. c. 13 C. L. J. 485.)

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1576 OF 1906.

November 27, 1908.

Present:—Mr. Justice Caspersz and Mr. Justice Doss.

MIDNAPORE ZEMINDARY CO., LD.—DEFENDANTS—APPELLANTS

versus

BAMAPADA ROY AND OTHERS—PLAINTIFFS RESPONDENTS.

Landlord and tenant—Lease—Ambiguous clause—Status of tenant, determination of—Surrounding circumstances—Conduct of parties—Origin of tenancy.

In determining the status of a tenant, the Court should not confine its attention solely to an ambiguous clause of the lease, but should also have recourse to evidence of the surrounding circumstances and the subsequent conduct of the parties in regard to the subject-matter of the lease, and should consider the origin of the tenancy.

Mohesh Jha v. *Manbharan Mia*, 5 C. L. J. 522, relied upon.

Appeal from the decree of the District Judge of Midnapur, dated the 17th July 1906, reversing that of the Subordinate Judge of that District, date the 15th December 1905.

Mr. *Sinha* and Babu *Jogesh Chandra Roy*, for the Appellants.

Mr. *Caspersz* and Babu *Joygopal Ghosha*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit by the plaintiffs-appellants for enhancement of rent of a tenure held by the defendants under them. The principal defence of the defendants was that they were *raiyats* and not tenure-holders and that, therefore, the plaintiffs were not entitled to maintain the suit for enhancement under section 7 of the Bengal Tenancy Act.

The first Court, upon a consideration of the *kabuliat*, dated the 29th *Srovan* 1255 (12th August 1848), and the other circumstances in the case, held that the defendants were tenure-holders, and that their tenure was not protected from enhancement and after determining the enhanced rent for which the defendants were liable, gave the plaintiffs a decree for such enhanced rent.

On appeal the learned District Judge has reversed that judgment holding, upon a construction of some of the terms of the *kabuliat*, that the defendants were *raiyats* and not tenure-holders, and has accordingly dismissed the plaintiff's suit without deciding the question as to the liability of the defendants and the extent to which the tenure was liable to enhancement.

It has been contended on behalf of the appellants that the learned District Judge is wrong in coming to a finding as to the status of the defendants solely on the terms of the lease. It has also been contended that, having regard to the findings arrived at by the Court of first instance, the defendants ought to have been held to be tenure-holders.

We do not think that in determining the status of the defendants the learned District Judge was right in confining his attention solely to the terms of the lease. He ought to have considered the origin of the tenancy, the subsequent conduct of the parties in regard to the land and the terms of lease dated the 7th *Jaist* 1270.

Various authorities have been cited before us; it is not necessary, however, to discuss them. It is quite clear from the case of *Mohesh Jha* v. *Manbharan Mia* (1), that when the terms of a lease are ambiguous, the Court must see how, since the grant was made, the parties have chosen to deal with the land.

In the present case, the first lease of 1255 (1848) comprised an area of 934 *bighas* and $15\frac{1}{2}$ *cottas* rent being assessed on 281 *bighas* and 12 *cottas*, at the rate of 5 annas 14 *gandas* per *bigha*. More than twelve years after this lease, that is, in 1270, and after the defendants had on their theory that they were *raiyats* acquird a right of occupancy, these lands were measured again, but they

(1) 5 C. L. J. 522.

were found to consist of 978 *bighas* odd; rent, however, was assessed on 578 *bighas* at the rate of 8 annas and 10 *gandas* per *bigha*, additional lands having been re-claimed during the interval. This is a circumstance which, among others, ought to have been taken into consideration. We think that the learned District Judge was wrong in holding upon the terms of the lease, that the lands were taken for the purpose of cultivation by the lessee himself. We think that the clause upon which the learned District Judge has based his conclusion is ambiguous and that being so, the question must be solved by having recourse to evidence of the surrounding circumstances and the subsequent conduct of the parties in regard to the subject-matter of the lease. This was done by the first Court and we are of opinion that the District Judge ought to have done the same thing.

In this view, we set aside the judgment of the District Judge and remand the case for consideration in the light of the observations we have just made. The question of non-joinder has been decisively set at rest; the other questions will remain open.

The appellant is entitled to costs of the appeal. The costs will abide the result.

Appeal allowed; Case remanded.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2189 OF 1908,

February 15, 1911.

Present:—Mr. Justice Mookerjee and Mr. Justice Teunon.

PRAMOTHA NATH KUMAR AND OTHERS —PLAINTIFFS—APPELLANTS

versus

NILMONI KUMAR AND OTHERS— DEFENDANTS—RESPONDENTS.

*Lease—Construction—Lessee, whether tenure-holder or raiyat—Principles of construction—Conduct of parties, when may be looked into—*Jote, *meaning of.*

A lease to a tenant recited that there were resident tenants on the land demised, that it was a lease for a term of 12 years but it was to be regarded as a temporary tenancy, and that the lessee was to hold the land either in *khas* or by letting it out to tenants:

Held, that the lessee was a tenure-holder and not a *raiyat*.

If the terms of an original grant are ambiguous, the subsequent conduct of the parties may be looked into to ascertain the nature of the tenancy in its inception; but where the terms are unambiguous, it cannot be laid down as an invariable proposition of law that the nature of the tenancy is necessarily altered by the subsequent conduct of the parties to the detriment of the under-tenants.

The mere description of a tenancy as a *jote* does not conclusively show its true nature. It is open to strangers to show that, although the tenancy is described as a *jote*, its real character is that of a tenure.

Syed Nawab Ali Chowdry v. *Hemanta Kumari Debia*, 8 C. W. N. 117, followed.

Appeal from the decree of the District Judge of Hooghly, dated July 16th, 1908, affirming that of the Settlement Officer at Chinsurah, dated March 31st, 1908.

Babu *Joy Gopal Ghosha*, for the Appellant.

Babus *Joti Prosak Sarbadhidari* and *Biraj Mohun Majumdar*, for the Respondents

JUDGMENT.—This is an appeal on behalf of the plaintiffs in an action commenced by them under section 106 of the Bengal Tenancy Act. It appears that the plaintiffs have been recorded as tenure-holders in the record of rights and their prayer is that the record may be amended and they be described as occupancy *raiyats*. The Courts below have concurrently found that the plaintiffs are tenure-holders and that the entry in the record represents the correct state of affairs.

On behalf of the plaintiffs-appellants, it has been contended that their status is determined by the lease granted to them on the 27th September 1898; that, upon a true construction of that document, it ought to be held that they are occupancy-*raiyats*; that, at any rate, in so far as the superior landlords defendants are concerned, they cannot be allowed to question the correctness of the allegation in that instrument and that, in so far as the under-tenant-defendants are concerned, as they did not substantially resist the claim in the original Courts, the suit ought not to have been dismissed as against them. In our opinion, each of these points is unsustainable and must be overruled.

In so far as the question of the status of the plaintiffs is concerned, the Courts below have held that that question must be answered with reference to the terms of the lease of the 24th June 1874, by which the tenancy was apparently created. This view is manifestly sound, the plaintiffs are purchasers of the tenancy at a sale held in execution of a decree for arrears of rent and after their purchase, they have executed a

kabuliat in favour of their superior landlords on the 27th September 1898. The nature of the tenancy, therefore, must be determined primarily with reference to the lease of the 24th June 1874. That document, in our opinion, shows that the tenant who accepted that lease was a tenure-holder The lease recites, in the *first* place, that there were resident tenants on the land demised. In the second place, it shows that it was a lease for a term of 12 years and yet was regarded as a temporary tenancy. In the third place, it provides that the lessee was to hold the land either in *khas* or by letting it out to tenants. Each of these three elements serves to indicate that the interest created in favour of the lessees was that of tenure-holder. It was pointed out by Mr Justice Field in the case of *Durga Prosonno Ghose* v. *Kalidas Dutt* (1), that the true test of a *raiyats* interest is to see in what condition the land was when the tenancy was created. If *raiyats* were already in possession of the land and the interest created was a right not to the actual physical possession of the land but to collect rents from their *raiyats*, that is not a *raiyati* interest. The recital in the lease of 24th June 1874 shows that there were resident tenants in occupation of the land at the time and, as *khud kasht raiyats* would not ordinarily be liable to be ejected, the lessees could hold possession of the land only by receipt of rents from their tenants. In the *second* place although the tenancy was for a term of 12 years, it was described as temporary. That would hardly be an appropriate description, if the intention of the lessor was to create in the lessee the interest of an occupancy-*raiyat*, because if the lessee became an occupancy *raiyat* he could not, under ordinary circumstances, be ejected at the expiration of the term of the tenancy. In the *third* place, the lease provided that the tenant was to hold possession either in *khas* or by letting it out to tenants. This, as pointed out in the case of *Midnapur Zemindary Company Ld.* v. *Sham Lall Mitra* (2), would indicate that the interest of a lessee was that of a tenure-holder. But, although the lease of 1874 indicates that the tenancy in its inception was a tenure, the learned Vakil for the appellants has contended that the nature of the tenancy must be determined with reference to the subsequent conduct of the parties and he has placed considerable reliance upon the later lease of the 27th September 1898, in which the tenancy is described as an occupancy-holding. Now, the decision in the case of *Midnapur Zemindari Company Ld.* v. *Sham Lall Mittra* (2), no doubt lays down broadly that in deciding the question of the character of a holding, not only the origin of the tenancy but also the subsequent conduct of the parties should be taken into consideration. The statement is, in my opinion, too comprehensively formulated; and one of the cases upon which reliance was placed by the learned Judges, namely, in the case of *Mindnapur Zemindary Co.* v. *Bamapada Roy* (3), does not furnish any authority for this proposition. The learned Judges who decided that case merely laid down that, if the terms of the original grant are ambiguous, the subsequent conduct of the parties may be looked into to ascertain the nature of the tenancy in its inception. Where, however, as here, the terms of the original grant are unambiguous it cannot be laid down as an invariable proposition of law that the nature of the tenancy is necessarily altered by the subsequent conduct of the parties. It would be very difficult to hold, at any rate, that by the subsequent conduct of the parties the nature of the tenancy might be altered to the detriment of the under-tenants. The decision of this Court in the case of *Mohesh Jha* v. *Man Bharan Mia* (4), perhaps, shows that the subsequent conduct of the parties might alter the nature of the tenancy for the benefit of the under-tenants; but, on no intelligible ground can it be mentioned that, after *A.* has granted a lease in favour of *B.* and *B.* has granted a sub-lease in favour of *C. A.* and *B.* by any conduct of theirs could prejudice the position of *C.*

The learned Vakil for the appellants further contended that, in so far as the under-tenants were concerned, they had not resisted the suit in the Court of first instance and, therefore, that the case ought to be further invesigated. It is clear, however, that these defendants may support the decision pronounced in their favour by both the lower Courts and they are entitled to contend that

(1) 9 C. L R. 449.
(2) 15 C. W. N. 218; 6 Ind. Cas. 362
(3) 13 C. L. J. 485; 10 Ind. Cas. 430.
(4) 5 C. L. J. 522.

the recital in the lease of 1898, could not, in any way, affect their position. We may further point out that the case of *Baidya Nath Mondal* v. *Sudharam Misri* (5) shows that conduct subsequent, while it might throw light upon the nature and origin of a tenancy, could not be taken to affect its terms. It may also be observed, as pointed out in the case of *Syed Nawab Ali Chowdhry* v. *Hunmanta Kumari Debi* (6), that the mere description of a tenancy as a *jote* does not conclusively show its true nature. It is undoubtedly open to strangers to show that, although its character is described as a *jote*, its real character is that of a tenure. Under these circumstances, we must hold that the view taken by the Courts below is correct and that the nature of the tenancy as indicated by the lease of 1874 has not been affected by the lease of 1898. The result, therefore, is that the decree of the Court of appeal below is affirmed and this appeal is dismissed. There will be no order for costs as the landlords have not resisted the appeal and the under-tenants, so far as they are concerned, have already been paid their costs in this Court by the appellants.

Appeal dismissed

(5) 8 C. W. N. 751.
(6) 8 C. W. N. 117.

PUNJAB CHIEF COURT.
SECOND CIVIL APPEAL No. 686 OF 1910.
May 17, 1911.
Present:—Mr. Justice Chevis.
Lala HIRA LAL—PLAINTIFF—APPELLANT
versus
HIMALAYA GLASS WORKS CO.—
DEFENDANT—RESPONDENT.

Companies Act (VI of 1882), s. 169—Notice of appeal not given within three weeks, effect of—Extension of time—Sufficient cause—Carelessness of Pleader—Leniency by Court, when to be shown.

An appeal against the order or decision of a District Court under the Indian Companies Act cannot be heard unless notice of the same has been given within three weeks of the date of such order or decision as required by section 169 of the Companies Act.

The carelessness or ignorance of a Pleader is not sufficient for extending the time fixed by section 169 of the Companies Act.

Daulat Ram v. *Woollen Mills Company, Limited, Delhi*, 95 P. R. 1908, followed.

As leniency in extending time in such cases cannot be shown to one party except at the expense of the other party, Courts should not show it but for sufficient cause.

Sant Singh v. *Qaim* 118 P. R. 1903, relied upon.

Appeal from the order of the District Judge, Lahore, dated the 13th May 1910, disallowing preference to the appellant over the other creditors.

The Hon'ble Mr. *Shadi Lal* and Diwan *Mehar Chand*, for the Appellant.

Mr. *Sunder Das*, and Lala *Lajpat Rai*, for the Respondent.

JUDGMENT.—In this case a preliminary objection is raised, *viz.*, that notice was not given to the respondents, as required by section 169 of the Indian Companies Act, within three weeks of the date of the District Judge's order.

This is correct. The District Judge's order was passed on 13th May 1910; copy was applied for at once and obtained the next day but appeal was filed in this Court only on 7th June 1910, and even then no application for prompt issue of notice was made, so notice issued in the usual way and was not served till 5th August.

Counsel urges me to extend the time pleading that it was the mistake of the Pleader who filed the appeal and who was not acquainted with the provisions of section 169. Carelessness of a Pleader is not recognised as sufficient ground for extending time in ordinary cases. See *Sant Singh* v. *Qaim* (1). No doubt section 169 is a peculiar one but considering that it has formed the subject of a Full Bench ruling published in *Daulat Ram* v. *Woollen Mills Company, Limited, Delhi* (2), I think it not unreasonable to expect the members of the Lahore Bar to be acquainted with its provisions.

As to the plea that it is hard to punish a man for the shortcomings of his Pleader, this would commend itself more to me if there were not a large number of Pleaders available; a man takes his choice and if, unfortunately, his Pleader makes a mistake (as must happen to every one occasionally), he must put up with the consequences. I am asked to be lenient, and not to administer a hard provision of law unnecessarily, but I am not here to criticise the law. As to leniency in such cases, I note that in civil cases it is impossible to favour one party except at the expense of the other, and I would refer to the quotation from *Karsandas* v. *Bai Ganga Bai* (3) which is to be found on the last page of *Sant Singh* v. *Qaim* (1).

(1) 118 P. R. 1908.
(2) 95 P. R. 1908.
(3) 30 B. 329; 7 Bom. L. R. 965.

LALIT MOHAN DAS *v.* RADHA RAMAN SAHA.

As notice was not served within three weeks as required by section 169 and as I can find no sufficient cause for extending time, I am debarred from hearing the appeal and it is accordingly dismissed.

No order as to costs in this Court as there has been no hearing on the merits.

Appeal dismissed.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 161 OF 1910.

April 5, 1911.

Present:—Mr. Justice Mookerjee and Mr. Justice Caspersz.

LALIT MOHAN DAS—DEFENDANT—APPELLANT

versus

RADHA RAMAN SAHA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Res judicata—*Decision of Probate Court about relationship of parties—Subsequent civil suit—Whether question of relationship is* res judicata—*Civil Procedure Code (Act XIV of* 1882*), s.* 13.

Every matter decided in proceedings for grant of Probate or Letters of Administration does not operate as *res judicata* in a subsequent civil suit between the parties. The decision is final and conclusive in so far as its immediate purpose is concerned, and no suit is maintainable to qualify or take away its effect but if a matter has been decided incidentally, the decision does not operate as *res judicata*.

The plaintiffs, alleging themselves to be the reversionary heirs of *P.*, sought to obtain Letters of Administration to his estate. They were opposed by the present defendant. The District Judge found that the plaintiffs had failed to establish the relationship and disallowed their application. The plaintiffs then brought this suit to recover possession of the properties upon declaration of their title:

Held, that the decision of the Probate Court did not operate as *res judicata*, because that Court was not competent to try the present suit, and the matter now directly and substantially in issue was not directly and substantially in issue in the proceedings for grant of Letters of Administration, but arose only incidentally for the determination of the question of representation to the estate of *P.*

Appeal from the order of remand of the District Judge of Murshidabad dated February 16th, 1910, reversing that of the Sub-Judge of that District, dated February 13th, 1909.

Babus *Ram Chandra Mojumdar* and *Chundra Sekhar Banerjee*, for the Appellant.

Babus *Provash Chandra Mitra* and *Biraj Mohan Mojumdar*, for the Respondent.

JUDGMENT.

MOOKERJEE, J.—The subject-matter of the litigation which has culminated in this appeal, is immoveable property which, according to the plaintiffs-respondents belonged to one Pulin Pramanik who died in 1865. Pulin left a widow, Khudumani, who died on the 15th November 1907. A few days before her death, Khudumani, it is alleged, executed a deed of gift in respect of the disputed properties in favour of the defendant-appellant. The plaintiffs claim to be sons of the sister of Pulin and thus entitled to take the disputed properties as reversionary heirs to the estate of their maternal uncle. Immediately after the death of Khudumani, on the 5th December 1907, they applied for Letters of Administration to the estate of Pulin Pramanik and his widow Khudumani. The requisite notices were issued, and the appellant, on the 3rd January 1908, put in a petition of objection, in which he denied that the applicants were the nephews of Pulin and entitled as such to Letters of Administration to the estate left by him. Evidence was adduced on both sides, and, on the 27th February 1908, the District Judge held that the petitioners were not entitled to Letters of Administration, as they had failed to establish relationship with the deceased as alleged by them. On the 6th April following, the plaintiffs commenced the present action for recovery of possession and mesne profits upon declaration of their title by inheritance. The defendant resisted the claim on the ground that the matter was *res judicata*. He also denied that the disputed properties formed part of the estate of Pulin Pramanik. The Subordinate Judge held on the authority of the case of *Kurrutulain* v. *Nuzhat-ud-dowla* (1) that the question of the relationship of the plaintiffs to Pulin Pramanik was *res judicata*, and could not be re-investigated. In this view, he dismissed the suit with costs. Upon appeal, the learned District Judge held, upon the authority of the cases of *Arunmoyi Dasi* v. *Mohendra Nath Wadodar* (2), *Jagannath Prasad Gupta* v. *Ranjit Singh* (3) and *Ganesh Jagannath Dev* v. *Ram Chandra* (4), that the matter was not *res judicata*, He, therefore, reversed the decision of the Subordinate Judge and remanded the case for trial on the merits.

The defendant has now appealed to this Court, and on his behalf the objection taken in the Conrts below have been re-iterated

(1) 33 C. 116.
(2) 20 C. 888.
(3) 25 C. 354.
(4) 21 B. 563.

namely, that the question of the relationship of the plaintiffs to Pulin Pramanik is *res judicata*, and is not open for fresh investigation. In support of this position, reliance has been placed upon the cases of *Ram Nandan Prashad* v. *Sheo Parson Singh* (5), *Barrs* v. *Jackson* (6), *Spencer* v. *Williams* (7), *Kurrutulain* v. *Nuzhatuddolla* (1) and *In re Pitamber Girdhar* (8). In answer to this contention, the learned Vakil for the respondents has argued that the decision of the Probate Court does not operate as *res judicata*, because, *first* the Probate Court was not competent to try the present suit; and *secondly*, the matter, now directly and substantially in issue, was not directly and substantially in issue in the proceedings for grant of Letters of Administration, but arose only incidentally for the determination of the question of representation to the estate of the original owner. In support of this argument, reliance has been placed upon the cases of *Arunmoyi* v. *Mohendra Nath* (2), *Jagannath* v. *Ranjit Singh* (3), *Ganesh Jagannath* v. *Ram Chandra* (4) and *Concha* v. *Concha* (9). The cases, relied upon on behalf of the appellant, have been sought to be distinguished on the ground that they either contained *obiter dicta* not binding upon this Court, or were decided under a different system of law so as to be inapplicable to judgments of Probate Courts in this country. After a careful consideration of the arguments addressed to the Court on both sides, I have arrived at the conclusion that the decision of the District Judge must be affirmed.

Under section 13 of Act XIV of 1882, which was in force when the present suit was instituted, the defendant must prove, in order that the decision of the Probate Court may operate as *res judicata*, *first*, that the Probate Court was a Court of jurisdiction competent to try the present suit and, *secondly*, that the matter, now directly and substantially in issue, was directly and substantially in issue in a former suit, and that the proceeding in the Probate Court was a suit within the meaning of this rule. In so far as the first of these elements is concerned, it is to be observed that under section 51 of the Probate and Administration Act, 1881, jurisdiction is conferred upon the District Judge to grant and revoke Probates and Letters of Administration in all cases within his local jurisdiction. Under section 87, the High Court has concurrent jurisdiction with the District Judge in the exercise of all the powers conferred upon the District Judge. Under section 23 of the Bengal Civil Courts Act, 1887, a Subordinate Judge or a Munsif may be authorised by a general or special order of the High Court to exercise under the Probate and Administration Act the jurisdiction vested in the District Judge. Section 24 then provides that these officers will deal with the cases under rules applicable to like proceedings when disposed of by the District Judge, subject to the qualification that when a Munsif deals with the matter, a first apeal lies from his order to the District Judge whose order may be questioned on appeal before the High Court. The appeal against an order of the Subordinate Judge, however in a case disposed of by him, lies to the High Court, under section 86, of the Probate and Administration Act, in the same manner as against an order of the District Judge himself. It is clear, therefore, that the jurisdiction which a Court of Probate exercises, whether, the Presiding Officer be the District Judge or a Subordinate Judge or a Munsif, is special jurisdiction distinct from the ordinary jurisdiction of the Court. I am, therefore, not prepared to accede to the contention of the learned Vakil for the appellant that when a question of *res judicata* arises, the Courts should be treated as identical. The special jurisdiction so far as Hindus are concerned, was created when by section 2 of the Hindu Wills Act, 1870, as it stood before its amendment by section 154 of the Probate and Administration Act, 1881, the provisions of Part XXXI of the Indian Succession Act 1865 relating to grants of Probate and Letters of Administration with the Wills annexed were made applicable to Hindus. Section 23 of the Probate and Administration Act, however, read with section 51, confers upon the District Judge jurisdiction to grant Letters of Administration in cases of intestacy also, and the grant is directed to be made to the person who would be entitled to the whole or any part of the estate of the deceased according to the rules

(5) 11 C. L. J. 623; 6 Ind. Cas. 301.

(6) (1842) 1 Y. & C. C. 585; reversed 1 Ph. 582; 14 L. J. Ch 432; 9 Jur. 609; 57 R. R. 461; and on appeal 65 R. R. 457.

(7) (1871) 2 P. & D. 230; 40 L. J. P. 45, 24 L. T. 513; 19 W. R. 703.

(8) 5 B. 638.

(9) (1896) 11 A. C. 541; 56 L. J Ch. 257; 55 L. T. 522; 35 W. R. 477.

for the distribution of the estate of an intestate applicable to his case. Under these circumstances, I am not prepared to hold that the Court which refused the application for Letters of Administration, was a Court competent to try the present suit within the meaning of section 13 of the Civil Procedure Code of 1882. It was not competent to that Court to determine the question of title to the disputed properties and the mode of their distribution now in controversy between the parties to this litigation. The jurisdictions of the two Courts are entirely distinct, and though the same officer may preside in both the Courts, the functions he discharges and the questions he investigates are radically different in scope and character.

A useful analogy is furnished by the cases under the Land Acquisition Act, 1894, in which it has been held that the decision of a Land Acquisition Judge, as an adjudication by a special tribunal constituted for a special purpose, does not operate as *res judicata* in a subsequent title suit, though the decision is final and conclusive for the purpose of the proceeding before the Land Acquisition Judge. [*Nobodeep* v. *Brojendro Lal* (10), *Dirgaj Deo* v. *Kali Charan* (11) and *Mahadevi* v. *Neelaman* (12).] The case of *Ram Chunder* v. *Madhu Kumari* (13) is not opposed to this view, as there the decision was in a civil suit for apportionment. But, although this is so, parties cannot re-open matters which have formed the precise subject-matter of investigation by the Court of special jurisdiction. [*Nilmonee* v. *Ram Burdhoo* (14) and *Chowakaran* v. *Vayyaprath* (15.] To put the matter in another way, when a special Court has been created to exercise special jurisdiction, there is no conflict with the jurisdiction of the ordinary Courts, because admittedly the latter never possessed the jurisdiction which is for the first time conferred by statute for a particular purpose; to hold that a Court of such special jurisdiction is identical with a Court of ordinary original civil jurisdiction is to overlook a distinction of fundamental importance. The first element, therefore, essential to make the rule of *res judicata* applicable is absent in the present case. As observed by their Lordships of the Judicial Committee in *Gokul Mondar* v. *Pudmanand* (16) in a matter like this, the Code must be taken to be exhaustive and it is not the province of a Judge to disregard or go outside the letter of the enactment according to its true construction. [*Shibo Kaut* v. *Baban Raut* (17)].

In so far as the second element is concerned, namely, whether the question now directly and substantially in issue, was directly and substantially in issue in the proceedings for Letters of Administration, the answer must depend upon the nature and scope of the previous proceedings. The question then before the Court was one of representation of the estate of the deceased and not of distribution. It was only for the purpose of determining the question of representation, that the Court was called upon to decide whether the then petitioners would be entitled to the whole or any part of the estate of the deceased within the meaning of section 23 of the Probate and Admininstration Act. It was not competent to that Court to decide any question of title to the properties; obviously, that Court could not decide the extent of the estate of the deceased. *Behary Lal* v. *Jugo Mohun* (18), *Raghunath* v. *Pate Koer* (19 and *Ochavaram* v. *Dolat Ram* (20). The Court was competent to deal with the question of representation and administration of the estate of the deceased, and whatever investigation was held, was incidental to that purpose and that purpose alone. The view I take is in accord with the decision of this Court in *Arunmoyi* v. *Mahendra Nath* (2). In that case, an application was made for Letters of Administration to the estate of one Narendra Nath by his two surviving brothers on the ground that they were residuary legatees under his Will. The application was opposed by the widow, on the ground that upon a true construction of the Will, there was no residuary bequest, and that the petitioners were not entitled to Letters of Administration under section 19 of the Probate and Administration Act. The High Court of Allahabad, which construed the Will, held that there was a residuary bequest in favour of the brothers and granted Letters of Administration to them. The widow then sued in the Court of the Subordinate Judge of the 24-Pargannahs for

(10) 7 C. 406; 9 C. L.R. 117.
(11) 34 C. 466; 11 C. W. N. 52*n*.
(12) 20 M. 269.
(13) 12 I. A. 188; 12 C. 484.
(14) 4 C. 757; 3 C. L. R. 211.
(15) 29 M. 173.
(16) 29 C. 707.
(17) 35 C. 353; 7 C. L. J. 470; 12 C. W. N. 359.
(18) 4 C. 1; 2 C. L. R. 422.
(19) 6 C. W. N. 345.
(20) 28 B. 644.

possession of the estate. Her brothers-in-law defended the suit on the ground that the matter was *res judicata*, and that the residuary bequest was in their favour. The Subordinate Judge gave effect to this contention and practically dismissed the suit. Upon appeal, it was ruled by this Court that the matter was not *res judicata*, because the only question which could be decided by the Court which had granted Letters of Administration was the question of representative title within the meaning of section 59 of the Probate and Administration Act and that the question of the construction of the Will was but an incidental question, which the Court had to consider in determining whether the brothers of the deceased were entitled to Letters of Administration in respect of his estate. This principle, in my opinion, is indubitably applicable to the present case. The Court of Probate has decided against the representative character set up by the plaintiffs. That decision, for the purposes of the controversy then before the Court, is final under section 41 of the Indian Evidence Act and operates as a judgment *in rem* [*Chinnasami* v. *Hariharabadra* (21)]. It has conclusively decided that the present plaintiffs, then petitioners, were not entitled to Letters of Administration to the estate of Pulin Pramanik. But, although this question cannot be re-opened and re-adjudicated, it would not be right to hold that that decision has also finally concluded the parties upon the question of title to the properties in controversy in this suit. The view I take is supported by the case of *Jagannath Prosad* v. *Ranjit Sinyh* (3) and *Ganesh Jagannath* v. *Ramchandra* (4).

It was argued, however, by the learned Vakil for the appellant that this view cannot be reconciled with the decision in *Ram Nandan Parshad* v. *Sheo Parson Singh* (5). In my opinion, the decision relied upon is distinguishable and is of no assistance to the appellant. As will be more fully explained by my learned brother in his judgment, the facts of that litigation were very peculiar. A Will had been set up in the Court of Probate, alleged to have been executed by one Bechu Singh. The caveators were met by the plea that they were not the next reversioners, and had no *locus standi* in the Probate proceedings. This objection was successful and Probate was granted. The grant was ultimately confirmed on appeal to this Court. The coveators then commenced a suit for declaration that they were the next reversioners, that the decision of the Probate Court was erroneous and that the grant of Probte was not operative as against them. Under these circumstances, this Court held that the suit was not maintainable. Possibly, if some of the observations of the Court are taken apart from the circumstances of that litigation, they may lend an apparent support to the contention of the appellant. But it is profitable to bear in mind the observation of Lord Halsbury, L. C., in *Quinn* v. *Leathem* (22), that every judgment must be read as applicable to the particular facts proved or assumed to be proved, since the generality of the expression which may be found there, are not intended to be exposition of the whole law but governed and qualified by the particular facts of the case in which such expressions are to be found. In the case to which reference has been made, the Will had been found genuine by the Probate Court. If the Probate remained in force, it was impossible for the caveators to succeed in their claim. They were consequently driven to sue for a declaration that the decision of the Probate Court was erroneous and was inoperative as against them. The attempt was as bold as it was futile. The Court of Probate was the only Court competent to decide the question of genuineness of the Will and also to determine for that purpose who were the parties competent to be heard before the adjudication was made. The Civil Court could give no declaration to nullify the decision of the Probate Court, and to compel that Court, as it were, to reverse its decision and re-call the Probate. Similarly, in the case before us, if the plaintiff sought for a declaration that they were entitled to Letters of Administration in spite of the adverse decision of the Probate Court, their claim could not possibly succeed. But they are no longer concerned with the question of administration possibly because, as happens frequently, [*Lakshmi Narain* v. *Nanda Ram Debi* (23)], there is really nothing to administer. They are not anxious to establish a representative title as against all debtors of the deceased and persons holding property which belonged to him. They seek, on the other hand, to establish

(21) 16 M. 380.

(22) (1901) A. C. 495; 1 S.E.C. (N.S.) 97 at p. 98; 70 L.J.P.C. 76; L. T. 289; 50 W. R. 139; 65 J. P. 705.

(23) 9 C. L. J. 116; 3 Ind. Cas. 287.

their title to properties which they claim as nephews of deceased. In my opinion, the decision in the case of *Ramanandan Parshad* v. *Sheo Parson Singh* (5), does not operate as a bar to the enforcement of their claim.

The learned Vakil for the appellant further relied upon the observation in the case of *In re Pitambar Girdhar* (8), and *Kurutulain* v. *Nazabuddowla* (1). These observations, however, do not decide that every matter decided in proceedings for grant of Probate or Letters of Administration operates as *res judicata* in a subsequent civil suit between the parties. The decision is final and conclusive in so far as its immediate purpose is concerned and no suit is maintainable to qualify or take away its effect. But these cases do not decide that if a matter has been decided incidentally, the decision operates as *res judicata*.

Much reliance was also placed by the learned Vakil for the appellant upon the decisions in *Barrs* v. *Jackson* (6); and *Spencer* v. *Williams* (7), and it was argued, upon the authority of these cases, that if a question of fact arise in a Probate Court as to which of two presons is the next of kin of a deceased and is determined, and the same question is afterwards raised between the same parties in any other Court, the decision of the Probate Court operates as *res judicata*. The decision in *Barrs* v. *Jackson* (6) was based upon the authority of the cases of *Bouchier* v. *Taylor* (24); *Hangrove Law Tracts* 473; *Thomas* v. *Ketteriche* (25) and *Blackam's Case* (26). Now, it is important to note that at the time when these cases were decided, a suit for distribution might have been instituted in the Ecclesiastical Court. So that the Court of Chancery that the Ecclesiastical Court had concurrent jurisdiction with respect to distribution. The decision of the Court of appeal in *Barrs* v. *Jackson* (6) was based on the ground that although the two suits were for different objects, one for administration and the other for distribution, yet the fact had been in issue betweenthe parties and was finally decided between them in a Court of concurrent jurisdiction. The is abundantly clear from the argumants addressed to the Court in *De Mora* v. *Concha* (27). The learned Vakil for the respondents rightly placed reliance upon the decision of the House of Lords in *Whicker* v. *Hume* (28) and *Concha* v. *Concha* (9), which show the real basis of the decision in *Barrs* v. *Jackson* (6), and *Spencer* v. *Williams* (7). It is perfectly true, as pointed out by the learned Vakil for the appellant, that the exposition of the principle of *res judicata*, given in the case of *Barrs* v. *Jackson* (6), has been adopted with approval by their Lordships of the Judicial Committe in *Durga Pershad* v. *Durga Konwari* (29), and *Pittapur Rajah* v. *Buchi Sitayya* (30). We must, however, be cautious in the application of these principles to the facts of individual cases, and one of the most important elements to be borne in mind is the character and extent of the jurisdiction of the two Courts. In my opinion, for reasons clearly explained, the decision of the Probate Court in the case before me does not operate as *res judicata* for the purpose suggested. As pointed out in the case of *Concha* v. *Concha* (9), the decision operates as an estoppel *in rem* in so far as it decides that the plaintiffs, are not entitled to administer to the estate of the deceased, but it does not operate as an estoppel *inter partes* in so far as the question arises whether the plaintiffs are not entitled to take by inheritance the estate of the deceased. In this view, it is unnecessary to discuss whether the broad proposition put forward by the learned Vakil for the respondents that a proceeding for the grant of Letters of Administration is, in no sense, a suit, requires to be qualified. I need only say that the cases of *Sarada Kanta* v. *Gobinda Mohan* (31), and *Ramani Debi* v. *Kumud Bandhu* (32), do not support such a comprehensive proposition. The conclusion consequently follows that the view taken by the District Judge is correct, and his order must be affirmed.

The result, therefore, is that the appeal is dismissed with costs. We assess the hearing fee at three gold *mohurs*.

CASPERSZ, J.—I agree that this appeal must be dismissed, but I desire to say a few words with reference to the case of *Ramansudan Parshad* v. *Sheo Parson Singh* (5), to the decision in which I was a party.

(24) (1776) 4 Brown P. C. 708.
(25) (1749) 1 Ves. Sr. 333.
(26) (1711) 1 Salk. 291.
(27) (1885) 29 Ch. D. 268; 33 W. R. 846.
(28) (1858) 7 H. L. C. 124; 28 L. J. Ch. 396; 4 Jur. (N. S.) 933.
(29) 5 I. A. 149; 3 C. L R. 31; 4 C. 190.
(30) 12 I. A. 16; 8 M. 219.
(31) 12 C. L. J. 91; 6 Ind. Cas. 912.
(32) 14 C. W. N 924; 12 C. L. J. 185; 7 Ind. Cas. 126.

MAHOMED MUSAJI *v.* AHMED MUSAJI.

The plaintiffs alleging themselves to be the reversionary heirs of one Pulin Paramanik sought to obtain a grant of Letters of Administration to his estate. They were opposed by the present defendant. The District Judge found that the plaintiffs "had entirely failed to establish the relationship" and disallowed their application. The plaintiffs then brought the suit, giving rise to this appeal, for a declaration of their heirship, and to recover possession of the properties in schedule *ka* and *kha*, and for other suitable relief. On the issue of *res judicata*, the first Court decided against the plaintiffs, but, on appeal, the District Judge held otherwise, and the defendant has appealed to this Court.

The weight of authority is in favour of the contention, raised on behalf of the plaintiffs, that this suit is not barred by the principle of *res judicata*. But the learned Vakil for the defendant has relied on the case already cited – *Ramanandan Parshad* v. *Parson Singh* (5)—the observations upon which stress is laid being on pages 630, 631 of the report. The learned Vakil for the plaintiffs, however, does not impugn the correctness of that decision on the facts of that case, and if we look to those facts, it is evident that no other decision was possible. There the plaintiffs sued for a declaration that they were entitled to represent the estate of the deceased. The District Judge, sitting as a Court of Probate, had previously held (1) that the plaintiffs had no *locus standi* to oppose the grant of Probate, they not being the next reversioners of the deceased, and (2) that the Will propounded by the defendant (which was thereupon proved without further contest) was the genuine duly executed Will of the deceased. The plaintiffs appealed from the Probate decree of the District Judge; but this Court confirmed the same. The suit, following upon this result, was aimed directly against the grant of Probate, and for a declaration of heirship, and it was held that the judgment assailed, being a judgment *in rem* could not be disturbed by a suit involving the same issues as were decided in the Probate proceedings. It was further pointed out that any declaratory decree would, in the circumstances, be infructuous.

The present plaintiffs failed to obtain a grant of Letters of Administration. The estate is not represented, and the plaintiffs do not now seek to represent it. Nor could administration be granted at this distance of time, the deceased Pulin Ram having died so long ago as the year 1865. But Pulin's widow is said, by the defendant, to have made a deed of gift in his favour, and the plaintiffs are entitled to bring their suit asserting an independent right against a transaction which, if that right is well-founded, would wrongfully deprive them of the property of Pulin.

The facts of the present litigation, and the reliefs claimed, differ widely from those in the case of *Ramanandan Parshad* v. *Sheo Passan Singh* (5), which is not, therefore, an authority for general proposition advanced on behalf of the defendant. The plaintiffs, as already observed, seek to establish an independent right against the deed of gift set up by the defendant. Consequently, the question of title is not concluded by the judgment of the Probate Court. Again, if we assume that the plaintiffs had succeeded before the District Judge, the defendant would, nevertheless, have been permitted to sue to enforce his deed of gift, for he does not claim from Pulin Pramanik but from his widow. Thus, the principle of mutuality, which is a test to be applied in such cases, avails the plaintiffs.

The appeal, therefore, fails, and must be dismissed with costs.

Appeal dismissed.

(s. c. 13 C. L. J. 507)

CALCUTTA HIGH COURT.

APPLICATION FOR LEAVE TO APPEAL TO THE PRIVY COUNCIL No. 11 OF 1911.

March 21, 1911.

Present:—Mr. Justice Mookerjee, and Mr. Justice Caspersz.

MAHOMED MUSAJI SALEJI

PETITIONER

versus

AHMED MUSAJI SALEJI—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908*)*, s. 109, *cls.* (a) *and* (c)—*Final order—Privy Council appeal—Receiver, order appointing—Certificate—Fit case for appeal.*

A "final order" within the meaning of clause (*a*) of section 109 of the Civil Procedure Code means an order which finally decides any matter directly at issue in the case in respect of the rights of the parties.

MAHOMED MUSAJI *v.* AHMED MUSAJI.

Secretary of State v. *British India Steam Navigation Co.*, 9 Ind. Cas. 183; 13 C. L. J. 90, relied upon.

An order appointing a Receiver is not such an order

Clause (*c*) of section 109 of the Code is intended to cover special cases, such, for example, as those in which the point in dispute is not measurable by money, though it might be of great public or private importance. To certify that a case is of that kind, though it is left entirely in the discretion of the Court, is a judicial process which cannot be performed without special exercise of that discretion, evinced by a fitting certificate.

Application for leave to appeal to the Privy Council.

Mr. *G. H. B. Henrick*, *K. C.* Advocate-General and Mr. *N. Sircar*, for the Petitioner.

Messrs. *Sinha*, *Chakravarti*, *B. C. Mitter* and *A. N. Chowdhury*, for the Opposite Party.

JUDGMENT.—This is an application for leave to appeal to His Majesty in Council from an order of the Court of Appeal which has directed, in reversal of the order of the original Court, that a Receiver be appointed in respect of the subject-matter of an administration suit now pending in this Court. There is no room for controversy that the order in question does not fall within clause (*a*) of section 109 of the Code of Civil Procedure, because it has been repeatedly held that a "final order," within the meaning of that clause, means an order which finally decides any matter directly at issue in the case in respect of the rights of the parties, *Secretary of State for India* v. *British India Steam Navigation Co.* (1), and an order appointing a Receiver is plainly not an order of this description. *Chundi Dutt Jha* v. *Pudmanund Singh* (2). The only question, therefore, which requires consideration is, whether leave should be granted under clause (*c*) of section 109 of the Code. In this connection the learned Advocate-General has suggested that the terms of clause (*c*) of section 109 of the Code of 1908 are wider than those of clause (*c*) of section 595 of the Code of 1882. A reference to section 594, however, shows that no mention was made of "orders" in clause (*c*) of section 595 by reason of the special definition of the term "decree" contained in section 594. We must take it, therefore, that the law in this respect has not been altered by the new Code. We may, therefore, usefully refer to decisions under the Code of 1882 to determine whether we should certify the case before us to be a fit one for appeal to His Majesty in Council, although it is not one comprised within clauses (*a*) and (*b*) of that section. Now, it was pointed out by Lord Hobhouse, in the case of *Banarasi Pershad* v. *Kasi Krishna Narain* (3), that the corresponding clause of the Code of 1882 was intended to cover special cases—such, for example, as those in which the point in dispute was not measurable by money, though it might be of great public or private importance. To certify that a case was of that kind, though it was left entirely in the discretion of the Court, was a judicial process which could not be performed without special exercise of that discretion, evinced by a fitting certificate. An illustration of a case dealt with under clause (*c*) of section 109 will be found in *Bombay Burmah Trading Corporation* v. *Dorabji C. Shroff* (4), where leave was granted on the ground that the question raised affected not merely the parties to the litigation but all Companies formed under the Indian Companies Act. It must be observed, however, that this Court always very sparingly exercised its powers under clause (*c*) of section 595 of the Code of 1882. To take one example, it is well-known that in the case of *Moniram Kolita* v. *Kerikolitani* (5), in which a question of considerable difficulty and importance, affecting the Hindu community, was raised, leave was refused by this Court, and subsequently special leave was granted by Her Majestry in Council. The view we take as to the scope of section 109, clause (*c*), is also supported by the observations of the Judicial Committee in the case of *Sadagopa Cheriar* v. *Rama Rao* (6); see also *Clarke* v. *Brajendra Kissore* (7). We are not satisfied that any question of special importance arises in this case, such as would justify the grant of leave to appeal to His Majesty in Council under clause (*c*) of section 109. The question in controversy is, whether a Receiver should or should not be appointed in respect of the subject-matter of the litigation. Two Courts have taken divergent views upon this matter. It has been suggested that the

(1) 13 C. L. J. 90; 9 Ind. Cas. 183.
(2) 22 C. 928.
(3) 28 I. A. 11; 23 A. 227.
(4) 27 B. 415.
(5) 5 C. 776; 6 C. L. R. 322; 7 I. A. 115.
(6) 34 I. A. 93; 30 M. 185 at. p. 188; 2 M. L. T. 204; 4 A. L. J. 333; 11 C. W. N. 585; 5 C. L. R. 566; 17 M. L. J. 240; 9 Bom. L. R. 663.
(7) 13 C. W. N. 1127; 3 Ind. Cas. 786.

order of the Court of Appeal is based upon circumstances not proved by the materials on the record, and further that it is not founded upon an examination of the merits of the case. We are, however, not concerned with the propriety or otherwise of the order against which leave is sought; it is sufficient to say that no special question arises, such as would justify an order under clause (*c*) of section 109 of the Code or under section 40 of the Letters Patent. We may add that, as was pointed out by the Judicial Committee in the case of *Moti Chand* v. *Ganga Prashad Singh* (8), there is nothing to prevent the petitioner from applying to His Majesty in Council for special leave. The application is, therefore, refused with costs.

Leave refused.

Solicitors for the Petitioner:—Messrs. *Dutt and Ghosh.*

Solicitors for the Opposite Party:—Messrs. *Dutt, Ghose and Manuell and Agarwala.*

(8) 29 I. A. 40; 24 A. 174.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1043 OF 1910.

April 27, 1911.

Present:—Mr. Justice Griffin.

GANGA SINGH—DEFENDANT—APPELLANT

versus

LACHMAN SINGH AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Suit, proper trial of—First Court not taking defendant's evidence and dismissing suit—Lower Appellate Court decreeing claim upon the same evidence—Irregularity.

In a suit for possession the defendant set up a plea of adverse possession. The first Court recorded the evidence of the plaintiffs, but without taking the evidence of the defendant dismissed the suit on the ground of jurisdiction. The lower Appellate Court upon the evidence on the record proceeded to decide the suit on its merits:

Held, that there was no proper trial of the case and that as the defendant's evidence was shut out by the action of the Court of first instance, the lower Appellate Court had decided the case upon an incomplete record.

Second appeal from the decision of the Additional Subordinate Judge of Aligarh, dated the 8th of July, 1910.

Mr. *Surendro Nath Sen*, for the Appellant.

Mr. *J. N. Mukerji*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for possession as lessees of a $\frac{1}{3}$rd *zemindri* share belonging to one Zorawar Singh. The defendant set up a title by adverse possession. The Court of first instance, after the case had been adjourned from time to time, recorded on the 4th of May 1910 evidence of five witnesses for the plaintiffs and on the same day without taking any evidence on behalf of the defendant dismissed the suit upon the ground that the suit for ejectment did not lie inasmuch as one of the plaintiffs alleged the defendant to be his sub-tenant. I note that no objection had been taken in the Court of first instance as to the jurisdiction of the Court to entertain the suit. The lower Appellate Court, purporting to act under the provisions of sections 196 and 197 of the Tenancy Act, dealt with the case, as it said, on the merits and held on the evidence that the plaintiffs had established their right to the possession of the share and mesne profits. The defendant comes here in second appeal and it is contended on his behalf that the Court of first instance dismissed the suit on a ground that was not raised in the pleadings, having satisfied itself from the evidence of the plaintiffs that their suit must fail and did not give the defendant an opportunity of proving his plea of adverse possession, that the record before the lower Appellate Court in appeal was not complete and that the lower Appellate Court ought not, therefore, to have dealt with the case under sections 196 and 197 of the Tenancy Act, for this among other reasons, that all the materials sufficient for the disposal of the case were not on the record. The defendant-appellant has filed an affidavit that his witnesses were present in Court when the suit was decided. The record also shows that his witnesses had been summoned for that date. It appears to me that there has been no proper trial of the case. The defendant's evidence was shut out by the action of the Court of first instance and lower Appellant Court has decided the case upon an incomplete record. It appears to me that the proper course to take, following the ruling in *Pabitra Kunwar* v. *Maharaja of Benares* (1), will be to allow this appeal, set aside the decree of the Court below and remand the case to the Court of first instance through the lower Appellate Court with directions to dispose of it according to law after taking all the evidence that may legally be tendered. I order accordingly.

(1) A. W. N. (1908) p. 140.

The costs of the case, including in this Court-fees on the higher scale, will follow the event.

Appeal allowed; Case remanded.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 824 OF 1910.

April 25, 1911.

Present:—Mr. Justice Banerji.

SHEOBARAN SINGH AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

BANWARI LAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Pre-emption—Preferential rights of pre-emptors inter se *—Classes of pre-emptors mentioned in the* Wajib-ul-arz alaltartib*—Construction of* Wajib-ul-arz.

In a *Wajib-ul-arz* the different classes of pre-emptors were mentioned '*alaltartib*', *i. e.*, one after another:

Held, that the right of pre-emption existed between the different classes of pre-emptors *inter se*, *i. e.*, one class of pre-emptors excluded another.

Second appeal from the decision of the Subordinate Judge of Jaunpur, dated the 22nd April 1910.

Mr. *Haribans Sahai*, for the Appellants.

Mr. *Ahmad Karim*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for pre-emption brought in respect of a sale of shares in ten villages. The plaintiffs are co-sharers of the vendors in the same *patti*. The vendees hold shares in the village but not in the same *patti* as that in which the property in dispute is situate. The plaintiffs claimed priority over the vendees by reason of their being co-sharers in the same *patti*. They also claimed to be *sharik ekjaddi* and to come within the first category of pre-emptors mentioned in the *wajib-ul-araiz* of the different villages.

As regards one village Padumanpur the Court of first instance dismissed the suit, holding that the plaintiffs had no preferential right. To this part of the decree the plaintiffs submitted.

As regards the shares in the other villages, that Court held that the plaintiffs had priority over the vendees and accordingly decreed the claim. It also held that the price of the property sold as mentioned in the sale-deed was exaggerated and was not the true price. The defendants-vendees appealed to the lower Appellate Court and disputed the plaintiffs' right of pre-emption and challenged the finding of the Court of first instance as to the amount of consideration for the sale. The lower Appellate Court decreed the appeal and dismissed the claim on the finding that under the terms of the *wajib-ul araiz* on which the claim was founded a right of pre-emption accrued only in the case of a sale to a stranger, *i. e.*, to a person who has no share in the villages and that as the vendees were co-sharers in the villages, no claim could be brought against them. In my opinion, this view of the learned Judge of the Court below is erroneous. Of the ten villages in question the *wajib ul-araiz* of eight are exactly in the same terms. They give the right of pre-emption to the different classes of pre-emptors mentioned therein *alaltartib i. e.*, one after another. It is thus manifest that under these *wajib-ul-araiz* the right of pre-emption exists between the different classes of pre-emptors *inter se i.e.*, one class of pre-emptors excludes another.

As regards the village Bhaura, that word does not occur, but it is clear from the language of the *wajib-ul-arz* that the right accrues not only in the case of a sale to a stranger but in the case of every sale, one class of pre-emptors having preference according to the order mentioned in the document. This case is distinguishable from the cases on which the lower Appellate Court has relied. As the plaintiffs are co-sharers in the same *patti* and the defendants vendees are not such co-sharers, the plaintiffs have priority of right over the defendants. The Court below is wrong in holding that they have no right of pre-emption simply because the sale was not to an outsider.

In this view no question of *res judicata* arises.

I, therefore, allow the appeal, set aside the decree of the Court below and as the case was decided on a preliminary point, in regard to which the decision of that Court has been found to be erroneous, I remand the case under Order XLI, rule 23, of the Code of Civil Procedure to that Court with directions to re-instate it under its original number in the register and to dispose of the other questions which arise in the case according to law. The appellants will have their costs this appeal. Other costs will follow the event.

Appeal allowed; Case remanded.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 547 OF 1910.

April 25, 1911.

Present:—Mr. Justice Banerji.

JADU BANS UPADHIYA AND OTHERS—PLAINTIFFS – APPELLANTS

versus

SHEOJIT SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (IV of 1882), s. 43—Mortgage by unauthorized person—Sale upon that mortgage—Acquisition by transferor of ownership in the property subsequent to the sale upon the mortgage, effect of—Contract of transfer must subsist at the time of acquisition.

Section 43 of the Transfer of Property Act applies to a case in which the contract of transfer subsists at the time when the property comprised in the transfer was subsequently acquired by the transferor, but the section cannot be applicable when the contract of transfer had come to an end before the acquisition of the property.

Durga Das v. *Muhammad Ismail*, A. W. N. (1908) 155, distingnished.

S. mortgaged his own share as well as the share of his brother *B.* to *D. D.* brought a suit on the mortgage and obtained a decree in execution of which he himself purchased the mortgaged property. Subsequent to the purchase, *B.* died and *S.* inherited his share in the property: *Held*, that *D.* was not entitled to take that portion of the property which belonged to *B.* and which *S.* acquired after the contract of mortgage had ceased to exist.

Second appeal from the decision of the Subordinate Judge of Jaunpur, dated the 23rd February 1910.

Mr. *Haribans Sahai*, for the Appellants.

The Hon'ble *Nawab Abdul Majid*, for the Respondents.

JUDGMENT.—In my judgment the decision of the lower Appellate Court is right. The facts are these, Khurbhur, Sheojit and Bhaggu, who were brothers, owned a certain fixed-rate holding. Khurbhur and Sheojit mortgaged the holding to the plaintiffs, who brought a suit for sale on the mortgage and obtained a decree. In execution of that decree, they caused the holding to be sold by auction on the 20th of November 1895 and themselves became the purchasers. They obtained formal possession but were ejected in 1900. They accordingly brought the suit out of which this appeal has arisen, for possession. The Court of first instance held that under the auction-sale plaintiffs acquired only the interests of Khurbhur and Sheojit and not of Bhaggu, who was no party to the suit or execution proceedings, and accordingly made a decree declaring the plaintiffs' right to 2-3rds of the property and did not make a decree for joint possession. The plaintiffs appealed and contended that in view of the provisions of section 43 of the Transfer of Property Act, they were entitled to the whole property inasmuch as Bhaggu was dead and his $\frac{1}{3}$rd share was inherited by Sheojit. This contention was repelled by the learned Subordinate Judge on the ground that it was after the sale that Bhaggu died and that Sheojit did not inherit his share before the sale. This view of the learned Subordinate Judge seems to me to be correct. It appears from the judgment of the Court of first instance that in the execution proceedings, which followed the decree obtained by the plaintiffs, Bhaggu raised an objection in respect of his $\frac{1}{3}$rd share and his objection was allowed on the 9th of March 1895. It is, therefore, manifest that what passed to the purchasers was the share of Khurbhur and Sheojit and not the share of Bhaggu. Under the auction purchase, the plaintiffs could not have acquired the share of Bhaggu, who was no party to the mortgage, or to the decree or to the execution proceedings. The learned Vakil for the appellant argues that as Sheojit acquired the interest of Bhaggu, the auction sale must be deemed to attach to Bhaggu's share also. This might have been a valid contention if Sheojit had executed a sale-deed of the property in question including the share of Bhaggu. Sheojit, no doubt, executed a mortgage and a decree was obtained under that mortgage. If before the acution-sale, the interests of Bhaggu had passed to Sheojit, those interests would have been comprised in the sale. This is what was held in *Durga Das* v. *Muhammad Ismail* (1), relied on by Mr. Haribans Sahai. There the property had not been sold by auction when the mortgagor acquired the whole of the property which he had mortgaged, although at the time of the mortgage he owned only a fractional share. Section 43 of the Transfer of Property Act applies to a case in which the contract of transfer subsists at the time when the portion of the property comprised in the transfer was subsequently acquired by the transferor, but the section cannot be applicable when the contract of transfer had come to an end before the acquisition of the property. The only contract in this case was the mortgage by Sheojit and that mort-

(1) A. W. N. (1908) 155.

gage determined after the auction-sale, the proceeds of which satisfied the mortgage. The contract of Sheojit cannot be said to have subsisted when Sheojit acquired the share of Bhaggu. If Bhaggu had been alive or if his share had passed to his son, the plaintiffs could not have claimed his share, although Sheojit had purported to mortgage it. The fact that Sheojit inherited the share of Bhaggu some time after the sale cannot entitle the plaintiffs to claim that share, by virtue of the provisions of section 43 of the Transfer of Property Act, inasmuch as Sheojit had not entered into a contract of sale with the plaintiffs before he acquired the said share. The plaintiffs purchased the property at an auction-sale and they acquired only those rights which belonged to their mortgagors, Khurbhur and Sheojit and not the $\frac{1}{3}$rd share of Bhaggu.

The Courts below were, therefore, right in holding that the said share did not pass to the plaintiffs and the plaintiffs are not entitled to recover possession of it.

The Court of first instance was clearly wrong in not making a joint decree for possession of the $\frac{2}{3}$rds share to which it found the plaintiffs entitled. In this respect the decree should be amended and a decree passed in plaintiffs' favour for joint possession of the $\frac{2}{3}$rds share, decreed to them. To this extent I allow the appeal, but in other respects the appeal is dismissed and the decrees of the Courts below are affirmed. I make no order as to the costs of this appeal.

Appeal allowed in part.

CALCUTTA HIGH COURT.
PRIVY COUNICL APPLICATION NO. 17 OF 1911.
April 21, 1911.
Present:—Mr. Justice Mookerjee and Mr. Justice Caspersz.

SRINIBASH PROSAD SINGH—JUDGMENT-DEBTOR—PETITIONER
versus
KESHO PROSAD SINGH—DECREE-HOLDER—RESPONDENT.

Privy Cruncil appeal—Civil Procedure Code (Act V of 1908), s. 109 *clauses* (a) *and* (c), *O. XLI, r.* 5—*Order refusing to stay execution—"Final order passed on appeal"—"Fit case for appeal to His Majesty."*

An order of the High Court under rule 5 of Order XLI, refusing to stay proceedings in execution of a decree, is not a final order passed on appeal by the High Court within the meaning of clause (*a*) of section 109 of the Civil Procedure Code.

Under the circumstances of the case, the High Court were of opinion that it did not involve any question of such special, public or private importance as would justify a certificate under clause (*c*) of section 109 of the Civil Procedure Code.

Application for leave to appeal to His Majesty in Council against the order of a Divisonal Bench of the High Court (Mookerjee and Teunon, JJ.) dated March 2nd, 1911, reported at 9 Ind. Cas. 862; 13 C. L. J. 365; 15 C. W. N. 475, refusing to stay the execution of the decree obtained by the opposite party.

Dr. *Rash Behary Ghosh*, Babus *Ram Charan Mitter* and *Mohini Mohan Chatterjee*, for the Petitioner.

Mr. *B. C. Mitter*, Counsel, Babus *Manmotho Nath Mookerjee*, *Provash Chandra Mitter* and *Narendra Chandra Bose*, for the Opposite Party.

JUDGMENT.

MOOKERJEE, J.—This is an application for leave to appeal to His Majesty in Council against an order under rule 5 of Order XLI of the Code of 1908, by which this Court refused to stay proceedings in execution of the decree in what is known as the Dumraon Raj case *Srinibash Prosad Singh* v. *Kesho Prosad Singh* (1). Two questions arise for consideration upon this application which purports to have been made under section 109 of the Code read with Order XLV, namely, *first*, whether the order against which leave to appeal is sought, is a final order passed on appeal within the meaning of clause (*a*) of section 109; and *secondly*, if the order is not of this description, whether the Court should certify the case as a fit one for appeal to His Majesty in Council within the meaning of clause (*c*) of section 109.

In so far as the first of these questions is concerned, I am not prepared to hold that the order against which leave to appeal is sought, is a final order passed on appeal by this Court. In the first place, it is well-settled, by a series of decisions which will be found reviewed in *Saratmoni Debi* v. *Bata Krishna Banerjee* (2), that the term "final order" in section 109 of the Code, denotes an order which finally decides any matter directly at issue in the case in respect of the right

(1) 13 C. L. J. 365; 9 Ind. Cas. 862; 15 C. W. N. 475.
(2) 10 C. L. J. 336; 4 Ind. Cas. 459.

of the parties. The order against which leave to appeal is sought, is clearly not an order of this description. It does not deal with the merits of the controversy between the parties to the litigation; but it merely decides that circumstances have not been established such as would justify an order for stay of execution of the decree under appeal; it is, therefore, obviously an interlocutory order which does not, in any way, affect the decision on the merits of the case. [See *Chundi Dutt* v. *Pudmanund Singh* (3) and *Mahomed Musaji* v. *Ahmed Saleji* (4).] In the second place, it is beyond controversy that the order in question was not passed on appeal within the meaning of clause (*a*) of section 109 of the Code. As pointed out by this Court in the case of *Secretary of State for India in Council* v. *British India Steam Navigation Co.* (5), an order cannot be deemed to have been passed on appeal unless it is an order passed by a superior Court in reversal, modification or affirmance of an order of an inferior Court. To constitute appellate jurisdiction, there must exist the relation of superior and inferior Court and the power on the part of the former to review the decisions of the latter. In the case before us, when the application for stay of execution was refused, it could not be said that the order of this Court was passed on appeal. It is plain, therefore, in my opinion, that the application for leave to appeal to His Majesty in Council, does not fall within clause (*a*) of section 109 of the Code.

In so far as the second question is concerned, we have to consider whether the order against which leave to appeal is sought, is such as to justify a certificate from the Court that the case is a fit one for appeal to His Majesty in Council, although it is not covered by either clause (*a*) or clause (*b*). Now, it has been repeatedly ruled that clause (*c*) of section 109 is clearly intended to meet special cases, such, for example, as those in which the point in dispute is not measurable by money, though it may be of great public or private importance. As Lord Hubhouse said in *Banarsi Prasad* v. *Kashi Krishna Narain* (6), to determine whether a case is of that kind, though it is left entirely in the discretion of the Court, is a judicial process which could not be performed without special exercise of that discretion evinced by the fitting certificate. It may be observed that the discretion thus vested in the Court, has been always very sparingly used, for instance, as pointed out in the case of *Mahomed Musaji* v. *Ahmed Saleji* (4), a special certificate was refused by this Court in the case of *Maniram Kolita* v. *Keri Kolitani* (7), although the question raised was by no means free from doubt and difficulty, and was in fact one of considerable importance to the entire Hindu community. Now, in the case before us, what are the special facts upon which a certificate of fitness is claimed under clause (*c*) of section 109 of the Code. The plaintiff sued for declaration of his title to what is called the Dumraon Raj estate, and obtained a decree for possession as against the infant defendant under the guardianship of the manager appointed by the Court of Wards. The infant defendant appealed to this Court, and on his behalf, an application was made for stay of execution of the decree of the Court below, which had been made after a protracted trial lasting for many months. The decree-holder offered to furnish adequate security for restitution before he should take possession in execution of the decree made in his favour. Upon the facts disclosed in the affidavits of both sides, the senior member of the Bench held that the appellant had failed to make out the possibility of substantial loss which alone would justify a stay of execution under rule 5 of Order XLI. This view by itself would be sufficient for the diposal of the application for stay of execution, as it would prevail under section 36 of the Letters Patent. Now, it is plain that the question whether or not the applicant had established that substantial loss might result to him if execution was not stayed pending the hearing of the appeal presented to this Court, is not a question of such exceptional importance as would justify a special certificate of fitness under clause (*c*) of section 109. It has been suggested, however, by the learned *Vakil* for the appellant-petitioner, that the case raises a question of constitutional law of some importance, inasmuch as one member of the Bench decided that if execution had to be stayed, the guarantee offered by the Secre-

(3) 22 C. 928.
(4) 13 C. L. J. 507; 10 Ind. Cas. 439.
(5) 13 C. L. J. 90; 9 Ind. Cas. 183.
(6) 28 I. A. 11; 23 A. 227.
(7) 5 C. 776.

tary of State for India in Council for the benefit of the appellant, could not be accepted as security, because it was invalid in law. In my opinion, there is no substance in this contention. In the *first* place, the question would not at all require consideration, unless it was decided that grounds had been established to justify a stay of execution. In the *second* place, even if such grounds were established, preliminary difficulties would have to be overcome by the appellant, any one of which might render an examination of the question suggested entirely superfluous. The Court unanimously held *first*, that as the Advocate-General, who had appeared as *amicus curiæ* for the Secretary of State, had not furnished any information to show that the requirements of section 41 of the Government of India Act, 1858, had been complied with, that is, that the Secretary of State for India in Council, with the concurrence of a majority of votes at a meeting, had offered to give the guarantee, the Court would not accept the security as valid in law; and *secondly*, that assuming the security to have been offered by the Governor-General in Council, as the Advocate General had not given any information as to the existence or otherwise of the elements required to validate a contract under section 1 of the Government of India Act, 1859, the Court could not accept the guarantee as a valid security. These are difficulties in bar, which have not been removed, as the requisite information has not been placed before the Court, and so long as they stand, no question obviously arises whether it is competent to the Secretary of State for India in Council or the Governor-General in Council to offer to indemnify the successful claimants to the Raj Estate out of the revenues of India. It may further be pointed out that two additional reasons were given by the Court against stay of execution, namely, *first*, that as the security, if accepted, cannot be enforced in execution under section 145 of the Code of 1908, it ought not to be forced upon the decree-holder; and, *secondly*, that in any view, the validity of the guarantee is so doubtful that the Court will not depart from its well-settled practice not to accept a security which is not reasonably free from doubt and difficulty. These, obviously, are questions which may arise in every ordinary case in which an application is made for stay of execution of a decree under appeal; they are undoubtedly not questions of such special public or private importance as would justify a certificate under clause (*c*) of section 109. It is, therefore, reasonably so plain that the question of constitutional law which, it is suggested, may arise in the case, and upon which the two members of the Court were divided in opinion, would not require consideration, unless the unanimous decision upon preliminary points of no exceptional difficulty or importance was reversed. Under such circumstances, I am not prepared to hold that we should certify the *case* itself as a fit one for appeal, when it is more than probable that its decision may not involve the examination of any question of special public or private importance. It may further be pointed out that the Secretary of State for India in Council is not a party to these proceedings, and the present application has not been made on his behalf. Whether in view of these facts, their Lordships would decide the constitutional question raised, is a matter entirely in their discretion, and, as our refusal to grant a special certificate leaves it open to the appellant to apply for special leave to His Majesty in Council, we are clearly of opinion that we ought not to create a precedent (See *Motichand* v. *Ganga Parshad Singh* (8) and *Clarke* v. *Brojendra Kissore Roy* (9)]. Indeed, if applications of this character are encouraged, the Court may have to deal with applications for leave to appeal to His Majesty in Council against orders refusing stay of executions in all cases where the unsuccessful litigant in the Subordinate Court is wealthy enough or has funds at his disposal sufficient to enable him to risk the necessary expenditure.

We may add that the learned Counsel for the respondent argued that clause (*c*) of section 109 ought to be interpreted as restricted in its application to cases of final orders precisely in the same manner as clauses (*a*) and (*b*). We are not, however, prepared to accept this construction as reasonable. The obvious difference in phraseology between clauses (*a*) and (*b*) on the one hand, and clause (*c*) on the other, shows conclusively that there is no substance in the contention, and there is plainly nothing in Order XLV also, which, in any manner, restricts the

(8) 29 I. A. 40; 24 A. 174.
(9) 13 C. W. N. 1127; 10 Ind. Cas. 786.

scope of clause (*c*). We may finally point out that the application does not purport to have been made under section 40 of the Letters Patent: but, even if the application were so made, we are clearly of opinion that it ought not to be granted. An order under that section cannot be claimed as a matter of right, and the present is obviously a case in which the discretion mentioned in section 40 ought not to be exercised in favour of the appellant.

On the whole, therefore, I am of opinion, that a certificate ought not to be granted under clause (*c*) of section 109. The application is, therefore, refused with costs, ten *gold mohurs*.

CASPERSZ, J.—This is an application, under Order XLV, rule 2, of the Code of Civil Procedure, for leave to appeal to His Majesty in Council, and it purports to be made with reference to clauses (*a*) and (*b*), section 109, of the Code. The order complained of by the petitioner was passed by this Court (Mookerjee and Teunon, JJ.) on the 2nd March, 1911. It was an order, under Order XLV, rule 5, refusing stay of execution of a decree made by the Subordinate Judge of Shahabad (at Arrah), directing the petitioner to make over the extensive property, known as the Dumraon Raj, to the plaintiff who is the opposite party in this application. That decree is under appeal to this Court.

I am of opinion that this application should be refused, but it will be open to the petitioner to invoke the prerogative right of the Crown and to apply to the Judicial Committee for special leave to appeal to His Majesty in Council.

Apart from any reported cases, I think, this application can be decided on the wording of the Code. Now, clause (*a*) of section 109, declares that an appeal shall lie from any decree or final order passed on appeal by a High Court. The order complained of is not of that description, it was not passed on appeal: it was on interlocutory order refusing to stay execution of the decree of the Subordinate Judge. Accordingly, reliance has been placed by the learned Vakil for the petitioners, on clause (*c*) of the section which provides that an appeal shall lie to His Majesty in Council from any order (not necessarily a final order) "when the case as hereinafter provided is certified to be a fit one for appeal to His Majesty in Council." It has been urged on behalf of the petitioners that this is eminently a fit case for leave to be granted to appeal from the order in question, because it raises important constitutional issues.

The precise grounds taken in the application clause are: (*a*) that this Court ought to have held that substantial loss would result to the petitioners unless an order was made for staying the execution of the decree; (*b*) that this Court ought to have held that the security offered by the petitioners was a good and valid security and the grounds on which it has held otherwise are erroneous in law; (*c*) that in any case an opportunity ought to have been given to the petitioners to give fresh security.

Even if the assumption be made, in agreement with the view expressed by Mr. Justice Teunon, that substantial loss may result to the petitioners if the possession of the Court of Wards is disturbed pending the disposal of the appeal by this Court, it has still to be shown that the plaintiff is in a position to disturb that possession. This he will not be able to do unless he furnishes security for restitution and we have not been told that he is prepard to undergo that heavy responsibility. Both the parties appear to be in a difficult position which may result in a Receiver being appointed on the application of the petitioners, or the opposite party, or of both. In that event, also, as in every case of protracted litigation, the estate might suffer, but the petitioners alone would not sustain any peculiar substantial loss.

Secondly, it is the settled practice of this Court that when security is offered for stay of execution of a decree it is not accepted unless its legal validity and sufficiency is beyond all reasonable doubt. The petitioners were prepared to offer security in terms of the telegram, dated the 31st December 1910, from the Secretary of State for India to His Excellency the Viceroy. That telegram was as follows:—

"Your telegram dated 22nd December, Dumraon Estate. I sanction security being furnished by Government of Bengal to the extent required by High Court Judicature for stay of execution pending final decision on appeal. I sanction also your proposal as to ward's maintenance and provisions of funds for prosecuting appeal."

In the absence of fuller details, the learned Judges were constrained to reject the security

offered. It was open to he Legal Advisers of the Crown to supply the fuller details required. That they did not do so affords no ground for appealing to the Judicial Committee. The judgment of this Court was based on the facts supplied by the learned Advocate-General, who appeared as *amicus curiæ*, and it is impossible to say that the decision so arrived at is a matter of public or private importance.

Lastly, we are not told, and there is nothing in the papers to show, that the petitioners are, or ever were, ready and willing to furnish fresh security of any other kind than that indicated in the telegram from the Secretary of State for India.

I agree, therefore, that this is not a fit case for leave to be granted to appeal to His Majesty in Council.

Application refused.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 973 OF 1910.
April 25, 1911.
Present:—Mr. Justice Griffin.
LALOO—DEFENDANT—APPELLANT
versus
LALOO AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Hindu Law—Succession—Daughter's sons inherit per capita.

Daughter's sons inherit their maternal grand-father's property *per capita* and not *per stirpes*.

Second appeal from the decision of the officiating Judge of Agra, dated the 16th August 1910.

Mr. *Balram Chandra Mukerji*, for the Appellant.

Mr. *Benode Behari*, for the Respondents.

JUDGMENT.—One Dharampal left a widow and two daughters. The two plaintiffs are the sons of *Musammat* Dulari, one of the daughters. The defendant is the son of the other daughter. Certain property belonging to Dharampal having been recorded in the names of the defendant, during the life-time of Dharampal's widow, the plaintiffs have now, on the death of the widow, instituted the present suit for possession of $\frac{2}{3}$rds of the property so recorded and of other property of Dharampal. The suit was resisted on various grounds. The lower Appellate Court has decreed the plaintiff's claim for the property left by Dharampal. The defendant comes here in second appeal. The first ground taken in appeal is that the plaintiffs are entitled

in any case to only one-half of the property of Dharampal. The contention on behalf of the appellants is that daughter's sons take *per stirpes* and not *per capita*. In Mayne's Hindu Law in paragrah 593 and page 765 it is stated that sons by different daughters all take *per capita* and not *per stirpes*. I have, however, been referred to the observations of the learned author of "The Principles of Hindu Law" (by J. C. Ghose) at page 102, where he states. "It remains to record the changes in the Hindu Law brought about by the ingenuity of the Judges and Lawyers of our modern Courts. The daughter's sons come next, and they are declared to take *per capita*, against all the *Rishis* and all the Commentators who have dealt with that question." At page 105 the learned authour further states the Courts have also fallen into error in holding that the daughter takes only a life-interest like the widow, and that the daughter's sons take *per capita*. The passages in the *Mitakshara* quoted on behalf of the appellant do not, in my opinion, support the contention now advanced that daughter's sons take *per stirpes* and not *per capita*. I prefer (to *stare decisis*,) to follow the law as set out in Mayne's Hindu Law, which is based on a series of rulings of the Indian Courts. As to the other grounds of appeals, it appears to me that the form of the decree is not open to objection. I am not concerned in this suit in declaring what is the nature of the right which has passed to the successors of Dharampal.

Other grounds of appeal have not been pressed.

The appeal is dismissed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 671 OF 1910.
May 2, 1911.
Present:—Mr. Richards, K. C., Chief Justice, and Mr. Justice Tudball.
HARDWARI MAL AND ANOTHER—DEFENDANTS—APPELLANTS
versus
BALDEO SAHAI AND OTHERS—PLAINTIFFS—RESPONDENTS.

Pre-emption—Custom or contract—Wajib-ul-arz, *evidentiary value of*—*Entry in* Wajib-ul-arz *of doubtful character*—*Whether such entry alone sufficient to establish custom*—*Burden of proof*—*Presumption.*

HARDWARI MAL *v.* BALDEO SAHAI.

In a suit for pre-emption, the plaintiff must establish the custom upon which he bases his claim. A doubtful entry in a *Wajib-ul-arz* as to pre-emption unsupported by any corroborative evidence is insufficient to establish the custom of pre-emption.

Returaji Dubain v. *Pahalwan Bhagat*, 7 A. L. J. 1040, 7 Ind Cas.. 680, referred to.

There is no class of evidence that is more likely to vary in value according to circumstances than that of *Wajib-ul-araiz*.

Thakur Anant Singh v. *Thakur Deya Singh*, 37 I. A. 191; 14 C. W. N. 770; 7 A. L. J. 764; 12 C. L. J. 36; 12 Bom. L. R. 504; 8 M. L. T. 79; 1 M. W. N. 324, 20 M. L. J. 604, 32 A. 363; 6 Ind. Cas. 787; *Mohammad Imam Ali Khan* v. *Hussein Khan*, 25 I. A. 161; 26 C. 81; *Parbati Kunwar* v. *Chandrapal Kuar*, 36 I. A. 125, 6 A. L. J. 767; 10 C. L. J. 216; 13 C. W. N. 1073; 11 Bom. L. R. 890; 12 O. C. 304; 31 A. 457; 4 Ind Cas 25; 5 M. L. T. 427; 19 M. L. J. 605, referred to.

Second appeal from the decision of the Additional District Judge of Meerut, dated 20th April 1910.

The Hon'ble Mr. *Sunder Lal* (with him Dr. *Tej Bahadur Sapru*), for the Appellants.

The Hon'ble Mr. *Moti Lal Nehru*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for pre-emption based upon a custom which is alleged to exist in the village. The village, as at present constituted, consists of several separate and distinct *mahals*. The property in suit is the whole of *khata khewat* No. 2 in *mahal* and *patti* Walid Husain. The vendees are co-sharers in the village but in another *mahal*. The pre-emptors are co-sharers in the same *mahal* but in another *patti*:

The Court of first instance dismissed the suit, holding that custom had not been established by the evidence produced by the plaintiffs.

The lower Appellate Court has decreed the claim, holding that the evidence adduced is sufficient to establish the custom.

The further question arose as to whether, assuming that the custom existed, the plaintiffs had a right preferential to that of the vendees to purchase the property. To establish the custom the plaintiffs produced the *wajib-ul-arz* of the year 1863 together with the *dastur dehi* of 1889. As the Court of first instance has remarked, plaintiff declined to produce any oral evidence to prove the existence of a custom of pre-emption. We may add that there is no documentary evidence either other than that referred to. The *wajib ul-arz* of 1863 states in respect to the right of pre emption that in the village up to that time no co-sharer had ever transferred his property by mortgage, but that for the future every proprietor would be entitled to transfer his share in whole or in part, that is, if any proprietor wished to sell or mortgage his estate, than he could transfer it to another proprietor at the price agreed upon. It is doubtful whether a particular word used in this document is *ek* or *sharik*. In the one case, the record would read "*to awal ek hath dusri ke intiqal kar sakta hai.*" If it be read as *sharik*, it will be "*to awal sharik hath dusri ke intiqal kar sakta hai.*" Between the years 1863 and 1889 the village was partitioned and the *mahal* which was called *mahal* Ghairdaiyan was constituted. In the *dastur dehi* in 1889 of that *mahal* certain custom were set forth and then the remark was entered that as to the customs other than those entered, reference must be made to the *wajib-ul-arz* of 1863. Subsequent to 1889, there were two more partitions, in 1304 and 1310. The first question which arises is whether or not the plaintiff has produced sufficient evidence to establish the custom which he sets forth. The Full Bench ruling in *Returaji Dabain* v. *Pahalwan Bhagat* (1), no doubt lays down that when a record of the right of pre-emption is found in the *wajib-ul-arz* it is presumbly a reference to custom. The chief reason for this being that it was the duty of the recording officer to record customs and not agreements made between the co-sharers. Applying that principle to the present instance, the presumption is greatly weakened when we find that at least in the case of mortgage the *wajib-ul-arz* clearly records not a custom but an arrangement for the future. There is a clear statement to the effect that in the past there had been no mortgages but that for the future mortgages should be carried out in a certain manner. It is clear that the Officer who recorded this *wajib-ul-arz* did not restrict himself to custom but that he did, as a matter of fact, record in one instance at least an agreement at which the co-sharers arrived at the time of the settlement. The rest of the language of the clause which refers to pre-emption is also language such as would be used in recording an agreement rather than recording a custom. The plaintiffs must establish the custom which they are setting up. The entry in the *wajib-ul arz*, which to say the least is of a very doubtful character, is without any corroborative evidence. On the other hand, we must

(1) 7 A. L. J. 1040; 7 Ind. Cas. 680.

quote the first Court's remarks: "There were admittedly two instances of transfer in 1906, but the right of pre-emption was not exercised in respect of either of them. Nor is it suggested that that right was ever enforced on any previous occasion." In the present case we cannot hold that the doubtful entry in the *wajib-ul-arz* unsupported by any corroborative evidence is sufficient to establish the alleged custom. In the case of *Thakur Anant Singh* v. *Thakur Daya Singh* (2), their Lordships of the Privy Council remarked as follows: "It has been pointed out more than once at this Board that there is no class of evidence that is more likely to vary in value according to circumstances than that of *wajib-ul-ariz* [*Muhammad Imam Ali Khan* v. *Hussein Khan* (3) and *Parbati Kunwar* v. *Chandarpal Kuar* (4)], and where, as here, from internal evidence it seems probable that the entries recorded connote the views of individuals as to the practice that they would wish to see prevailing rather than the ascertained fact of a well-established custom, the learned Judicial Commissioners properly attached weight to the fact that no evidence at all was forthcoming of any instance in which the alleged custom had been observed."

In our opinion the above remarks are applicable to the facts of the present case and with considerable force. It is true that in that case the custom in question was one which was put forward to rebut the ordinary presumption that the law of the *Mitakshara* prevailed in a matter of inheritance. In the case before us the custom alleged is one put forward in derogation of the ordinary right of a proprietor to sell his property to whomsoever it may please him to sell. The burden of proof was upon the plaintiffs to establish by sufficient evidence the alleged custom. The evidence he has produced is, in our opinion, quite insufficient. As we have not heard the respondent's arguments on the other point which arises in the case, we do not think it expedient to express an opinion thereon.

The result is that the appeal will be allowed, the decree of the lower Court will be set aside, and that of the Court of first instance will be restored with costs in this Court and in the Court below which will include fees in this Court on the higher scale.

Appeal allowed.

(2) 37 I. A. 191: 14 C. W. N. 770; 7 A. L. J. 764; 12 C. L. J. 36; 12 Bom. L. R. 504; 8 M. L. T. 79; 1 M. W. N. 324; 20 M. L. J. 604; 32 A. 362; 6 Ind. Cas. 787.

(3) 25 I. A. 161 at p. 169; 26 C. 81.

(4) 36 I A. 125; 6 A. L. J. 767; 10 C. L. J. 216; 13 C. W. N. 1073; 1 Bom. L. R. 890 12 O. C. 304; 31 A. 457; 4 Ind. Cas. 25; 19 M. L. J. 605; 5 M. L. T. 427.

(s. c. 13 C. L. J. 399.)

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL NO 42 OF 1910.

February 27, 1911.

Present: - Mr. Justice Mookerjee and Mr. Justice Teunon.

GANES NARAIN SINGH AND OTHERS—OPPOSITE PARTY—APPELLANT

versus

MALIDA KOER—PETITIONER—RESPONDENT.

Arbitration—Award—Private arbitration - Order filing award—Appeal—Civil Procedure Code (Act V of 1908), s. 104, sub s. (1) cl. (f) and Sch. II, s. 21—Legal misconduct of arbitrator—Hearing evidence behind back of one party—Private inquiries—Award incomplete - Leaving certain matters undetermined—Award bad and unenforceable.

An order directing a private award to be filed and a decree to be drawn up on the basis thereof, under section 21 of Schedule II of the Civil Procedure Code of 1908, is appealable under section 104, sub-section (1), clause (*f*).

In arbitration proceedings, both sides must be heard, and each in the presence of the other.

Consequently, an arbitrator entirely misconceives his duty, who takes upon himself to hear evidence behind the back of the party interested in controverting it; and it is legal misconduct on the part of an arbitrator to make private inquiries and to base his award on information which he has privately obtained.

Therefore, an award based partly on private inquiries cannot be treated as binding.

An award should be a final decision on all matters referred to the arbitrator. Where it leaves undecided one of the cardinal points in controversy, the award is bad.

Appeal from the order of the first Sub-Judge of Patna, dated December 15th. 1909.

Dr. *Rash Behary Ghosh*, Babus *Umakali Mukerjee*, *Mohendra Nath Roy*, *Chandra Sekhar Prosad Singh*, *Ganesh Dutt Singh* and *Manmotha Nath Roy* for the Appellants.

Mr. *B. Chakravarti*, Counsel and Moulvi Syed *Shamsol Huda*, Babus *Kulwant Sahai*, *Harendra Krishna Mukherjee* and *Rajeswari Prosad*, for the Respondents.

JUDGMENT. This appeal has been preferred against an order by which the

Court below has directed a private award to be filed under section 21, sub-section 1 of the second Schedule of the Civil Procedure Code of 1908. A preliminary objection has been taken to the appeal on the ground that it is incompetent. There is no substance in this objection, because under section 104, sub-section 1, clause (*f*), of the Code, an appeal lies from an order filing an award in an arbitration without the intervention of the Court. This provision has settled the difficulty and divergence of judicial opinion under the Code of 1882, and it is consequently unnecessary to examine the decisions under that Code. We shall, therefore, proceed to consider the appeal on the merits.

There is no controversy between the parties as to the circumstances under which the reference to arbitration was made. One Gunput Narain Singh, a wealthy Hindu, governed by the *Mitakshara* Law, died on the 25th August 1908. Shortly before his death, he had executed a testamentary instrument on the 18th August 1908, which was registered two days later. Gunput Narain left a widow, Malida Koeri, a daughter, Ramjot Koeri and several agnatic relations. Immediately upon his death, disputes broke out among these parties, and the substantial questions in controversy were, *first*, whether the alleged Will was genuine and had been executed by the testator with a sound disposing mind; *secondly*, whether his relations were members of the same joint family and whether their properties were joint; *thirdly*, whether the widow and the daughter were successively entitled to any portion of the estate left by the deceased. On the 26th October 1908, the parties executed an *ekrarnama*, by which they appointed Babu Laldhari Singh as arbitrator to decide the matters in controversy. They further undertook to abide by his decision, to have the award filed in a competent Court, and to get a deed of family arrangement executed in terms thereof. The arbitrator made his award on the 20th February 1909, and on the 7th June following, Malida Koeri, the widow who was described as the first party, made an application, under section 20 of the Second Schedule of the Code, to Subordinate Judge of Patna for leave to file the award. The agnatic relations, who may be called the Singhs, described as the second party, and the daughter Ramjot Koeri, described as the third party, were made parties to this application. Notices were served upon the opposite parties, but objections were taken on behalf of the Singhs alone. The Subordinate Judge overruled these objections, and directed the award to be filed and a decree drawn up on the basis thereof. The Singhs have now appealed to this Court, and on their behalf, the decision of the Subordinate Judge has been assailed substantially on five grounds, namely, *first*, that the reference to arbitration was invalid, as the question of the genuineness of a testamentary instrument cannot be determined by arbitration; *secondly*, that the Court of the Subordinate Judge had no jurisdiction to entertain the application to file the award, because the Court of Probate has exclusive jurisdiction to determine the genuineness of a Will; *thirdly*, that as the widow had, on the 3rd July, 1909, applied to the Court of Probate for Probate of the Will, she must be taken to have made her election, and could not therefter proceed with the application to file the award; *fourthly*, that the award, on the face of it, was illegal, because it was based on private inquiries made by the arbitrator; and, *fifthly* that the award was illegal, because it was incomplete and did not decide at least one fundamental question referred to arbitration. The first three grounds, it will be observed, are in the nature of objections in bar, and relate either to the validity of the agreement to refer to arbitration or the jurisdiction of the Court to entertain the application to file the award and determine the question raised thereon. In support of these contentions, reliance was placed upon the cases of *Ramani Debi* v. *Kumud Bandhu Mookerjee* (1), *Ghellabhai* v. *Nandubhai* (2), *Monmohini* v. *Banga* (3), *Kunja Lal* v. *Kailash Chandra* (4), *Ameer Chand* v. *Mohanund Bibi* (5), *Sarada Kanto Das* v. *Gobindo Mohan Das* (6) and *Fagan* v. *Fagan* (7), it may be added, deals with the same matter. The first two, at least, of the questions raised are of some nicety and need not be decided on the present occasion,

(1) 14 C. W. N. 924; 7 Ind. Cas. 126; 12 C. L. J 185.
(2) 21 B. 335.
(3) 31 C. 357.
(4) 14 C. W. N. 1068; 7 Ind. Cas. 740.
(5) 6 C. L. J. 453.
(2) 12 C. L. J. 91; 6 Ind. Cas. 912.
(7) (1849) 12 Ir. Eq. R. 433.

because we are clearly of opinion that the fourth and fifth grounds, which relate to the validity of the award, must prevail.

In so far as the fourth objection taken by the appellants is concerned, it is well-settled that, in arbitration proceedings, both sides must be heard and each in the presence of the other. However immaterial the arbitrator may deem a point, he should be very careful not to examine a party or a witness upon it except in the presence of the opponent. If he errs in this respect, he exposes himself to the gravest censure, and the smallest irregularity is often fatal to the award. In support of his position, reference may be made to the decision of the House of Lords in *Drew* v. *Drew* (8), where Lord Cranworth, L. C., said that he agreed with Lord Eldon that the principles of universal justice required that the person who is to be prejudiced by the evidence ought to be present to hear it taken and that an arbitrator entirely misconceived his duty who took upon himself to hear evidence behind the back of the party interested in controverting it. This rule has been recognised in cases of high authority, amongst which may be mentioned, *Harvey* v. *Shelton* (9), *In re Hick* (10), *In re Tidswell* (11), *Walker* v. *Frobisher* (12), *Featherstone* v. *Cooper* (13), *Dobson* v. *Groves* (14), *In re Plews and Middleton* (15), *In re Brook* (16), and *Oswald* v. *Grey* (17). The same view has been adopted in the American Courts as based upon broad principles of justice, equity and good conscience, and it has been ruled by the Supreme Court of the United States that the arbitrator cannot take it upon himself to listen to evidence on behalf of either party behind the back of the other, and where such evidence has been received, the award made cannot be treated as binding. *Lutz* v. *Linthicum* (18); see also *Moshier* v. *Shear* (19) and *Small* v. *Trickey* (20). A similar view was adopted by the learned Judges of the Allahabad High Court in *Daya Kissen* v. *Dharmadas* (21), where it was held by Edge, C. J., that it was legal misconduct on the part of an arbitrator to make private inquiries and to base his award on information which he had privately obtained and which the parties had no opportunity to check. In the case before us, the award recites on the face of it that the arbitrator held, partly on evidence taken before him and partly on private inquiries, that the Will executed by Gunpat Narain was genuine. This it was not competent for him to do. See the authorities collected in the Laws of England, edited by Lord Halsbury, Vol. I, page 480, note (*f*) and (*g*). Consequently, on this ground alone the award must be taken to have been vitiated.

In so far as the fifth ground urged on behalf of the appellants is concerned, we are of opinion that it is equally well-founded. It is well-settled that an arbitrator must be careful to see that his award is a final decision on all matters requiring his determination. The obligation so to decide depends upon the question whether the submission requires that all or only some of the matters in dispute are to be determined by him. *Wrightson* v. *Bywater* (22), *Randall* v. *Randall* (23), *Samuel* v. *Cooper* (24), *In re Wright* (25), *Whitworth* v. *Hulse* (26), *Doe* v. *Horner* (27), *Stone* v. *Phillipps* (28), *Wakefield* v. *Llanelly Ry. Co.* (29), *Mitchel* v. *Staveley* (30), *Wilkinson* v. *Page* (31), *Fagan* v. *Fagan* (7) and *Bowes* v. *Fernie* (32); see also authorities collected in the Laws of England, edited by

(8) (1855) 2 Macq. 1.
(9) (1844) 7 Beav. 455, 13 L. J. Ch. 466.
(10) (1819) 8 Taunton 694; 21 R. R. 511.
(11) (1883) 33 Baev. 213; 11 Jur. (N. S.) 143.
(12) (1801) 6 Ves. 70; 5 R. R 223.
(13) (1803) 9 Ves. 67.
(14) (1814) 6 Q. B. 637; 14 L. J. Q. B. 17; 9 Jur. 86.
(15) (1845) 6 Q B. 845; 14 L. J. Q. B. 139; 9 Jur. 160
(16) (1845) 15 C. B. (N. S.) 403; 33 L. J. C. P. 246; 10 Jur. (N. S) 704; 10 L. T. 378.
(17) (1855) 24 L. J. Q. B. 69.
(18) (1844) 8 Peters 175.
(19) (1882) 102 Ill. 169; 40 Am. Rep. 573.
(20) (1856) 41 Maine 507; 66 Am. Dec. 255.
(21) 4 A L. J. 159; A. W. N. (1907) 75.
(22) (1838) 3 M. & W. 199; 6 D. P. C. 359; 1 H. & H. 50; 7 L J. Ex. 23.
(23) (1805) 7 East 81; 8 R. R. 601; 3 Smith 90.
(24) (1835) 2 A. & E. 752; 1 H. & W. 86.
(25) (1841) 1 Q. B. 98; 4 P. & D. 710.
(26) (1866) L. R. 1 Ex. 251; 35 L. J. Ex. 149; 12 Jur. (N. S,) 652; 14 L. T. 445; 14 W. R. 736.
(27) (1838) 8 A. & E. 235, 3 N. & P. 344; W. W. & H. 348; 2 Jur 417; 7 L. J. Q. B. 164.
(28) (1837) 4 Bing. (N. C.) 37; 5 Scott 275; 6 D. P. C. 247; 3 Hodges 302; 7 L. J. C. P. 54.
(29) (1865) 3 De G. J. & S. 11; 34 Beav. 245.
(30) (1812) 16 East. 58; 14 R. R. 287.
(31) (1842) 1 Hare 276; 11 L. J. Ch. 19; 6 Jur. 567
(32) (1838) 4 Myl. & C. 150.

Lord Halsbury, Vol. I, page 478, note(*q*). The same rule has been adopted in the American Courts in a series of decisions amongst which may be mentioned, *Kleine* v. *Cotara* (33) and *Smith* v. *Potter* (34). The position, of course, is different where the arbitrator is empowered to make one or more awards at his discretion, as in *Dowse* v. *Cox* (35), *Wrighton* v. *Bywater* (22), and the decision of this Court in the case of *Sashimukhi Dabya* v. *Nobin Chandra* (36), must be taken to fall within this class of cases. In the case before us, however, it was clearly the duty of the arbitrator to give a complete adjudication of the matters in controversy. In our opinion, he has failed to do so, for his award, upon a reasonable construction of the whole of the instrument, must be taken to have left undecided one of the cardinal points in controversy, namely, whether the testator belonged, with the present appellants, to a joint Hindu family. There is also room for doubt whether the arbitrator has decided the question of testamentary capacity of the deceased at the time of the alleged execution of the Will. The award is consequently open to the objection of incompleteness, and on this ground also, its validity cannot be sustained.

The result, therefore, is that this appeal must be allowed, the order of the Subordinate Judge discharged, and the application to file the award dismissed with costs both here and in the Court below. We assess the hearing fee in this Court at five gold *mohurs*.

Appeal allowed.

(33) (1814) 2 Gal. 61; 14 Fed. Cas. 732
(34) (1855) 27 Vermont 304; 65 Am. Dec. 198.
(35) (1825) 3 Bing. 20; 28 R. R. 565; 10 Moore, 272; 3 L. J. (o. s.) C. P. 127.
(36) 4 C. L. R. 92.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 975 OF 1910.

April 29, 1911.

Present:—Mr. Justice Griffin.

BOHRA GAJADHAR SINGH—PLAINTIFF—APPELLANT

versus

GIRDHARI LAL—DEFENDANT—RESPONDENT.

Res judicata—*Former decision that plaintiff purchased plot A only—Second suit that he purchased A and B, whether lies.*

The plaintiff purchased a certain plot of land which had been previously mortgaged to the defendant. The plaintiff instituted a suit for redemption and obtained a decree. It was decided in execution of that decree, on the objection of the defendant, that the plaintiff had purchased property A only. He subsequently brought a suit for possession of property B on the strength of the same sale:

Held, that the suit was barred as *res judicata*.

Second appeal from the decision of the Additional Sub-Judge of Agra, dated 22nd August 1910.

Mr. *Govind Prashad* (with him Mr. *Gulzari Lal*), for the Appellants.

Mr. *Satya Narain*, for the Respondent.

JUDGMENT.—The plaintiff purchased a certain plot of land which had been previously mortgagad to the defendant. The plaintiff brought a suit for redemption of the mortgage and obtained a decree. In execution of the decree he obtained possession of a certain plot of land. Objection was taken by the defendant, and it was found that the plaintiff was entitled to possession of a plot shown in the map in the present case as A B C D only and not to the other plot shown as B E F C in the same map. This was decided in the year 1903. The plaintiff has instituted the present suit for possession of the plot B E F C on the strength of the same sale. Both the Courts below have dismissed the suit. The plaintiff wishes to adduce evidence to show that what he really purchased were two plots A B C D and B E FC. Both the lower Courts have held that the provisions of section 92 of the Evidence Act preclude him from producing evidence to show the existence of facts in variance with the terms of the sale-deed. The plaintiff has also claimed a certain lane adjoining the plot in suit on the east. Both the Courts below have held that this lane is not included in the sale-deed. The plaintiff wished to show by oral evidence, that it was included. But as stated above, the Courts below did not allow oral

evidence to be produced on this point also. He comes here in second appeal, and it is contended on his behalf that, under the provisions of section 92 of the Evidence Act, only parties to a deed or their representatives are excluded from adducing evidence for the purpose of contradicting, varying etc. the terms of the deed. The defendant to the suit was not a party to the sale-deed nor is he the representative of the vendor. Be that as it may, I do not think the case is one in which the plaintiff should be permitted to re-open the matter which has been decided in the litigation which came to an end in 1903. It was then decided that what the plaintiff had purchased was the plot A B C D and not the plot B E F C. The matter now in suit was directly and substantially in issue in the former litigation. The plaintiff cannot now be permitted to re-open the matter. The appeal is dismissed with costs including in this Court fees on the higher scale.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 91 OF 1911.

April 25, 1911.

Present:—Mr. Justice Banerji.

BECHAI SINGH AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

SHAMI NATH TEWARI AND OTHERS—DEFENDANTS—RESPONDENTS.

Pre-emption—Decree in favour of plaintiff on payment of certain specified sum—Judgment-debtor liable to costs—Set-off.

In a pre-emption suit plaintiff's suit was decreed on payment of Rs. 324-12. The decree provided that if payment was made within a month, the plaintiff would get Rs. 9-11 as costs from the judgment-debtor. The plaintiff paid Rs. 324 within the time fixed:

Held, that he was entitled to set-off the balance of annas 12 against the costs payable to him.

Ishri v. *Gopal Saran*, 6 A. 351; *Parmanand Raot* v. *Gobardhan Sahai*, 28 A. 676, A. W. N. (1906) 198; 3 A. L. J. 804, followed.

Second appeal form the decision of the District Judge of Gorakhpur, dated the 9th December, 1910.

Mr. *Gobind Prashad*, for the Appellants.

Mr. *Sital Prashad*, for the Respondents.

JUDGMENT.—This is a decree-holders' appeal in a case in which they obtained a decree for pre-emtion and has arisen under the following circumstances:—On the 31st of March 1909, a decree was passed in favour of the decree-holders by the Court of first instance decreeing pre-emption to them on condition that they should deposit Rs. 324 as purchase-money within one month. This sum of Rs. 324 was deposited within the time allowed and possession was obtained by the decree-holders. An appeal was preferred against the decree of the Court of first instance and the lower Appellate Court increased the amount of the purchase-money by 12 annas, which it directed the plaintiffs pre-emptors to pay within one month of the date of its decree. The decree, as the law requires, provided that in default of payment, the suit would stand dismissed, otherwise on payment of the purchase-money the plaintiffs would get their costs in both Courts, those costs amounting to Rs. 9-11. The judgment debtors filed an application praying for restoration of possession on the allegation that the additional 12 annas awarded by the Appellate Court had not been paid by the plaintiffs-decree-holders, and that, therefore, their suit must be deemed to have been dismissed. The decree-holders alleged that they had paid the 12 annas to the defendants in cash but the Court of first instance disbelieved the evidence adduced on the point and allowed the application of the defendants and directed that possession should be restored to them. This order has been affirmed by the lower Appellate Court on grounds which it is not easy to follow. The learned Judge states in his judgment that he refuses to interfere (1) because the plaintiffs-appellants are pre-emptors and pre-emption is a weak right. That is wholly immaterial for the purposes of this case. The question was whether the decree had been complied with and not whether the plaintiffs' right was or was not a weak right. The second reason of the learned Judge is that he who seeks equity must do equity. That is, no doubt, true, but in this case equity was in favour of the plaintiffs who had obtained the decree and against the defendants as I shall presently show. The third reason which the learned Judge gives in his judgment in deciding against the appellants is that even if the evidence adduced by them as to the payment of 12 annas be true, "the appellants would still deserve to lose their case for being such fools as to make a payment in pre-emption decree and not even take a written

receipt for it." If the plaintiffs-pre-emptors did, as a matter of fact, pay the 12 annas which they alleged having paid, the mere fact that they did not take a receipt should not prejudice their case. If the payment was made, they are entitled to the fruits of their decree whether or not they were so foolish as not to take a receipt. However, irrespective of the reasonings of the learned Judge and in spite of the finding of the Court of first instance that the additional 12 annas decreed by the lower Appellate Court in the suit for pre-emption were not paid, the plaintiffs would not be deprived of the fruits of the decree, if they in fact and substance complied with the decree. As I have said above, the decree of the Appellate Court provided for payment of Rs. 324-12, the purchase-money or any balance that might bo due, within one month of the date of the decree and it further provided, that in case of default the suit would stand dismissed, but that if payment was made, the plaintiffs were to get their costs amounting to Rs. 9-11. The result of the decree was, therefore, this that the plaintiffs were to pay Rs. 324-12 and to recover Rs. 9-11. Admittedly, they have paid Rs. 324 and it has been found that they did not actually pay the 12 annas. But they were entitled to a sum of Rs. 9-11 for costs and from that sum they were also entitled in equity to deduct any portion of the purchase-money, which they had not paid. In this case the unpaid portion of the purchase-money was 12 annas only and this sum of 12 annas they were entitled to deduct from Rs. 9-11 awarded to them as costs. This case is similar to the case of *Ishri*, v. *Ram Gopal Saran* (1). Applying the rule laid down in that case, the plaintiffs were entitled to set-off the unpaid portion of the purchase money against the costs, payable to them, those costs being in excess of the unpaid portion of the purchase-money. The same principle was laid down in *Parmanand Roat* v. *Gubardhan Sahai* (2). Following these rulings, I must hold that the decree in this case was fully complied with and the judgment-debtors were not entitled to be restored to possession. I allow the appeal, set aside the order of the Courts below and dismiss the respondents' application for restoration of possession. Under the circumstances, I make no order as to costs.

Appeal allowed.

(1) 6 A. 351.

(2) 28 A. 676; A. W. N. (1906) 193; 3 A. L. J. 804.

CALCUTTA HIGH COURT.

CIVIL RULE NO. 4682 OF 1910.

April 10, 1911.

Present:—Mr. justice Chitty and Mr. Justice N. Chatterjea.

AKHIL CHANDRA DEY—DEFENDANT—PETITIONER

versus

AKHIL CHANDRA BISWAS AND OTHERS—PLAINTIFFS—RESPONDENTS.

Specific Relief Act (I of 1877), s. 9—Dispossession of tenant, whether amounts to dispossession of landlord.

The dispossession of a tenant is a dispossession of the landlord for which the landlord can bring a possessory suit under section 9 of the Specific Relief Act.

Bindubasini Chowdhrani v. *Jahnavi*, 13 C. W. N. 303; 1 Ind. Cas. 150; *Bindubasini Chowdhrani* v. *Janhobi Chowdhrani*, 13 C. W. N. 307 *note*; 1 Ind. Cas. 151; *Janoki Nath Roy Chowdhury* v. *Dinamoni Chowdhrani*, 13 C. W. N. 305; 1 Ind. Cas. 152; *Shyama Churn Ghosh* v. *Mahomed Ali*, 13 C W. N. 835; 3 Ind. Cas. 466; 10 C. L. J. 30 and *Nobin Das* v. *Kailash Chandra Dey*, 7 Ind. Cas. 924; 12 C. L. J. 483; 15 C. W. N 294 followed.

Sonaton Shome v *Sheik Helim*, 6 C. W. N. 616, dissented from

Rule against the judgment of the Munsif of Patiya dated June 7th, 1910.

Babu *Sachindra Prasad Ghosh*, for the Petitioner.

Babu *Probodh Kumar Das*, for the Opposite Party.

JUDGMENT.—This is a rule issued at the instance of defendant No. 1 calling upon the plaintiff, the opposite party, to show cause why the decree in his favour in a suit under section 9 of the Specific Relief Act should not be set saide on the ground that he had not been dispossessed within the meaning of that section. The point raised by the rule is whether the *ouster* of a tenant is an *ouster* of the landlord for which the landlord can sue under section 9. The rule was granted upon that ground, and we think that we must not travel beyond that. As to this point, it has been before the Court in a number of cases. In favour of the present petitioner is the case of *Sonaton Shome Sheikh Helim* (1) decided in 1902.

(1) 6 C. W. N. 616.

SUDAMAN *v.* BEHARI MAHTON.

On the other side are the cases of *Bindubasini Choudrani* v. *Sremati Jahnavi* (2) decided in 1897; *Bindubasni Choudrani* v. *Janhobi Choudrani* (3) decided in 1892, *Janoki Nath Roy Chowdhury* v. *Dinamoni Choudrani* (4), *Shyama Churn Ghosh* v. *Mahomed Ali* (5) and *Nobin Chunder Dass* v. *Kailash Chandra Dey* (6). We asked for a reference to any decision in which the case of *Sonaton Shome v. Sheikh Helim* (1) had been followed; but the learned Pleader for the petitioners has been unable to refer as to any such case. He asks that, having regard to the conflict of rulings between that case on the one hand and the cases to which we have alluded on the other, a reference should be made to a Full Bench. But, having regard to the number of rulings which are against the ruling in *Sonatam Shome* v. *Sheikh Helim* (1), we do not think that we should be justified in following that course. Nor do we think that the importance of this case demands it. We think that the Court should not interfere in this matter, and that this rule should be discharged with costs, two gold *mohurs*.

Rule discharged.

(2) 13 C. W. N. 303; 1 Ind. Cas. 150.
(3) 13 C. W. N. 307; *Note*, 1 Ind. Cas. 151.
(4) 13 C. W. N. 305; 1 Ind. Cas. 152.
(5) 13 C. W. N. 835; 10 C. L. J. 30; 3 Ind. Cas 466.
(6) 12 C. L. J. 483; 7 Ind. Cas. 924; 15 C. W. N. 234.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 2237 OF 1908.
April 25, 1911.
Present—Mr. Justice Mookerjee and Mr. Justice Teunon.
SUDAMAN JAMADAR AND OTHERS—DEFENDANTS—APPELLANTS
versus
BEHARI MAHTON AND ANOTHER—PLAINTIFFS - AND OTHERS—REMAINING DEFENDANTS—RESPONDENTS.

Landlord and tenant—Transfer of non-transferable holding—Acceptance of rent by gomasta *of landlord from transferee—Whether landlord bound by receipts—Authority of* gomasta—*Burden of proof—Scope of agent's authority—Decision on particular facts—Evidence Act (I of* 1872*)*, *s.* 103.

It cannot be affirmed as a general proposition of law that a landlord is always bound by the receipts given by his *patwaris* or *gomastas* with regard to payments of rent made by purchasers of a non-transferable holding.

It must be decided on the particular facts about the scope of the authority of a *gomasta* to bind his principal. The burden of proof in the first instance is upon the landlord to show the precise scope of the authority he had conferred upon his agent, because this is a matter peculiarly within his knowledge.

Where it has been found that rent was paid by the transferees for about six years, but the landlords did not repudiate the act of their *gomastas* who received the rent, and have not offered to refund the money received on their behalf by the agents, of which persumably they enjoyed the benefit during all these years:

Held, that the act of the agent was within the scope of his authority, and the acceptance of rent by him from the transferees was sufficient recognition of their *status* as tenants of the holding

Nabakumari v. *Behari Lal*, 34 C. 902; 2 M. L. T. 433. 6 C. L. J. 122: 11 C. W. N. 865; 4 A. L. J. 570; 9 Bom; L. R. 846; 17 M. L. J. 397, referred to.

Appeal from the decree of the Sub-Judge of Patna, dated July 14th, 1908, affirming that of the Munsif of Bihar, dated March 26th 1908.

Babus *Ram Chandra Majumadar* and *Surendra Nath Guha*, for the Appellant.

Maulvi *Mahammad Mustafa Khan*, for the Respondents.

JUDGMENT.—This is an appeal on behalf of the defendants in a suit commenced by the plaintiffs-respondents for a declaration that a rent-decree and the execution-sale held on the basis thereof were collusive and fraudulent and did not in any manner affect their title to the occupancy-holding in dispute. The common case of the parties is that one Gopal Mahton and his brother Pundit Mahton were the tenants of the holding under the defendants-landlords. On the 26th December 1901, the tenants transferred the holding to the present plaintiffs. Subsequently, the landlords sued the transferors for arrears of rent in respect of the years 1311 to 1313. The application of the present plaintiffs to intervene in this suit was refused and a decree was made by consent in favour of the landlords. In execution of this decree, the holding was put up for sale and purchased by the thirteenth defendant. The plaintiffs allege that no rent, as a matter of fact, was due in respect of these years, that since their purchase they had regularly paid the rent to the landlords, and that the rent suit, as well as the proceedings subsequent to the decree made thereunder, were fraudulent and collusive. The Subordinate Judge, in concurrence with the original Court has, found that the rent for recovery whereof the suit was brought was not due to the landlords

that the rent had been duly paid by the plaintiffs from 1308 to 1313, and that, therefore, the rent suit and the execution proceedings must be deemed fraudulent and collusive. A question was also raised before the Subordinate Judge as to whether the plaintiffs had a valid title, such as would enable them to maintain the suit. It was argued on behalf of the landlords that the holding was non-transferable and that consequently the plaintiffs had not acquired a valid title by their purchase. The Subordinate Judge found that the holding was not transferable but he held that as rent had been accepted from the plaintiffs by the *gomasta* of the landlords on their behalf, they had acquired the status of tenants in relation to the hoding purchased by them. In support of this view, the Subordinate Judge relied upon the case of *Pyari Mohun Mukhopadhya* v. *Gopal Paik* (1).

The defendants have now appealed to this Court, and on their behalf the decree of the Subordinate Judge has been assailed substantially on the ground that the acceptance of rent from the plaintiffs by the *gomasta* of the landlords was not binding upon the latter, unless it was proved that the *gomasta* acted within the scope of his authority. In support of this proposition reliance has been placed upon the case of *Bhajohuree Barick* v. *Aka Golam Ali* (2). Reference has also been made to the cases of *Beni Pershad Koeri* v. *Goberdhan Koer* (3) and *Beni Pershad Koeri* v. *Ramdahim Pandey* (4) to show that a *gomasta* of a landlord has no authority to bind the latter in the matter of the recognition of the sub-division of a holding by the tenants. In our opinion the decree of the Subordinate Judge must be maintained, though we are not prepared to affirm as a general proposition of law that a landlord is always bound by the receipts given by his *patwaris* or *gomastas* with regard to payments of rent made by purchasers of non-transferable holdings.

We may, at the outset, observe that neither the case of *Bhajohurree Barick* v. *Aka Golam Ali* (2) nor that of *Jagdishur Bhuttacharji* v. *Joymoni Devi* (5) purports to lay down any inflexible rule of law. If a question arises as to the authority of a *gomasta* to bind the landlord by his act or omission, it must be decided on the particular facts, as in every other case, about the scope of the authority of an agent to bind his principal. The burden of proof in the first instance is upon the landlord to show the precise scope of the authority he had conferred upon his agent, because this is a matter peculiarly within his knowledge. (Section 103, Indian Evidence Act). Now, in the case before us, no evidence has been given on the side of the landlords to show the precise scope of the authority conferred by them upon their *patwari* or *gomasta*. Their contention apparently has been that no *patwari* or *gomasta* can have authority to bind the landlord by the acceptance of rent from the transferee of a non-transferable occupancy-holding. This, clearly, is an extreme proposition which cannot possibly be sustained. In the case before us, however, there are circumstances which undoubtedly militate against the contention of the landlords-appellants. The Subordinate Judge has found that rent was paid by the transferees from 1308 to 1313. The landlords have not up till now repudiated the act of their agents. They have not even now offered to refund the money received on their behalf by their agents, of which presumably they have enjoyed the benefit during all these years. Under such circumstances, the Court may reasonably draw the inference that the act of the agent was within the scope of his authority. The Court may also, in the alternative, draw the inference that as the landlords have acquiesced in the act of their agent for a number of years, it is no longer open to them to repudiate it even though it be a fact that their agent acted beyond the scope of his authority. This view of the matter does not appear to have been realised in some of the judicial decisions to which our attention was invited by the learned Vakil for the appellants. In the cases of *Beni Pershad Koeri* v. *Goberdhan Koeri* (3), and *Beni Pershad Koeri* v. *Ram Dahin Pandey* (4), it was assumed, as a matter of law, that when an agent of the landlord has recognised the sub-division of a holding, his act is not binding upon his master while in the cases of *Jagadishur Bhuttacharji* v. *Joymoni Devi* (5) and *Pyari Mohun Mukhopadhya* v. *Gopal Paik* (1), it was assumed that the landlord was bound, as a

(1) 25 C ; 2 C. W. N. 375.
(2) 16 W. R. 97.
(3) 6 C. W. N. 823.
(4) 10 C. W. N. 216
(5) 25 C. 533 *Note*; 2 C. W. N. 378 *Note*.

matter of law by the act of his agent. As we have already explained, no such inflexible rule of law can be laid down. Under the circumstances of the case before us, we are clearly of opinion that the landlord has failed to show that the agent acted beyond the scope of his authority. It has not been, and it cannot be, disputed that if the *gomasta* or *patwari* acted within the scope of his authority, acceptance of rent by him from the plaintiffs-transferees was sufficient recognition of their *status* as tenants of the disputed holding. *Nobakumari* v. *Behari Lal* (6).

The result is that the decree of the Court below is affirmed and this appeal dismissed with costs.

Appeal dismissed.

(6) 34 C. 902; 2 M. L. T. 433; 6 C. L. J. 122; 11 C. W. N. 865; 4 A. L. J. 570; 9 Bom. L. R. 846; 17 M. L. J. 397.

ALLAHABAD HIGH COURT.

CIVIL REVISION No. 6 OF 1911.

April 20, 1911.

Present:—Mr. Justice Banerji.

DORI LAL—PLAINTIFF—APPLICANT

versus

PATTI RAM AND OTHERS - DEFENDANTS—RESPONDENTS.

Joint decree—Joint property of judgment-debtors sold in execution—One of the judgment debtors depositing money to set aside sale—Civil Procedure Code (Act XIV of 1882), s. 310A—Sale set aside—Suit for contribution—Contract Act (IX of 1872), s. 69—Reimbursement—To what extent—Whether contribution can lie in respect of 5 per cent. deposit and costs in making application under section 310A.

One *M.* had a decree against *D.* and *P.* In execution of that decree certain property of the judgment-debtors was attached and sold. After the sale, *D.* made an application under section 310A of the Code of Civil Procedure, 1882, to have the sale set aside and deposited the requisite amount of money under that section. The sale was set aside, whereupon *D.* instituted the suit for contribution against *P.* He included in his claim not only the amount of the decree but also 5 per cent. deposit made under section 310A and also the costs of the application under that section:

Held, that the deposit made by *D.* in this case was not voluntary or gratuitous, that he was, therefore, entitled to be re-imbursed under section 69 of the Contract Act for the payment which he made for *P.*, but that he was not entitled to claim any portion of the 5 per cent. deposit which he was required to make under section 310A, inasmuch as that deposit was made for his own benefit only. There was no obligation on the defendants to pay that amount as they did not want to have the sale of their property set aside. For the same reason, the plaintiff was not entitled to a share of the costs of the application under section 310A.

Yagambal Boyee Ammanee Ammal v. *Nania Pillai Markayar*, 33 M. 15, 3 Ind. Cas. 11; 6 M. L. T. 162; 19 M. L. J. 489, not followed.

Fatima Khatun Chowdhrain v. *Mahommed Jan Chowdhry*, 12 M. I. A. 65; I B. L. R. (P. C.) 21; 10 W. R. (P. C.) 29, *Dulichand* v. *Ramkishen Singh*, 7 C. 648; *Ram Tuhul Singh* v. *Biseswar Lal Sahoo*, 2 I. A. 131; 33 W. R. 305; 15 B. L. R. 208, *Suchand Ghosal* v. *Balram Mardana*, 38 C. 1; 14 C. W. N. 945; 12 C. L. J. 566; 6 Ind. Cas. 810, referred to.

Revision against the decree of the Munsif of Farrukhabad, dated the 13th July 1910.

Mr. *Surendro Nath Sen*, for the Applicant.

Mr. *Gowind Prashad*, for the Respondents.

JUDGMENT.—This is an application for the revision of a decree of the Munsif of Farrukhabad exercising the powers of Judge of a Court of Small Causes, by which he dismissed a suit brought by the plaintiff-applicant, for contribution under the following circumstances. One Mehdi Ali Khan held a decree for money against the parties to the suit and in execution of that decree caused the property of the parties to be attached and sold. After the sale, the plaintiff made an application under section 310 A of the Code of Civil Procedure, 1882, to have the sale set aside and he made the deposit required by the section. The sale was thereupon set aside and the decree was discharged and the parties remained in possession of their property. The plaintiff contends that, as he satisfied the decree for which he and the defendants were jointly liable, he is entitled to be *reimbursed* for the portion of the decretal amount for which the defendants were liable and which he has paid for them. He included in his claim not only the amount of the decree but also the 5 per cent. deposit made under section 310A and also the costs of the application under that section.

The Court below held, following the ruling of the Madras High Court in *Yagambal Boyee Ammani Ammal* v. *Nania Pillai Markayar* (1), that the payment made by the plaintiff was a voluntary payment and that the suit was, therefore, not maintainable. It accordingly dismissed the suit.

(1) 33 M. 15; 3 Ind. Cas. 110; 6 M. L. T. 162; 19 M. L. J. 489.

DORI LAL *v.* PATTI RAM.

It is urged that the Court below was wrong in holding that the payment was voluntary. On the other hand, it is contended on behalf of the respondents that as the property was sold, the defendants must be taken to have satisfied the decree by reason of the sale of their property, that they did not desire that the sale should be set aside and that it was for his own benefit that the plaintiff made the application under section 310A and must, therefore, be deemed to have paid the amount of the decree gratuitously.

I am unable to agree with this contention. There can be no doubt that if, after the attachment of the property and before its sale, the plaintiff had discharged the amount of the decree, he could have claimed contribution from the defendants. On this point the rulings of their Lordships of the Privy Council in *Fatima Khatun Chowdhrain* v. *Mahammad Jan Chowdry* (2) and *Duli Chand* v. *Ram Kishen Singh* (3), are conclusive. Does the fact of the amount of the decree having been paid after the sale make any difference? I am of opinion that it does not. The mere fact of the property of the parties being sold by auction was not sufficient to discharge the decree. The decree would have been satisfied if the sale had been confirmed and the amount of the decree had been paid to the decree-holder out of the sale proceeds; but if the sale was set aside before confirmation and the amount realised by the sale was paid back to the auction-purchaser, the decree was not satisfied. It was the payment made by the plaintiff which satisfied the decree, although the payment was made under section 310A. This circumstance does not seem to have been considered by the learned Judges of the Madras High Court in the case referred to above. As the liability for the discharge of the decree lay on the plaintiff as well as on the defendants, there was an obligation on the plaintiff to discharge the whole amount of the decree and he paid that amount not for his own benefit but for the benefit of the defendants also. It is true, as held by their Lordships of the Privy Council, in *Ram Tahal Singh* v. *Biseswar Lal Sahoo* (4), that "it is not in every case in which a man has benefited by the money of another that an obligation to re-pay that money arises. The question is not to be determined by nice considerations of what may be fair or proper according to the highest morality. To support such a suit, there must be an obligation express or implied to re-pay. It is well settled that there is no such obligation in the case of a voluntary payment by A. of B.'s debts. In this case, I am unable to hold that the payment was voluntary or gratuitous. It was a payment which the plaintiff was interested in making for the discharge of a decree for which both the parties were liable and a portion of which the defendants were bound to pay. Not only have the defendants been relieved of their liability under the decree but they have been able to retain their property of which they are admittedly in possession. This, therefere, is a case which comes within the purview of section 69 of the Contract Act and the plaintiff is entitled to be reimbursed for the payment which he made for the defendants. He is, however, not entitled to claim any portion of the 5 per cent. deposit which he was required to make under section 310A, inasmuch as that deposit was made for his own benefit only. There was no obligation on the defendants to pay that amount as they did not want to have the sale of their property set aside. For the same reason, the plaintiff is not entitled to a share of the costs of the application under section 310A. But, as regards the amount of the decree, since the defendants were bound to pay it, the plaintiff is entitled to contribution.

The view taken by me is supported by the decision of the Calcutta High Court in *Such-and Ghoshal* v. *Balaran Mardana* (5). The case before me is a stronger one than the case mentioned above. There the plaintiff was not a party to the suit in which the decree was passed but his property was sold. It was held by Jenkins, C. J., and Doss, J., that the plaintiff was entitled to sue the several defendants for contribution, each according to his share in the decretal debt only, but not in respect of the deposit of 5 per cent. of the purchase-money. For the reasons

(2) 12 M. I. A. 65; 1 B. L. R. (P. C.) 21; 10 W. R. (P. C.) 29

(3) 7 C. 648.

(4) 2 I. A. 131; 23 W. R. 305; 15 B. L. R. 208.

(5) 38 C. 1: 14 C. W. N. 945; 12 C. L. J. 566; 6 Ind. Cas. 810.

stated above, I am unable, with great respect, to concur in the view taken by the Madras High Court in *Yogambal Boyee Ammani Ammal* v. *Naraina Pillai Markayar* (1), on which the respondents rely.

The decree of the Court below is, in my judgment, erroneous and must be set aside. I accordingly allow the application, reverse the decree of the Court below and send back the case to that Court with directions to reinstate it under its original number in the register, and determine the amount for which each defendant is liable, bearing in mind the observations made above. The applicant will get the costs of this application.

Application allowed.

(s. c. 15 C. W. N. 569)

PRIVY COUNCIL.

APPEAL FROM THE CAPE OF GOOD HOPE.

March 28, 1911.

Present:—Lord Macnaghten, Lord Robson and Sir Arthur Wilson.

SAMUEL JACOBUS GREYVENSTEN—PLAINTIFF—APPELLANT

versus

DANIEL WILHELMUS HATTINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Locusts—Owner's right to drive away locusts from land—Liability to owner of land where they alight.

The principles of law laid down for preserving or regulating the settled course of a river, on which may depend so many of the rights and benefits of adjacent owners, are not necessarily appropriate to the course of an insect pest, which it is the interest of every one concerned to repel or destroy.

The obligation of a landowner not actively to transfer to his neighbours a danger which he himself has created or increased, is not inconsistent with his right to repel some extraordinary misfortune which comes to him by way of his neighbour's land.

If an extraordinary flood is seen to be coming, the owner may protect his land from it, and so turn it away without being responsible for the consequences. Visitations of locusts are in the nature of extraordinary and incalculable events, and landowners would be entitled, as an agricultural operation, to drive the locusts away just as they are entitled to scare crows, without regard to the direction they may take in leaving.

Appeal from a judgment of the Supreme Court of the Cape of Good Hope affirming that of a Divisional Court, dismissing the action of the plaintiff.

Sir *R. Finlay*, K. C., and Mr. *Charles*, for the Appellant.

Mr. *Gregory*, K. C., and Mr. *Beaumont*, for the Respondents.

JUDGMENT.—This is an appeal by the plaintiff in the action from a judgment of the Supreme Court of the Cape of Good Hope, which affirmed the decision of a Divisional Court (Mr. Justice Buchanan) dismissing the action with costs.

The parties are all farmers in the district of Molteno, in the Cape of Good Hope.

On the 25th November 1907, the appellant's farm was entered from the north by a swarm of locusts. They were "voetgangers," *i. e.*, young insects who had not yet acquired the use of their wings, and who trekked across the country on foot, eating the grass and crops on their way. The farms of the respondents lay to the south of the farm thus invaded, and were separated from it only by a comparatively narrow strip of veldt belonging to various persons. The locusts trekked across the appellant's farm in a direction which made the respondents reasonably apprehensive for the safety of their own lands, and the steps they took to avert the anticipated danger have given rise to the complaint of the appellant. He alleged, *firstly*, that the respondents wrongfully and maliciously trespassed on his lands and drove the locusts back on to the cultivated portions thereof, so as greatly to increase his damage. On this point, there was a sharp conflict of testimony. The respondents allege that they went on the appellant's farm at his request or with his approval in order to repel a common danger, and that if any trespass was, at any time, in fact committed, it was of a trivial character and without either the effect or the intention of doing the appellant any material harm. Mr. Justice Buchanan, who heard the evidence, has made clear findings of fact on this part of the case, and their Lordships see no reason why those findings should not be fully accepted. The learned Judge did not believe that there was any wilful or malicious driving of the locusts on to the appellant's cultivated land and he accepts the respondents' story as to how they came to enter his farm and what they did there. He further finds that the sums paid into Court by respondents to meet any damage they may have caused by the alleged trespass, apart from the damage done by the locusts, was more than sufficient. There was ample evidence to support all these conclusions, and the appellant's case on this head fails.

But the alleged trespass was not the main issue in the case. When the respondents were forbidden to remain on the appellant's land, they, with the consent of the adjacent proprietors, took up positions on the veldt outside his boundary and drove the locusts back on to his farm and in various directions away from the direction in which their own farms lay. The result of this proceeding was, of course, detrimental to the appellant's land. It is contended on his behalf that such action on the part of respondents was wrongful. His case is that locusts are like flood water and that their natural course must not be diverted, even, in self-defence, if injury is thereby caused to a neighbouring proprietor.

According to this argument, the respondents were bound to receive the locusts. In support of this proposition, the appellant's Counsel cited a number of cases which, in the view of their Lordships, have little or no analogy to the present case.

In *Menzies* v. *Breadalbane* (1), the defendant was erecting an embankment which would have the effect of throwing the ordinary flood stream of the River Tay off his lands and entirely on the lands of his neighbour. The House of Lords held, on the facts of that case that the embankment was an obstruction and diversion of the natural and ancient course of the stream in times of flood and that the natural course of a river could not legally be altered by one proprietor so as to create a new water way to the prejudice of other proprietors. The same principle was illustrated in another aspect by the decision in *Farquharson* v. *Farquharson* (2), an unreported case cited by the Lord Chancellor in *Menzies* v. *Breadalbane* (1). In that case it was held that a riparian proprietor might erect a mound to prevent the river from encroaching on his land and creating a new water-way for itself.

Great reliance was placed by the appellant on the decision in the first-mentioned case, but the principles of law laid down for preserving or regulating the settled course of a river, on which may depend so many of rights and benefits of adjacent owners, are not necessarily appropriate to the course of an insect pest, which it is the interest of everyone concerned to repel or destroy. The supposed analogy between the two things is wholly fallacious. The pest has no settled course, and whatever its course may be, no one is bound to respect it. Indeed, the progress of a fire would be a much nearer analogy to the moving horde of locusts than the course of a river.

The case of *Smith* v. *Kenrick* (3) was also cited by the appellant. That was a case of adjacent mine-owners. The defendant's mine was on a higher level than that of the plaintiff, and was subject to no servitude in favour of the latter. As the defendant's mining operations proceeded on his own property in the manner most convenient to himself, the plaintiff's mine was flooded by water from the workings of the defendant. This was held to be no wrong on the part of the defendant, for it took place in the ordinary and natural user of his property but no one suggested that the plaintiff was not entitled to protect himself by barriers which would have dammed the stream of the water back on the defendant's mine, where it had its origin. On the contrary, that was held to be his proper remedy, and such a remedy is fairly analogous to the conduct of the defendants in the present case.

The appellant, of course, admitted that an owner or occupier of land is entitled to defend or protect his property so far as he can, but he said they had no right to do so by transferring the mischief from their own land to that of their neighbour, and according to him that was what the respondents did when they prevented the locusts from leaving his land in order to keep them from coming on their own. In support of this proposition the case of *Whalley* v. *Lancashire and Yorkshire Railway Company* (4) was cited. In that case an abnormal rainfall caused water to accumulate in large quantities against the defendant's embankment, and they released it by making holes in the embankment so that the water flowed on to the land of the plaintiff, and did much greater damage than if it had flowed there direct without the temporary obstruction of the embankment. This was held to be wrong; but the decision does not help the appellant. It cannot be said that the obligation of a land-owner not actively to transfer to his neighbours a danger,

(1) (1828) 3 Bligh (N. S.) 414 at p. 418,
(2) Unreported, decided in 1741.
(3) 7 C. B. 515; 18 L. J. C. P. 172; 13 Jur. 362.
(4) 13 Q. B. D. 131; 53 L. J. Q. B. 285; 20 L. T. 472; 32 W. R. 711; 48 J. P. 500.

which he himself has created or increased, is inconsistent with the right of a land-owner to repel some extraordinary misfortune which comes to him by way of his neighbour's land.

In *Whalley's case* (4), Cotton, L. J. points out that, if an extraordinary flood is seen to be coming, the owner may protect his land from it, and so turn it away without being responsible for the consequences. Visitations of locusts, though, no doubt, unpleasantly frequent, are in the nature of extraordinary and incalculable events, rather than a normal incident like the rise of a river in a rainy season.

On the facts as found in this case, their Lordships are of opinion that the respondents did no more than what Lord Justice Cotton has defined as being within their rights. But their conduct may be justified on a wider and simpler ground. Even if the invasion be regarded as a normal incident of agricultural industry in South Africa, the respondents would be entitled, as an agricultural operation, to drive the locusts away just as they are entitled to scare crows, without regard to the direction they may take in leaving.

Their Lordships will humbly advise His Majesty that this appeal should be dismissed with costs.

Appeal dismissed with costs.

Solicitors for the Appellant: Messrs. *Biddle & Co.*

Solicitors for the Respondents: Messrs. *Widdle & Co.*

MADRAS HIGH COURT.

ORIGINAL SIDE APPEAL NO. 15 OF 1910.

April 5, 1911.

Present:—Sir Arnold White KT., Chief Justice, and Mr. Justice Munro.

ARJI MARAPPA CHETTY—

APPELLANTS

versus

ARJI SHUNMOOGAPPA CHETTY—

RESPONDENT.

Decree, execution of—Payment out of Court—Omission by decree-holder to certify—Payment of the amount by judgment-debtor to third party—Suit for recovery of amount from decree-holder—Limitation.

Where a decree-holder failed to certify to Court a payment made towards the decree out of Court and the judgment-debtor was compelled to pay the amount in consequence to a third party: *Held*, tha time began to run against the judgment-debtor for the recovery of the amount from the decree-holder from the date when he had to pay the amount a second time.

Quære:—Whether, in ordinary cases, limitation runs against the judgment-debtor on the expiration of 90 days from the date of the payment.

Appeal against the decree and judgment of the Hon'ble Mr. Justice Sankaran Nair dated the 25th day of February 1910, in the Ordinary Original Civil Jurisdiction of the High Court in C. S. No. 250 of 1907.

FACTS.—See 6 Ind. Cas. 267.

Mr. *Ram s wmi Aiyar*, for the Appellant.

Mr. *Ramachandran* for the Respondent.

JUDGMENT.—Assuming that when the judgment-debtor sues to recover money paid in respect of what the judgment-creditor has failed to certify, limitation begins to run against the judgment-debtor on the expiration of 90 days from the date of the payment (though there appears to be no direct authority on the point). We are not prepared to apply this period of limitation to a case where, by reason of the judgment-creditor's failure to certify, the judgment-debtor has been compelled to pay a third party.

In the first class of cases, the plaintiff sues to recover money paid on a consideration which has failed. In the second class he sues to recover damages for the loss sustained by reason of the judgment-creditor having failed to discharge the duty cast upon him by the law. We agree with Sankaran Nair, J., that in the second class of cases, the cause of action arises when the judgment-debtor has to pay the second time. The cass of *In the matter of Medai Thalavai Kalian Anni* (1) does not touch the question of limitation. It merely decided that the judgment debtor has a cause of action when the judgment creditor fails to certify. The appeal is dismissed with costs.

Appeal dismissed.

(1) 30 M. 545; 3 M. L. T. 15.

SHASHI BHUSHAN v. JOTINDRA NATH ROY.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 50 OF 1910.

May 9, 1911.

Present.—Mr. Justice Coxe and Mr. Justice Teunon.

SHASHI BHUSHAN BID—PLAINTIFF—APPELLANT

versus

JOTINDRA NATH ROY CHOWDHURY ANE ANOTHER—DEFENDANTS—RESPONDENTS.

Partition suit—Court Fees Act (VII of 1870), Sch. II, Art. 17—Suit for declaration and possession—Amending plaint according to decision of Appellate Court—Appeal from order—Acquiescence—Conduct—Estoppel—Right to file appeal.

In a suit for partition a preliminary decree was made by the first Court. The District Judge on appeal considered that the Court-fee payable should be calculated *ad valorem* on the property in suit and the case re-tried as a suit for declaration of title and recovery of possession. The plaintiff agreed to amend his plaint so as to make it one for a declaration of title as well as for partition and to pay the necessary Court-fee. The District Judge thereupon remanded the case to the first Court for re-trial. The plaintiff appealed from that order:

Held, that if the plaintiff had title to the property and was a co-owner of that property with the defendant the suit was one for partition of joint property and not one for declaration of title and recovery of posssession.

Bidhata Rai v. *Ram Chariter Rai*, 12 C. W. N. 37; 6 C. L. J. 651; 3 M. L. T. 33, relied upon.

Held, also, that the plaintiff was not precluded by his conduct in acquiescing in the decision of the District Judge and amending his plaint, from filing this appeal if, on reflection, he thought that the action he had taken was injudicious.

Appeal from the order of the District Judge of 24-Pergannahs dated November 26th, 1909, reversing the decree of the Sub-Judge of Alipur, dated May 12th, 1909.

Babus *Mohendra Nath Roy* and *Bipin Chandra Mallik*, for the Appellant.

Bubus *Sarat Chandra Roy Chowdhari* and *Lalit Mohan Banerjee*, for the Respondents.

JUDGMENT. This is a suit for partition of the lands described in the two schedules attached to the plaint. It is admitted that the plaintiff is co-owner with the defendants of the lands described in schedule 2nd; but his title to, and possession of, any interest in the lands described in the first schedule to the plaint is denied.

The suit was decreed by the Subordinate Judge, and a preliminary decree for partition was passed.

The defendants appealed to the District Judge. The District Judge came to no clear finding on the principal question in the suit, namely whether the plaintiff was entitled to partition of the lands described in the first schedule. He regarded the suit as one to obtain a declaration of the plaintiff's title and possession, under the garb of a suit for partition; and he considered that the Court-fee payable should be calculated *ad valorem* on the property in suit, and the case re-tried as a suit for declaration of title and recovery of possession. This view appears to have been accepted or, at any rate, acquiesced in by the plaintiff's Pleader; and he agreed to amend his plaint, so as to make it one for a declaration of the plaintiff's title as well as for partition and to pay the necessary Court-fee. The learned District Judge thereupon directed that the case should go back to the Subordinate Judge, apparently for re-trial.

Against this order, the plaintiff appeals; and it is argued on his behalf that this order of the District Judge remanding the case, is not justified by law.

It appears to us that this contention ought to prevail. No doubt, it was incumbent on the learned District Judge, before he could affirm the preliminary decree for partition passed by the Subordinate Judge, to come to a clear and definite finding that the plaintiff had title to the property which is the subject of this appeal, that is to say, the property described in the first schedule to the plaint. Unless the plaintiff can make out his title to the property, he clearly has no right to partition of it. But, as regards the question of possession, it appears to us that if the plaintiff has title to the property and is a co-owner of that property with the defendants, the doubts felt by the learned District Judge with regard to his possession did not justify him in refusing the relief sought. The learned District Judge does not explain how this case is distinguishable from that of *Bidhata Rai* v. *Ram Chariter Rai* (1), which was cited and relied upon by the Subordinate Judge. So far as the facts have been laid before us that decision appears to be applicable. It has been argued that as the property described in the first schedule is totally different from the property described in the second schedule, that ruling is inapplicable. To this contention we are not prepared to accede. If the plaintiff and the defendants are, as a matter of fact, co-owners of the lands described in both schedules, and the

(1) 12 C. W. N. 37; 6 C. L. J. 65'; 3 M. L. T. 33.

plaintiff's possession is admitted in the lands described in the second schedule, which appears to constitute the more valuable portion of the property, the fact that the lands in the first schedule are situate in a different village, and are entirely different properties from those contained in the second schedule, does not, in ouropinion, take the case outside the scope of the decision which we have quoted. We think, therefore, that the proper course for the District Judge to have adopted on this occasion was to have come to a distinct finding as to whether the plaintiff had succeeded in proving his title to the lands comprised in the first schedule attached to the plaint. He was not entitled to remand this point for re-trial to the Subordinate Judge. If he found it against the plaintiff, there was an end to the case, so far as that property was concerned. But if he found it in favour of the plaintiff, then his findings in respect of possession did not debar him from affirming the preliminary decree for partition and did not justify him in remanding the case to the Subordinate Judge for re-trial.

It has, however, been argued on behalf of the respondent that the plaintiff is now precluded by his own conduct from contesting the propriety of the District Judge's decision. It appears that he acquiesced in that decision and he amended his plaint, that the defendant subsequently filed a written statement and that fresh issues were framed. But no authority has been shown us for holding that the plaintiff is precluded by this conduct from filing an appeal within the time allowed by limitation, if, on reflection, he thinks that the action he has taken is injudicious.

Accordingly, the case must go back to the learned District Judge, in order that the appeal may be re-heard on the pleadings as they stood before the amendment. He must come to a decision as to whether the plaintiff had a subsisting title at the time of the institution of the suit; and if he finds that in favour of the plaintiff, he must then come to a decision as to whether the Subordinate Judge's preliminary decree for partition, so far as regards the property described in the first schedule to the plaint, should or should not be affirmed.

As regards the property described in the second schedule to the plaint, it is admitted by both sides that that ought to be partitioned.

The costs will abide the result. The hearing fee is assessed at three gold *mohurs*.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 581 OF 1910.

March 30, 1911.

Present:—Mr. Justice Abdur Rahim.

VENKATRAMA AIYAR AND ANOTHER—PETITIONERS

versus

DURAISAWMY SASTRIAL—RESPONDENT.

Limitation Act (IX of 1908) s. 7—Discharge by one of two joint decree-holders—Whether bars fresh execution.

One of two joint decree-holders cannot give a valid discharge of the decree without the concurrence of the other.

Periasawmi v. *Krishna Aiyan*, 25 M. 431 at p. 439, referred to.

Such a discharge, therefore, does not prevent the decree-holder from applying afresh for execution under section 7 of the Limitation Act, 1908.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the order of the Subordinate Judge's Court of Kumbakonam, dated the 17th August 1910. in F.A. No. 475 of 1910 in S.C.S. No. 39 of 1899.

Mr. *K. Balamkunda Aiyar*, for the Appellant.

Mr. *T. Gangadhara Aiyar*, for the Respondent.

JUDGMENT.—I think the order of the Subordinate Judge must be set aside. One of two joint decree-holders cannot give a discharge without the concurrence of the other. *Periasawmi* v. *Krishna Ayyan* (1) and, therefore, under section 7 of the new Limitation Act, the petitioners are entitled to apply for execution of the decree. The order is set aside and the lower Court will dispose of the petition for execution according to law.

The respondents will pay the costs of this petition.

Order set aside.

(1) 25 M. 431 at p. 439.

BHOLA *v.* MOHAMMAD HABIBUL RAHMAN KHAN.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 735 OF 1910.

April 25, 1911.

Present:—Mr. Justice Griffin.

BHOLA—PLAINTIFF—APPELLANT

versus

MOHAMMAD HABIBUL RAHMAN KHAN—DEFENDANT—RESPONDENT.

Landlord and tenant—Agreement by tenant not to take compensation for improvements made without consent of the zemindar*—Illegality—Agra Tenancy Act (II of 1901), ss.* 40, 90*—Agreement to pay enhanced rate—Distinct promises for the same consideration—One of them illegal, effect of—Cess—Essential to be proved.*

An agreement between a tenant and a landlord whereby the former undertook not to make any improvements without the consent of the *zemindar*, and provided that if he did make any improvement, he would not be entitled to any compensation at the time of ejectment, is illegal and unenforceable at law.

An agreement by a tenant to pay an enhanced rate of rent is not illegal unless there has been a legal enhancement within 10 years of the agreement.

If several distinct promises are made for one and the same consideration and if one or more of them be such as the law will not enforce, this will not of itself prevent the rest from being enforced.

In order to show that a condition in an agreement as to a certain payment is of the nature of a cess which should not be recognized, it must not only be shown that the condition referred to relates to the payment which comes within the definition of a cess but it should also be shown that the payment of this nature has not been recognised by the Settlement Officer.

Second appeal from the decision of the District Judge of Aligarh, dated the 13th July 1910.

Dr. *Satish Chandar Banerji* (with him Mr. *Govind Prashad*), for the Appellant.

Mr. *W. K. Porter* (with him Mr. *B. E. O'Conor*, the Hon'ble Mr. *Sunder Lal* and Mr. *Ghulam Mujtaba*), for the Respondents.

JUDGMENT.—The plaintiff is a tenant of the defendant. He brought a suit for a declaration that a certain agreement, dated the 12th October 1909, was *null* and *void*, on the ground that the conditions contained in the agreement were against public policy, that the agreement was not explained to plaintiff and had been obtained from him by undue influence and coercion. The Court of first instance held in favour of the plaintiff that the agreement was executed under coercion; that the conditions were illegal and on these findings, decreed the plaintiff's suit. On appeal by the defendant, the lower Appellate Court has found that there was no undue influence or coercion, and while it held that some of the conditions in the agreement are in themselves illegal and unenforceable, considered that no declaration was necessary in so far as these conditions were concerned. The learned District Judge, therefore, allowed the appeal of the defendant and dismissed the suit. Plaintiff comes here in second appeal. As to the ground taken that the *zemindar* was in a position to dominate the Will of the plaintiff the question as to undue influence was considered by the Court below, which Court pronounced on the evidence before it that there was no undue influence used. The question of burden of proof does not arise in this case. The other contention advanced on behalf of the appellant is, that the Court below ought to have given the plaintiff a decree for a declaration that the conditions in the agreement which the Court below held to be unenforceable were void. It appears that the plaintiff is an occupancy tenant of the defendant; that there was a suit pending against him for enhancement of rent: while the suit was pending, the agreement which has given rise to this suit was executed; by that agreement, the plaintiff agreed to an enhancement of Rs. 21 odd. And further agreed to the other conditions as follows:—

1. That he would not make any improvements without the consent of the *zemindar* and if he made any such improvements he would not be entitled to any compensation at the time of ejectment.

2. That he would sow 2 *bighas* of indigo per plough and supply the indigo to the *zemindar* at the market-rates. And in the event of his failure to do so, he would be liable to pay damages at the rate of Rs. 10 per *bigha* per plough.

3. That the *zemindar* was entitled to take wheat and barley at the current rate in payment of rent.

(4) This tenant will pay 4annas per plough as the pay of the Shahna, and will give $1\frac{1}{4}$ maunds *karal* in *kharif* and $1\frac{1}{4}$ maunds *bhusa* in *rabi*, per plough. There were other conditions also, which it is unnecessary to notice here. After the agreement was entered into, the suit for enhancement of rent was withdrawn. The judgment of the Court below contains the following remark:—"When we examine the records of the cases which were filed against other tenants at the same time for enhancement, we find that in some cases the enhance.

ment ordered by the Court was much greater than the enhancement now complained of." On behalf of the appellant it is contended that the condition in the agreement that the tenant will not be able to make any improvements without the consent of the *zemindar* and if he makes any such improvement he will not be entitled to any compensation at the time of ejection is a provision contrary to law; see section 90 of the Tenancy Act. It is also contended that the enhancement of rent is illegal, there having been a previous enhancement within the period of ten years. It is stated in the agreement that there had been an informal enhancement. It is, however, clear that there was no enhancement before the one made by the present agreement, which would have been recognised by a Court of law. Section 41 of the Tenancy Act provides,—"The rent of ex-proprietary or occupancy tenants shall be liable to enhancement or abatement only (*a*) by registered agreement, (*b*) by decree or order of a Revenue Court." Before the agreement of 12th October 1909, there had been no legal enhancement of the plaintiff's rent within the period of 10 years. It is contended on behalf of the appellant that, because the condition relating to compensation for improvements was in contravention of the statute, therefore, the whole agreement was void. Reliance is placed upon a ruling reported in *Kristodhone Ghose* v. *Brojo Gobindo Roy* (1). In that case there was an agreement between a *zemindar* and his tenant for the payment of an enhanced rent at a rate which exceeded the enhancement allowed by law; the agreement, therefore, clearly contravened the provisions of the Bengal Tenancy Act VIII of 1885. The Court held in that case that it could not sever the good part from the bad, that is, so much of the enhancement as does not exceed two annas in the rupee; to do so would be to create a new agreement between the parties. In the present case, the provision that the tenant would not demand compensation for improvements, is one which can be severed from the rest of the contract. It is well settled that if several distinct promises, are made for one and the same cosideration, and if one or more of them be such as the law will not enforce, this will not of itself prevent the rest from being enforced. It is also contended that the condition as to payment of 4 annas per plough to the Shahna, and delivery of certain quantity of fodder at each harvest are in the nature of cesses and should not be recognised. Section 56 of the Revenue Act provides for the recording of cesses in the nature of rent payable by a tenant. It is not sufficient for the plaintiff to show that the condition above referred to relates to the payment of what comes under the definition of a cess; it is necessary for him further to show that payments of this nature had not been recognised by the Settlement Officer. If the defendant landlord sues on this agreement, it will be for the Courts to consider whether or not the condition referred to above is enforceable. The other conditions are of an onerous and troublesome nature, but the finding being that the contract was entered into by the plaintiff without undue influence or coercion, it must be assumed that he was a free agent and accepted the conditions. As far as I can judge, there is only one condition in the agreement which is in direct contravention of the law, namely, the condition relating to compensation for improvement. The question, therefore, is whether the plaintiff should not have this suit decreed in so far that that condition be declared null and void. Section 39 of the Specific Relief Act provides, for the bringing of suits for the cancellation of instruments when there is a reasonable apprehension that the instrument if left outstanding would cause serious injury. I am unable to hold that in this case the plaintiff has any serious reason for apprehending that a Court will give effect to the condition in the agreement which is in direct contravention of the statute law. In my opinion the suit has been rightly dismissed by the lower Appellate Court, and dismiss this appeal with costs, which will include fees in this Court on the higher scale.

Appeal dismissed.

(1) 24 C. 895; 1 C. W. N. 442.

ABDUL AZIZ *v.* KANTHU MULLICK.

CALCUTTA HIGH COURT.
CIVIL RULE No. 3225 OF 1910.
December 15, 1910.
Present:—Mr. Justice Mookerjee, and
Mr. Justice Coxe.
Syed ABDUL AZIZ—PLAINTIFF—APPELLANT
versus
KANTHU MULLICK—DEFENDANT—OPPOSITE PARTY.

*Estoppel—Estoppel against Act of Legislature—*Kabulyat *executed to landlord—Subsequent payment of rent to registered proprietor—Whether there is estoppel—Bengal Tenancy Act (VIII of* 1885*), s.* 60*—Land Registration Act (VII of* 1876 *B. C.), ss.* 78, 81*—Evidence Act (I of* 1872*), s.* 116.

There can be no estoppel against an Act of the Legislature.

Madras Hindu Mutual Benefit Permanent Fund v. *Ragava Chetti*, 19 M. 200 and *Jagabandhu* v. *Radha Krishna*, 4 Ind Cas. 414; 36 C. 920, referred to.

Consequently, the principle of estoppel cannot override the provisions of either section 78 of the Land Registration Act or section 60 of the Bengal Tenancy Act; and a tenant who has executed a *kabulyat* in favour of a landlord may resist a claim by the latter for rent, on the ground that his name has not been registered under section 78 of the Land Registration Act, and that he (the tenant) has paid rent to the registered proprietor.

The restrictions imposed by section 81 upon section 78 of the Land Registration Act, to the effect that the disability imposed upon the proprietor who has failed to register his name to realise rents ceases when that proprietor sues to recover rent under a written contract, cannot be incorporated by implication into section 60 of the Bengal Tenancy Act.

Therefore, an unregistered proprietor cannot sue for rent even upon a *kabulyat* executed by the tenant and it is open to the defendant to prove payment of rent to the registered proprietor and to plead that the plaintiff has no enforceable right as against him.

Rule against the decree of the District Judge of Dacca, dated February 2nd, 1910, affirming that of the Munsif of Manikgunge, dated July 12th, 1909.

Moulvi *Syed Shamsul Huda* and Babu *Kumar Sankar Roy*, for the Petitioner.

Babus *Hara Kumar Mitra* and *Hira Lal Bose*, for the Opposite Party.

JUDGMENT.—We are invited in this rule to set aside a decree by which the Court of Appeal below in concurrence with the Court of first instance has dismissed a suit for rent. The plaintiff alleged that the disputed holdings are situated within *Taluks* Nos. 4424 and 4425 of which he is a part proprietor, that on the 25th July 1892 and the 5th December 1893 the defendant executed two *kabuliats* in his favour and was inducted into the land, that he consented to a decree for arrears for the year 1302, but that, subsequently, he has attorned to one Mohin Kant and withheld rent for the years 1312 to 1314. The defendant resisted the claim, broadly on the ground that the plaintiff had no title to the property, that he was not entitled to realise any rent as his name had not been registered under section 78 of the Land Registration Act and that in any event as the defendant had paid rent to Mohin Kant who had been duly registered, there was a complete defence to the claim of the plaintiff. The Courts below have held that section 81 of the Land Registration Act, though it qualifies section 78 of the same Act, has no application to a case under section 60 of the Bengal Tenancy Act, and that consequently it is open to the defendant to prove payment of rent to the registered proprietor and to plead that the plaintiff has consequently no enforceable right as against him.

The plaintiff has assailed this decision on two grounds, namely, *first*, that as the defendant was inducted into the land by the plaintiff, on the principle of estoppel embodied in section 116 of the Indian Evidence Act, the defendant cannot question the title of the plaintiff and is, therefore, bound to pay him rent; and *secondly*, that section 60 of the Bengal Tenancy Act is qualified by the provisions of section 81 of the Land Registration Act, and that, therefore, the defendant is not entitled to prove payment of rent to the registered proprietor.

In so far as the *first* of these contentions is concerned, it is obvious that there is no substance in it, because it is well-settled that there can be no estoppel against an Act of the Legislature. In support of this proposition, reference may be made to the decision of the Madras High Court in *Madras Hindu Mutual Benefit Permanent Fund* v. *Ragava Chetti* (1), where Mr. Justice Subramania Aiyar relied upon *Barrow's case* (2) and *Fairtitle* v. *Gilbert* (3). To the same effect is the decision of this Court in *Jagabandhu* v. *Radhakrishna* (4). [See also the observations of Maclean, C.J., in *Jogini Mohan* v. *Bhoot Nath* (5) and of *Baron Parke in Hill* v. *Manchester and*

(1) 19 M. 200.
(2) 14 Ch. D. 432 at p. 441; 49 L. J. Ch. 498; 41 L. T. 755; 28 W. R. 270.
(3) 2 T. R. 169; 1 R. R. 455.
(4) 36 C. 920; 4 Ind. Cas. 414.
(5) 31 C. 146 at p. 149.

Salford Water Works Co.(6). See further, *Doe* v. *Ford* (7); *Doe* v. *Howells* (8); *Gas Light* v. *Turner* (9); *Doe* v. *Hares* (10); and *Glasgow* v. *Independent* (11). We are, therefore, not prepared to accede to argument of the learned Vakil for the petitioner that the principle of estoppel overrides the provisions of either section 78 of the Land Registration Act or section 60 of the Bengal Tenancy Act. The first contention of the petitioner, therefore, fails

In so far as the second contention of the petitioner is concerned, it has been argued that section 60 of the Bengal Tenancy Act is not applicable, *first*, because rent is claimed by the plaintiff not as proprietor of an estate but under the terms of an agreement between himself and the defendant; *secondly*, because section 60 ought to be construed as subject to the same limitation as is imposed upon section 78 of the Land Registration Act by section 81 of that Act, and *thirdly*, because the payment alleged to have been made by the defendant was made, as a matter of fact, to a person registered as proprietor in respect not of the entire superior interest but of only a fractional share.

In so far as the first branch of this contention is concerned, there is no force in it. No doubt the plaintiff seeks to realise rent on the basis of a contractual obligation, but it is equally obvious that he claims rent as proprietor of two *taluks*.

In so far as the second branch of the contention is concerned, we are not prepared to accede to the argument that section 60 is to be read subject to the limitation imposed by section 81 of the Land Registration Act upon section 78. Section 78 of the Land Registration Act provides that no person shall be bound to pay rent to any person claiming such rent as proprietor of an estate in respect of which he is required by the Act to cause his name to be registered, unless the name of such claimant shall have been registered under the Act. Section 81 then provides that nothing in the three preceding sections shall be held to interfere with the conditions of any written contract. It may be conceded, therefore, that the effect of the disability imposed upon the proprietor who has failed to register his name under section 78 of the Land Registration Act, ceases when that proprietor sues to recover rent under a registered instrument. Section 60 of the Bengal Tenancy Act, on the other hand, provides that where rent is due to the proprietor of an estate the receipt of the person registered under the Land Registration Act as proprietor shall be a sufficient discharge for the rent. The question, therefore, narrows down to this, whether the protection which was intended to be afforded to the tenant under section 60 of the Bengal Tenancy Act extends to a case where the plaintiff claims to recover rent under an instrument in writing. In our opinion, it is reasonably plain that the restrictions imposed by section 81 upon section 78 of the Land Registration Act cannot be incorporated by implication into section 60 of the Bengal Tenancy Act.

In so far as the third branch of the contention of the learned Vakil for the petitioner is concerned, we are of opinion that it cannot be maintained in view of the decision of this Court in the cases of *Parashmoni* v. *Nobo Kishore Lahari*(12) and *Deoki Singh* v. *Lakshman Roy* (13). It was held in these cases that the Land Registration Act provides for the registration by proprietors of their shares in an estate but does not make it incumbent upon them to register their shares in specific *mauzahs* or portions of land within the estate. In other words, if a proprietor is registered in respect of a certain share in an estate, and, then, by an amicable arrangement amongst the co-owners, becomes entitled to collect the whole rent in respect of a particular village included within the estate, the provisions of section 78 of the Land Registration Act do not operate as a bar to the recovery of such rent. It may be observed that, in the case before us, there is no contest between the two persons both of whom are registered as proprietors under the Act. The plaintiff admittedly is not registered under the Land Registration Act. The person set up by the defendant as registered proprietor has his name registered in respect of certain shares.

(6) (1831) 2 B. & Ad. 544 at p. 553.
(7) (1835) 3 Ad. and Ell. 649; 5 N. and M. 209; 1 H. and W. N. 378; 5 L. J. K. B. 25.
(8) (1831) 2 B. and Ad. 744; 9 L. J. (o. s.) K. B. 332.
(9) (1840) 6 Bing. N. C. 324.
(10) (1833) 4 B. and Ad. 435; 1 N. and M. 237; 2 L J. K. B. 88.
(11) (1901) 2 Ir. R. 278 at p. 311.
(12) 30 C. 773.
(13) 30 C. 880.

But it is alleged and proved that by amicable arrangement amongst the co-owners, that is, by amicable arrangement amongst the registered proprietors, this person is entitled to the whole rent of the *taluk* within which the disputed land is situated. What the precise position might have been if there had been a contest between the persons, both of whom were registered under the Act, need not be considered on the present occasion. It is sufficient to say that the plaintiff is not entitled to succeed as against the defendant who, relying upon section 60 of the Bengal Tenancy Act, has established that his debt has been discharged by payment of rent to the registered proprietor.

The result, therefore, is that the decree made by the Court below must be affirmed and this rule discharged with costs. We assess the hearing fee at one gold *mohur*.

Rule discharged.

CALCUTTA HIGH COURT.

SECOND Civil APPEAL No. 2782 OF 1907.

December 16, 1910.

Present:—Mr. Justice Mookerjee and Mr. Justice Coxe.

MANIK BORAI—PLAINTIFF—APPELLANT

versus

BANI CHARAN MANDAL—DEFENDANT—RESPONDENT.

Bengal Tenancy Act (*VIII of* 1885), s. 85—*Sub-lease by* raiyat—*Invalidity—By whom may be questioned—Permanent lease given by* raiyat.

The question of the invalidity of a sub-lease granted by a *raiyat* in contravention of the provisions of section 85 of the Bengal Tenancy Act, can be raised only by the landlord of the *raiyat*.

Where, therefore, a plaintiff seeks to recover possession of disputed land on the strength of a permanent lease which is found to have been executed by a *raiyat*, the defendant, who is a trespasser having no title to the land, cannot question the validity of the lease.

Appeal from the decree of the Sub-Judge of Jessore, dated August 1st, 1907, reversing that of the Munsif of Magura, dated December 10th, 1906.

Babus *Kishori Lal Sarkar* and *Harish Chandra Roy*, for the Appellant.

Babu *Brojo Lal Chakravarti*, for the Respondent.

JUDGMENT.—This is an appeal on behalf of the plaintiff in an action in ejectment. The plaintiff seeks to recover possession of the disputed land on the strength of a permanent lease granted in his favour by the tenth defendant, and upon the allegation of wrongful dispossession by the other defendants.

The Court below has found that the landlord of the plaintiff was a *raiyat* and has held, upon the authority of the decisions of this Court in the cases of *Srikant Mondul* v. *Sarodo Kant* (1) and *Ramgoti Mondul* v. *Shyama Charan Dutt* (2), that the plaintiff has not acquired any interest in the land on the basis of the permanent lease taken by him.

On behalf of the appellant, this view has been assailed on the ground that the question of the validity of the sub-lease granted to the plaintiff by his landlord cannot be questioned by a trespasser in the position of the contesting defendant. In support of this proposition reliance has been placed upon the cases of *Tamijuddi* v. *Asgar Howladar* (3) and *Banka Behary* (*Beni Madhab*) v. *Raj Chandra Pal* (4). Before we deal with the judicial decisions to which reference has been made and which may not all be easy to reconcile, we must examine the terms of section 85 of the Bengal Tenancy Act, which, it is conceded, governs this matter.

Section 85 of the Bengal Tenancy Act defines the restrictions on sub-letting by a *raiyat*. The first sub-section provides that, if a *raiyat* sub-lets otherwise than by a registered instrument, the sub-lease shall not be valid against his landlord, unless made with the landlord's consent. The second sub-section provides that a sub-lease by a *raiyat* shall not be admitted to registration, if it purports to create a term exceeding nine years. It is not necessary for our present purpose to refer to the provisions of the third sub-section which deals with an instrument registered before the commencement of the Bengal Tenancy Act. Now it is, we think, reasonably plain that the first two sub-sections must be read together. It is clear from the first sub-section that the question of the validity of a sub-lease not created by a registered instrument may be raised by the landlord of the *raiyat*, because it provides expressly that such sub-

(1) 26 C. 46.
(2) 6 C. W. N. 919.
(3) 36 C. 256; 1 Ind. Cas. 942, 13 C. W. N. 183.
(4) 14 C. W. N. 141; 2 Ind. Cas. 202.

lease shall not be valid against the landlord of the *raiyat* unless made with his consent. The second sub-section guards against registration of a lease by which a term exceeding nine years is created, the effect of this is to render inoperative a sub-lease admitted to registration in contravention of the provisions of the law. But it is clear that such invalidity operates only in favour of the landlord of the *raiyat*. Apart from judicial decisions, therefore, upon a plain reading of the section of the statue, the position seems to be fairly c ear that the question of the invalidity of a sub-lease granted in contravention of these provisions can be raised only by the landlord of the *raiyat*. This view is supported by some of the decisions to which reference has been made.

In the earliest of the cases mentioned,—*Srikant Mandul* v. *Saroda Kant Mandul* (1),—the dispute was between an under-*raiyat* on the one hand and the superior landlord of the *raiyat* on the other, and it was held that a sub-lease which had been registered in contravention of sub-section (2) of section 85 was not binding upon the landlord of the *raiyat*. In the second case,—*Ramçati Mondul* v. *Shama Churn Dutt* (2),—the dispute arose between the sub-tenant of an under-*raiyat* as plaintiff and the representatives of the *raiyat*. The provisions of section 85 would not be strictly applicable to a case of this description; but apparently the learned Judge held that the principle embodied therein was applicable. We may observe here that it is difficult to reconcile this decision with the case of *Fazel Sheikh* v. *Keramuddi Sheikh* (5). In that case, it was held that if an under-*raiyat* was in possession under a sub-lease granted to him in contravention of the provisions of section 85 of the Bengal Tenancy Act, he could not ejected by the landlord of the *raiyat*. That decision was passed on the ground that, although the instrument was inoperative under section 85, the under-*raiyat* had a subsisting tenancy. If this view be adopted as well-founded, it is difficult to see why the same principle should not be applied when the under-*raiyat* happens to be the plaintiff, as in the case of *Ramgati Mandul* v. *Shama Churn Dutt* (2). If it be ruled that an under-*raiyat* acquires a valid tenancy, although the instrument may be inoperative under section 85, it is clearly immaterial whether he is the plaintiff or the defendant in the suit. A similar view was adopted in the case of *Banka Behari* v. *Raj Chander Pal* (4) in which it was ruled that, even on the assumption that a permanent *mokurari* under-*raiyat* lease is void under section 85 of the Bengal Tenancy Act, it is open to the under-*raiyat* to prove a tenancy independently thereof. We must not, however, be taken to express any opinion as to the other ground mentioned in the judgment, namely, that as the plaintiff had proved prior possession, bare possession was sufficient title against the defendant-trespasser. The learned Judges, when they founded this conclusion upon the decision of the Bombay High Court in *Pemraj Bhavaniram* v. *Narayan Shivaran* (6), apparently overlooked that the contrary view had been adopted by this Court in the case of *Purmeshur Chowdhry* v. *Brijo Lall Chowdhry* (7); *Shama Churn* v. *Abdul Kabeer* (8), and *Nisa Chand* v. *Kanchiram* (9), in which it was held that mere previous possession does not entitle a plaintiff to a decree for the recovery of possession, except in a suit under section 7 of the Specific Relief Act, which must be brought within six months from the date of the dispossession. There has been much divergence of judicial opinion on this subject, as appears from the decisions in *Narayana* v. *Dharmachar* (10) and *Krishna Aiyar* v. *Secretary of State* (11), which accord with the view indicated in *Hanmantrav* v. *Secretary of State* (12) and *Ali* v. *Pachu Bibee* (13), while the most recent case in this Court [*Shama Charan* v. *Suraja Kant* (14)] seems to show an inclination in favour of the Bombay view. The question is by no means free from difficulty, and we reserve our opinion on it, involving, as it does, an examination of the true effect of the decision of the Judicial Committee in *Sundar* v. *Parbati* (15).

(5) 6 C. W. N. 916.

(6) 6 B. 215.
(7) 17 C. 256.
(8) 3 C. W. N. 158.
(9) 26 C. 579; 3 C. W. N. 568.
(10) 26 M. 514.
(11) 33 M. 173; 4 Ind. Cas. 1070; 6 M. L. T. 306; 20 M. L. J. 716.
(12) 25 B. 287.
(13) 5 Bom. L. R. 264.
(14) 6 Ind. Cas. 806; 15 C. W. N. 163.
(15) 16 I. A. 186, 12 A. 51,

The learned Vakil for the respondent has next contended that the decision of this Court in the csse of *Tamijuddi* v. *Asgar Howladar* (3) is inconsistent with the provisions of section 85 of the Bengal Tenancy Act. It is not necessary for our present purpose to examine whether that decision is well-founded on principle, because the learned Judges appear to have held that an under-*raiyat* was entitled to succeed as against the superior landlord of the *raiyat* as long as the *raiyati* interest intervened and continued in operation. It may be pointed out that, in the case before us, if the allegations of the plaintiff are proved to be true, the contest is not between the under-*raiyat* and the superior landlord of the *raiyat* but between the under-*raiyat* and a trespasser who has no title to the property. In this view it becomes unnecessary to consider whether, as appears to have been held in the case of *Basaratulla Mundle* v. *Kasirunnessa Bibi* (16), the validity of a sub-lease granted by a *raiyat* in contravention of section 85 can be questioned by the grantor himself. In the case of a contest between the grantor and the grantee, a question of estoppel may possibly arise unless, indeed, the principle is invoked that there can be no estoppel against an Act of the Legislature [*Jagadbandhu* v. *Radha Krishna* (17); *Abdul Aziz* v. *Kanthu Mallik* (18)]. We must, therefore, hold that in the case before us, the suit ought not to have been dismissed on the ground that the plaintiff had acquired no valid title to the property, because, even though the instrument under which he claims be inoperative under section 85 of the Bengal Tenancy Act, he had a subsisting interest when the action was commenced.

The result, therefore, is that this appeal must be allowed, the decree of the Subordinate Judge set aside and the case remanded to him in order that the appeal may be disposed of after the decision of any other question that may arise between the parties. The costs of this appeal will abide the result.

Appeal allowed.

(16) 11 C. W. N. 190.
(17) 26 C. 920; 4 Ind. Cas. 414.
(18) 10 Ind. Cas. 467.

(s. c. 7 N. L. R. 49.)

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 184 OF 1910.

January 30, 1911.

Present:—Mr. Stanyon, A. J. C.

SITAI—APPLICANT

versus

TANAI—RESPONDENT.

Revision—Order granting leave to sue in forma pauperis—*Powers of High Court.*

An order granting leave to sue *in forma pauperis* is not open to revison.

Muhammad Ayub v. *Muhammad Mahmud*, 32 A 623; 7 A. L. J. 741; 6 Ind. Cas. 831, followed.

The power of revision by a High Court cannot be invoked to correct every illegal order made by a Court subordinate to it, but only in cases which have been decided and in which no appeal lies to the High Court.

Civil revision against the order of the Additional District Judge, East Berar, Amraoti, dated the 3rd May 1910.

Mr. *N. M. Bedarkar*, for the Applicant.

JUDGMENT.—This is an application for revision under section 115 of the Code of Civil Procedure, 1908, of an order allowing the non applicant to sue *in forma pauperis*. In Civil Revision No. 176 of 1910, Skinner, A. J. C., held that a grant of permission to sue *in forma pauperis* in contravention of the provisions of Order XXXIII, rule 5, which are imperative, is an illegality justifying interference by this Court in revision. With due respect, I am unable to concur in this view. The power of revision by the High Court cannot be invoked to correct every illegal order made by a Court subordinate to it, but only in cases which have been decided and in which no appeal lies to the High Court. A Court which refuses leave to sue *in forma pauperis* may possibly be regarded as having finally decided the case presented to it. But a Court which grants leave to sue *in forma pauperis*, thereby starts a case which it has yet to decide. It makes a purely interlocutory order, and no such order is open to revision. The matter has very recently been discussed by a Division Bench of the Allahabad High Court in *Muhammad Ayub* v. *Muhammad Mahmud* (1), and it is sufficient to say that I concur with the view adopted by the learned Judges in that case. This application for revision is, therefore, dismissed without notice to the other side.

Application dismissed.

(1) 32 A. 623, 7 A. L. J. 741; 6 Ind. Cas. 831.

SUKHDEO *v.* GANESH.

(s. c. 7 N. L. R. 50.)

NAGPUR JUDICIAL COMMISSIONERS COURT.

CIVIL REVISION No. 210 OF 1910.

March 4, 1911.

Present:—Mr. Drake-Brockman, J. C.

SUKHDEO—APPLICANT

versus

GANESH—OPPOSITE PARTY.

Oaths Act (X of 1873), s. 12—Refusal to take oath offered by other party—Effect of refusal—Right of Court to take refusal into consideration—Weight to be attached when both parties refuse to take oaths.

A Court does no act irregularly or illegally in taking into consideration the fact that the plaintiff declined to take an oath by which the defendant offered to be bound. The refusal is a piece of conduct which the Court is entitled to consider along with the other evidence.

Durga v. *Kewal*, Civil Revision No. 6 of 1881, distinguished.

Issen Meah v. *Kalaram*, 2 C. L. R. 476; *Chintaman* v. *Shrinivas*, 22 B. 680; *Moyan* v. *Pathukutti*; 31 M. 1; 17 M. L. J. 545; 3 M. L. T. 98, relied upon.

No weight should be attached to the refusal of a plaintiff to take an oath, where there is a similar refusal by the defendant.

Civil revision against the decree of the Judge, Small Cause Court, Kamptee, dated the 8th July 1910.

Mr. *Atmaram Bhagwant*, for the Applicant.

JUDGMENT.—This is an application under section 25 of the Provincial Small Cause Courts Act, 1887, against so much of the decree passed by the Judge of the Court of Small Causes at Kamptee as dismisses part of the applicant's claim.

The applicant joined in his suit two separate causes of action, one a loan of Rs. 100 advanced on the 19th March 1907 and the other a loan of Rs. 25 advanced on the 26th October in the same year. The defendant denied the latter and also alleged a payment of Rs. 9 which was not admitted by the plaintiff. The plaintiff alone adduced any evidence. After the 1st witness was examined, the Court recorded the following notes of the proceedings:—

"(1) The defendant proposed '*Jaganath*' oath to P. W. No. 1 and said that he would pay the full claim if the said witness says on the oath proposed that the amount of Rs. 25 was lent. The witness declined to take the oath."

"(2) Both parties propose, *Gangajali* oath to each other and say that they will abide by it; but neither is willing to take the oath."

After setting out the two points for determination, the judgment proceeds thus,—

"My finding on the first issue is that the defendant did not borrow Rs. 25 from the plaintiff. The evidence adduced by the plaintiff is very discrepant and unsatisfactory. *Secondly*, the plaintiff was offered *Gongajali* oath by the defendant, but he declined to take the same; so also did his first witness. *Thirdly* the plaintiff took a writing from the defendant when the amount of Rs. 100 was lent on a pledge of certain ornaments, and hence it is but natural that he would have taken one this time too, had the amount been advanced."

The Judge further held that the defendant did not make the re-payment alleged.

It is now contended on the plaintiff's behalf that, in treating his refusal to take the special oath offered by the defendant as indicating the falsity of the plaintiff's claim in respect of the second advance, the Judge was guilty of a material irregularity which justifies reversal of his decree in so far as it disallows part of the claim. The decision of Neill, J. C., in *Durga* v. *Kewal* (Civil Revision No. 6 of 1881), of which a brief summary appears as No. 87, in Part X (Procedure) of the Digest of Civil Rulings issued by this Court in 1882, is cited in support of the applicant's contention. I have perused this Court's record in that case and find the facts to have been as follows: The plaintiff Kewal sued on a bond execution of which was denied by the defendant Durga. Execution was proved and also payment of half the consideration, whereupon the defendant called witnesses to prove that he had re-paid what he had received. The necessary process-fees were paid, but the witnesses were not summoned owing to the carelessness of a Court official. Kewal then wished the matter to be decided by the oath of Durga, who refused to take an oath and insisted that his witnesses should be summoned and examined. The Court of first instance, however, declined to summon the defendant's witnesses, construed against him his refusal to take an oath and went so far as to decree the plaintiff's claim in full, although only

part of the consideration was shown by his own witnesses to have been paid. It was held that the defendant was entitled to have his witnesses examined and that, in any case, a decree for more than was proved due should not have been passed. There is nothing in this decision to assist the present applicant. On the other hand, there is authority in *Issen Meah* v. *Kalaram* (2) for the proposition that the Court may raise a presumption adverse to the party refusing to take an oath by which his opponent offers, under section 9 of the Indian Oaths Act, 1873, to be bound. In *Chintaman* v. *Shrinivas* (3) the Calcutta decision was cited and the Judges held that refusal to take an oath by which the opposite party offers to be bound is merely a piece of evidence which should be considered along with the other evidence. And in *Moyan* v. *Pathukutti* (4) it was said by White, C. J., that section 12 of the Oaths Act, which provides for recording the nature of the oath proposed and the fact of the refusal to take it together with any reason assigned for the refusal, negatives the view that refusal is itself a ground for dismissing the suit or for giving the plaintiff a decree as the case may be. In this Madras case the plaintiff had offered to take an oath and afterwards refused to do so, and the learned Chief Justice held that the Court should give such weight as it might think fit to the offer and the refusal. I hold, then, that the Judge of the Small Cause Court in the present case did not act irregularly or illegally in taking into consideration the fact that the plaintiff declined to take an oath by which the defendant offered to be bound; the refusal was a piece of conduct which the Court was entitled to consider along with the other evidence.

At the same time, I think, it necessary to point out that the weight which should be attached to the refusal on the part of the plaintiff is practically *nil*, for the simple reason that there was a similar refusal on the part of the defendant. Nor would it be safe to allow much importance to the refusal of the plaintiff's first witness to take the oath proposed for him: he had already taken an affirmation and may well have considered that he had thereby done enough to indicate his *bona fides* and truthfulness, the matter in dispute being one with which he had no personal concern.

The applicant's learned Pleader has not attempted to impugn the lower Court's finding that the plaintiff's evidence is very discrepant and unsatisfactory, or the conclusion that, if the plaintiff had really advanced the second loan, he would have taken something in writing as he did in the case of the earlier advance. The force of the latter consideration is great, inasmuch as the earlier loan was secured by a pledge of ornaments, while the other was quite unsecured. There is thus ample ground for upholding the lower Court's decision apart from the matter of the oath, and section 167, Indian Evidence Act, would preclude me from interfering even if the plaintiff's refusal to take the oath had been improperly admitted as evidence.

The application is accordingly dismissed without notice to the other side.

Application dismissed.

(2) 2 C. L. R. 476.
(3) 22 B. 680.
(4) 31 M. 1; 17 M. L. J. 545; 3 M. L. T. 98.

(s c. 7 N. L. R. 63.)

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 476 OF 1910.

December 23, 1910.

Present:—Mr. Stanyon, A. J. C.

SUKHNANDAN—APPELLANT

versus

MANAKCHAND—RESPONDENT.

General Clauses Act (X of 1897), s. 3 (26)—Civil Procedure Code (Act V of 1908), O. XXI—Central Provinces Revenue Manual, Vol. III, Revenue Book Circular No. IV-9—Land, definition of—Trees—Jurisdiction of Civil Court to attach and sell trees.

Trees of all kinds, standing on an agricultural holding, are part and parcel of land used for agricultural purposes, at least in those cases where the property in them has not been expressly severed from the property in the soil on which they stand. Therefore, the jurisdiction of a Civil Court to attach and sell such trees in execution of a decree is ousted by Appendix C, to Revenue Book Circular No. IV-9 (Central Provinces Revenue Manual, Volume III, p.76.)

The definition, which must be applied to the word "land" as used in the Civil Procedure Code, is that given in section 3 (26) of the General Clauses Act, 1897, which includes trees.

Appeal from the decree of the District Judge, Betul, dated the 4th April 1910, confirming the order of the Additional Judge to the Court of Munsif, Betul, dated the 12th May 1909.

SUKHNANDAN *v.* MANAKCHAND.

Sir *B. K. Bose*, and Mr. *M. B. Kinkhede*, for the Appellant.

Mr. *J. Mittra*, for the Respondent.

JUDGMENT.—The respondent in this appeal having obtained a money-decree, amounting with costs to Rs. 182-9-3, against the appellant, in execution thereof attached, and caused to be sold, some 84 trees standing on the agricultural land of the latter. This land consists of two fields, one, No. 4, being a *malik makbuza*, and the other, No. 125, an occupancy-holding. The trees sold comprise 57 mango, 7 tamarind, and 20 other kinds, and the price they fetched was Rs. 160. The appellant applied to the executing Court to set aside the sale, on the ground of material irregularity in conducting the same. The application failed, and an appeal to the District Court having been dismissed, the judgment-debtor has made this second appeal. It was objected before me that no such appeal lies, but it is not necessary to decide that point because it is conceded that the first ground taken in appeal affords a fit subject for revision by this Court, if the Courts below have gone wrong. That ground, taken for the first time in this Court, is that the trees in dispute are part and parcel of an agricultural holding, and, therefore, not liable to attachment and sale by the Civil Court. If this objection is well founded then the sale was *ultra vires*, and this Court is bound to interfere.

I am of opinion that this appeal or application must succeed. By Appendix C, to Revenue Book Circular No. IV-9 (Central Provinces Revenue Manual, Vol. III, p. 76) the jurisdiction of the Civil Court is clearly ousted in respect of execution sales of land held for agricultural purposes, or purposes subservient to agriculture. Rules made under powers conferred by an enactment, become an integral part of that enactment for the purposes of interpretation. Under section 3 (26) of the General Clauses Act, 1897, *trees* are included in the definition of "land," and that is the definition which must be applied to the word "land" as used in the Code of Civil Procedure, and in all rules made thereunder, unless there is something repugnant in the context. The argument that the language of Appendix C, above cited, makes it clear that the word "land" was used therein to denote the earth or soil, apart from what stands upon it, does not commend itself to me. It was supported by the contention that the interpretation claimed by the appellant would oust the jurisdiction of the Civil Court to sell standing crops, whereas the presence of such jurisdiction is admitted on all hands. This contention is erroneous. No doubt, in the absence of express provisions to the contrary, it was once held that standing crops were immoveable property as things rooted in land: but that *dictum* is obsolete, because section 2 (13) of the Code of Civil Procedure of 1908, now enacts that the term "moveable property" includes growing crops. Such crops are, therefore, necessarily excluded from the definition of land, which is immoveable property. But trees standing on land, as distinguished from the fruit and other product thereof when severed therefrom, are unquestionably immoveable property. I am, therefore, of opinion that trees of all kinds, standing on an agricultural holding, are part and parcel of land used for agricultural purposes, at least in those cases where the property in them has not been expressly severed from the property in the soil on which they stand. Whether the same rule would apply to cases where trees belonging to A, stand on the land of B is a question which I am not called upon to decide in the present case. Here the judgment-debtor is equally the owner or occupant of the trees and the soil on which they stand, and Appendix C above quoted prohibits the Civil Court from carrying out an execution-sale as much in the one case as the other. Such a severance as the Courts below have attempted to effect in the present case, would lead to endless anomaly and difficulty.

For the above reasons, the application to set aside the sale of the trees is allowed, the sale is set aside, and the whole of the proceedings in execution precedent to and consequent upon such sale, are quashed as *ultra vires*. The judgment-debtor will be re-placed in possession of the trees, and any balance of purchase-money which may remain after satisfying the judgment-debtor's costs, will be refunded to the decree-holder. The decree-holder will pay all costs connected with the execution proceedings for sale of the trees in all three Courts, including Rs. 25 allowed as Pleader's fees in this Court.

Appeal allowed.

SIVADURGA DEBI *v.* RAJMOHAN PODDAR.

(s. c. 15 C. W. N. 577.)

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 145 OF 1909.

July 12, 1910.

Present:—Mr. Justice Mookerjee and Mr. Justice Carnduff.

SIVADURGA DEBI—JUDGMENT-DEBTOR—APPELLANT

versus

RAJMOHAN PODDAR—DECREE-HOLDER—RESPONDENT.

Execution of decree—Deliberate under-valuation in sale proclamation—Material irregularity—Substantial injury—Civil Procedure Code (Act XIV of 1882), ss. 287, 311.

Deliberate under-valuation of property in a sale proclamation is a material irregularity in publishing the sale within the meaning of section 311 of the Civil Procedure Code, 1882, and if the properties have been sold below their proper value the sale should be set aside.

Sadatmand Khan v. *Phul Kuar*, 20 A. 412; 25 I. A 146; 2 C. W. N. 550, relied upon.

Appeal from the order of the Sub-Judge of Bakergunge, dated December 21st, 1908.

Babu *Gunoda Charan Sen*, for the Appellant.

Babus *Harendra Narayan Mitra* and *Gopal Chandra Das*, for the Respondent.

JUDGMENT.—This is an appeal on behalf of the judgment-debtor against an order refusing to set aside an execution sale. The sale took place on the 20th March 1908 in execution of a mortgage-decree. Seventy-one items of property were sold and they were purchased by the decree-holders for Rs. 6,085. On the 21st April 1908, the judgment-debtor made an application to set aside the sale under sections 244 and 311 of the Code of 1882. Her allegations mainly were, that there had been serious irregularities in the publication and conduct of the sale, that such irregularities had caused substantial injury, and that consequently the sale could not be sustained. The learned Subordinate Judge has dismissed this application. He has held that the sale-proclamation was duly served. It is not necessary for us to consider that aspect of the case in the view we take of the other contentions of the appellant before us. The attention of the learned Subordinate Judge was drawn to the circumstance that in the sale-proclamation many of the properties were under-valued. It was contended on behalf of the judgment-debtor that such under-valuation constituted material irregularity, and that as a result of such under-valuation, the properties had been under-sold, the sale ought to be reversed. The learned Subordinate Judge held that the under-valuation was an irregularity; but as the properties were not grossly under-valued, he could not hold that the under-valuation was a material irregularity. He further held upon the evidence that there was nothing to show that the properties had been under-sold.

On behalf of the judgment-debtor, the conclusions of the Subordinate Judge have been assailed substantially on two grounds, namely, *first*, that the properties had been under-valued in the sale proclamation and that the under-valuation was of such a character as to constitute material irregularity, and, *secondly*, that the judgment-debtor has suffered substantial injury inasmuch as, by reason of the irregularity mentioned, the properties have been under-sold. In our opinion, both these contentions are well founded and must prevail.

That the properties were under-valued in the sale proclamation to a considerable extent cannot be disputed for a moment. The value of the 71 properties which were actually put up for sale was put down in the sale proclamation at Rs. 4,210. They were purchased by the decree-holders for Rs. 6,085. Therefore if the final estimate of the value of the properties as made by the decree-holders be accepted as correct, there can be no question that the estimate as made for the purpose of the sale proclamation was considerably lower than their proper value. The position, however, becomes clear if we examine some of the items of the properties sold. The decree-holders valued the item No. 1 at Rs. 400; but it was purchased by them at the sale for Rs. 800. The item No. 12 was valued at Rs. 25 but was purchased by them for Rs. 170. The item No. 20 was valued as Rs. 50, but was purchased by the decree-holders for Rs. 280. The item No. 25 was valued at Rs. 30 but was purchased for Rs. 430. It is manifest from these instances that the value inserted in the sale-proclamation must have been fixed with gross carelessness. The under-valuation was also obviously deliberate because the decree-holders purchased the properties at the execution sale for considerably higher sums than those mentioned by them in the

sale-proclamation as the proper value. It has been suggested by the learned Vakil for the respondent that this does not constitute material irregularity, and in support of this view reliance has been placed upon the decision of this Court in the case of *Moulvi Abdul Kashem* v. *Benode Lal Dhone* (1). It is to be remarked, however, that the attention of the learned Judges was not drawn to the decision of the Judicial Committee in the case of *Sadatmand Khan* v. *Phul Kuar* (2). Their Lordships pointed out in that case that the mis-statement of value in the sale proclamation was something more grave than an ordinary irregularity of procedure. In the case before us, this mis-statement was made deliberately as well as gratuitously. In view of the decision of the Judicial Committee in the case just mentioned, we must hold that there was material irregularity in connection with the sale proclamation in the case before us. It does not follow, however, that merely because the properties have been under-valued that the judgment-debtor is entitled to relief, because if the properties have been sold for their proper value, the judgment-debtor has no grievance. We must, therefore, turn to the second ground taken before us, namely, the question of the value of the properties which have been sold.

[Upon a consideration of the evidence their Lordships then found that the properties had been sold below their proper value, and concluded as follows: –]

The result, therefore, is that this appeal is allowed, the order of the Court below reversed, and the sale set aside. But the decree-holder will be at liberty to proceed to sell the properties again. It has been suggested by the learned Vakil for the respondents that his clients will now be placed in a position of great disadvantage, because even upon a re-sale, the judgment-debtor may take objection on the ground of irregularity. It is manifest, however, that the decree-holders can amply protect themselves if they are careful. If they state the value of the properties after proper inquiry and not recklessly as they have done in the present instance, and if they take care to have the sale proclamation served upon the properties which they wish to sell, they will be amply protected; and if, after these precautions, the properties are under-sold, there will not be any ground for setting aside the sale under section 511, Civil Procedure Code. The appellant is entitled to her costs in this Court. We assess the hearing fee in this Court at three gold *mohurs*.

Appeal allowed.

(1) 12 C. W. N. 757.
(2) 20 A. 412; 2 C. W. N. 550; 25 I. A. 146.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 605 OF 1910.

May 2, 1911.

Present:—Mr. Richards, K. C., Chief Justice, and Mr. Justice Tudball.

MUHAMMAD SADIQ—DEFENDANT—APPELLANT

versus

ABDUL MAJID—PLAINTIFF AND ANOTHER—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. VI, r. 17—Amendment—Pleadings—Alteration in description of property detailed in plaint made beyond limitation—Power of Court to make the amendment—Effect on limitation.

One *H.* sold the property owned by her in a village and in the sale-deed described the property as being a 24 *biswansis* share. In point of fact the share owned by *H.* amounted to only 17 *biswansis*. The plaintiff brought a suit for pre-emption on the last day of limitation but claimed only 15 *biswansis* share which he alleged *H.* had sold. Later on he discovered that the share of *H.* was 17 *biswansis* and applied to amend the plaint:

Held, that the amendment might be looked upon as a correction in the description of the property as set forth in the plaint. As such, the Court had power to allow the amendment and the amendment would not have the effect of barring the suit by limitation.

Second appeal from the decision of the District Judge of Moradabad, dated the 7th of April 1910.

Mr. *Muhammad Ishaq Khan*, for the Appellant.

Mr. *Ghulam Mujtaba*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for pre-emption of certain *zemindari* property based on the Muhammadan Law. The defendant, *Musammat* Hakiman, sold the property to the appellant Muhammad Sadiq on the 16th December 1907. The sale deed was duly executed and registered, and it set forth that the share sold was in or about a 24 *biswansi* share. As a matter of fact the share which the *Musammat* had was a 17 *biswansi* share, and this has been decided in the suit brought against her and her vendee by the other co-sharers. The

plaintiff, when he instituted his suit, only claimed a 15 *biswansi* share, alleging that that was the share which the vendor had actually sold. The suit was instituted on the last day of limitation. Afterwards, the plaintiff came to understand that the real share sold was, as we have said before, a 17 *biswansi* share, and accordingly he was allowed to amend the plaint by claiming a 17 *bisuansi* share instead of 15 *biswansi* share. The first Cout found that the formalities necessary under the Muhammadan law had been duly performed and the lower Appellate Court accepted the finding. The plaintiff's suit was accordingly decreed.

In appeal it has been urged that the amendment was an amendment which ought not and could not have been made having regard to the provisions of the Limitation Act; and, *secondly*, that the Courts below were wrong in holding that the preliminaries required by the Muhammadan law had been fulfilled. The Courts are allowed by the Code ample power to amend, and we are slow to interfere with any amendment which the lower Courts have power to make and which they in exercise of discretion have made. We think, however, that no Court would have power to allow a new cause of action to be introduced into a plaint after that cause of action had become barred by limitation. The real question in the present appeal is whether or not we are not bound to regard the amendment which was made, namely, to allow the plaintiff to claim 17 *biswansis* instead of 15 *biswansis*, as the introduction of a new cause of action, or whether it may be regarded as a correction of the description of the property.

With regard to the due performance of the formalities of the Muhammadan Law the evidence which was believed by both the Courts below, was to the effect that the vendee informed the plaintiff in the present suit that he had purchased the "share of *Musammat* Hakiman." There was no specification of exactly what that share was and the plaintiff at once said, without waiting to ask any questions, that he claimed his right to pre-empt. We think that the Courts below were entitled on this evidence to hold that the formalities had been fulfilled. Of course, the demand was made in the presence of witnesses.

There was a great deal of confusion as to what was in fact the actual share of the *Musammat*. We have already pointed out that, although she purported to sell a share equal to about 24 *biswansis*, her real share was a 17 *biswansi* share. After consideration, we have come to the conclusion that the amendment in this case may be looked upon as a correction of the description of the property. Looked upon in this light, it was an amendment which the Court below was entitled to make, and if it was an amendment which the Court was entitled to make we think that limitation must be reckoned as from the date of the presentation of the plaint, as explained by section 3. We accordingly dismiss the appeal with costs.

Appeal dismissed.

(s. c. 15 C. W. N. 545; 8 A. L. J. 552; 13 C. L. J. 575.)

PRIVY COUNCIL.

APPEAL FROM THE ALLAHABAD HIGH COURT.

March 28, 1911.

Present:—Lord Macnaghten, Lord Robson, Sir Arthur Wilson and Mr. Ameer Ali.

KHUNNI LAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

KUNWAR GOBIND KRISHNA NARAIN AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Hindu Law—Change of religion—Effect of conversion of member of Hindu joint family to Muhammadanism—Regulation VII of 1832, *s.* 9—*Act XXI of* 1850—*Compromise—Family arrangement for settlement of disputes—Compromise by Hindu widow—Reversioners, whether bound.*

The intention of the Legislature in both the enactments, Regulation VII of 1832 and Act XXI of 1850, is perfectly clear; by declaring that the Hindu or Mahammadan Law shall not be permitted to deprive any party not belonging to either of those persuasions of a right to property, or that any law or usage which inflicts forfeiture of rights or property by reason of any person renouncing his or her religion shall not be enforced, the Legislature virtually set aside the provisions of the Hindu Law which penalises renunciation of religion or exclusion from caste.

Therefore, where in a joint Hindu family consisting of a father and a son, the father was converted to Mahammadansim in 1845, the effect of such conversion was not to make the son the sole owner of the property of the joint family.

On the death of the son and subsequently that of the father, the daughters of the son sued a daughter's son of the father who had taken possession of the property as heir, for recovery of possession, and the suit was compromised by the parties dividing the property between them:

KHUNNI LAL *v.* GOBIND KRISHNA NARAIN.

Held, that the compromise was a family arrangement for the settlement of disputes and was binding upon the reversioners.

Consolidated appeals from a judgment of the Allahabad High Court, dated April 23rd, 1907, and reported at 29 A. 437, reversing that of the Sub-Judge of Bareilly, dated May 20th, 1905.

Mr. *Herbert Cowell*, for the Appellants.

Mr. *L. De'Gruyther*, *K. C.*, and Mr. *Bugwandin Dube*, for the Respondents.

JUDGMENT.

Mr. AMEER ALI.—These appeals, which have been consolidated by an order, dated 1st November 1910, arise out of three actions in ejectment, brought by the plaintiffs in the Court of the Subordinate Judge of Bareilly, who dismissed the suits by one judgment on 20th of May 1905. His decision, however, was reversed on appeal by the High Court of Allahabad which decreed the plaintiffs' claims on the 23rd of April 1908. The defendants have appealed to His Majesty in Council, and the point for determination is the same in each case.

The plaintiffs claim as next reversioners to their grandfather (mother's father) Raja Daulat Sing to recover possesion of certain properties held by the defendants, on the allegation that the deed of compromise under which the latter purport to derive title is not binding on them. The defendants, on the other hand, are transferees from one Raja Khairati Lall, a grandson by daughter of Raja Ratan Sing, the father of Daulat Sing, and a party to the compromise in question.

The history of Ratan Singh's family, and the circumstances which led to the compromise have been twice before this Board, and will be found summarised in the earlier of the two cases, *Rani Mewa Kunwar* v. *Rani Hulas Kunwar* (1), *Munshi Karimuddin* v. *Kunwar Gobind Krishna* (2). It is unnecessary, therefore, to enter into them at any length. For the purposes of the present appeals, it is sufficient to state that Raja Ratan Sing, who appears to have held a high position in the Court of the then King of Oudh, owned considerable property within British territories, part of which is in suit, and that he and his son Daulat were members of a joint Hindu family and thus entitled in joint tenancy each to a moiety of the properties.

It may be taken now as established beyond dispute that in 1845 Ratan Sing abandoned Hinduism and adopted the Mahomedan faith. But, although his renunciation of the Hindu religion involved, under the Hindu Law, the forfeiture of civil rights to the extent of depriving him of his share in the joint estate, Daulat advanced no claim based on such forfeiture, and father and son remained joint until the latter's death in January 1851.

Daulat left him surviving a widow, named Sen Kunwar, and two daughters, Chattar Kunwar and Mewa Kunwar. On the death of Ratan Sing, some months later (September 1851), the entire property which had stood all along in his name in the Collector's Register was recorded in the name of his widow, Rani Raj Kunwar.

Disputes then arose between the heirs of Daulat on the one side and Raj Kunwar on the other. Eventually, and in consequence of these disputes, the Court of Wards took over, in 1852, possession of the entire estate, making Raj Kunwar, who is stated to have been a person of weak intellect, an allowance of Rs. 500 a month. The rights of Daulat's heirs do not appear to have been admitted to any part of the property, as no allowance was made to them, and, in fact, it is alleged they were referred to the Civil Court for the establishment of their rights. Matters remained in this condition for several years. Sen Kunwar died in 1857 and Raj Kunwar, Ratan's widow, the following year. In 1860, under the advise of Mr. John Inglis, a well-known District Officer, then Collector of Bareilly, the daughters of Daulat and the grandson of Ratan, Khairati Lall, entered into the compromise which the plaintiffs now seek to set aside so far as it affects them.

By this compromise Daulat Singh's daughters, Chattar Kunwar and Mewa Kunwar, obtained between them an $8\frac{1}{2}$-anna share, taking the entire estate as 16-annas; whilst Khairati Lall received a $7\frac{1}{2}$-anna share. Partition was effected in terms of the compromise, and the parties obtained possession of the respective shares allotted to them. Chhattar Kunwar died in 1866. There was litigation between Chattar's husband and Mewa Kunwar as to the right to Chattar's share, which was ultimately

(1) 1 I. A. 157; 13 B. L. R. 312.

(2) 36 I. A. 138; 6 A. L. J. 807; 13 C. W. N. 1117; 11 Bom. L. R. 911; 6 M. L. T. 275; 10 C. L. J. 243; 31 A. 497; 3 Ind. Cas. 795; 19 M. L. J. 687.

decided in Mewa Kunwar's favour who thus obtained possession of the entire 8½-anna share received by the two sisters in 1860. Mewa Kunwar died in 1899, and the share held by her has devolved on the plaintiffs, her sons.

Their case is, that on the abandonment of Hinduism by Ratan Sing he forfeited his half share in the joint property which vested in Daulat Sing, that they as his heirs are entitled to the entire 16-annas, and that they are not bound by the compromise of 1860, as Chhattar Kunwar and Mewa Kunwar, being mere-life tenants, had no authority, in the absence of legal necessity, to alienate the 7½-anna share in favour of Khairati Lall.

The defendants who are transferees either from Khairati Lall or his heirs, contend *inter alia* that the compromise entered into by the two ladies was not an alienation; that it was a family arrangement for the settlement of disputes under which they obtained more than they were legally entitled to; that in view of the British Legislation (to which the defendants refer) the forfeiture, on which the plaintiffs rely, could not be enforced, and that, therefore, there was no divestment of the right of Ratan in respect of his half share, and that even if any such right as the plaintiffs allege, devolved on Daulat in consequence of Ratan's conversion in 1845 it became "extinguished" on the lapse of 12 years from the date of such devolution.

The Subordinate Judge in a well-considered judgment upheld the defendants' pleas and dismissed the suits. The learned Judges of the High Court, on appeal by the plaintiffs, arrived at a different conclusion. They were of opinion that on the conversion of Ratan Sing, Daulat became "sole and absolute owner of the whole estate," inasmuch as Regulation VII of 1832 "did not abrogate the Hindu Law as to the consequences of apostasy," and Act XXI of 1850 was not enacted until some five years after his adoption of the Mahomedan faith. With regard to the compromise of 1860, although they considered it to be "just and wise," "perhaps the best arrangement that could be made," they felt pressed by authority to hold in effect that it amounted to an alienation which the ladies, in the absence of legal necessity, were not competent to make, and that consequently it was not binding on the plaintiffs. In this view of the question they reversed, as already stated, the decision of the Subordinate Judge, and decreed the plaintiffs' claims in all three suits. The learned Judges did not deal with the question of limitation raised by the defendants.

Their Lordships regret they are unable to concur in the judgment of the High Court.

In 1845, where Ratan Singh abandoned Hinduism and adopted the Mahomedan faith, the rule laid down in section 9, Regulation VII of 1832, for decision in civil suits where the parties ranged against each other belonged to different persuasions, was in force in the Bengal Presidency.

It declared in express terms that in such cases—

"When one party shall be of the Hindu and the other of the Mahomedan persuasion, or where one or other of the parties to the suit shall not be either of the Mahomedan or Hindu persuasions, the laws of those religions shall not be permitted to operate to deprive such party or parties of any property to which, but for the operation of such laws, they would have been entitled."

Act XXI of 1850 extended the principle of section 9, Regulation VII of 1832, of the Bengal Code, throughout the territories subject to the Government of the East India Company. After reciting the provisions of section 9, and stating that it would be beneficial to extend its principle to the rest of British India, it enacted that—

"So much of any law or usage now in force within the territories subject to the Government of the East India Company, as inflicts on any person forfeiture of rights or property, or may be held in any way to impair or affect any right of inheritance, by reason of his or her renouncing, or having been excluded from the communion of any religion, or being deprived of caste, shall cease to be enforced as Law in the Courts of the East India Company, and in the Courts established by Royal Charter within the said territories."

The intention in both enactments is perfectly clear; by declaring that the Hindu or Muhammadan Law shall not be permitted to deprive any party not belonging to either of those persuasions of a right to property, or that any law or usage which inflicts forfeiture of rights or property by reason of any person renouncing his or her religion, shall not be

enforced, the Legislature virtually set aside the provisions of the Hindu Law which penalises renunciation of religion or exclusion from caste.

The effect of the Legislation of 1832 and 1850 was that on Ratan Singh's abandonment of Hinduism, Daulat Singh did not acquire any enforcible right to his father's share in the joint family property which he could either assert himself or transmit to his heirs for enforcement in a British Court of Justice.

In the view their Lordships take of this branch of the case "it is not necessary to discuss the question of limitation raised by the defendants. But, it may be observed that whatever right Daulat acquired under the Hindu Law to the share of his father came into existence in 1845 on conversion of the latter to the Mahommadan religion. No suit could be brought, even if the enactments referred to above had permitted it, to enforce the right after the lapse of 12 years "from the time the cause of action arose" (section 12, Act XIV of 1859). Nothing in Article 142 of Act IX of 1871 or of Article 141 of Act XV of 1877 could lead to the revival of a right that had already become barred. In this connection their Lordships would refer to the judgment of this Committee in the case of *Hurrinath Chatterji* v. *Mohunt Mothoor Mohun Goswami* (3), where it was pointed out that the intention of the law of limitation is, not to "give a right where there is not one, but to interpose a bar after a certain period to a suit to enforce an existing right."

Such was the relative position of the parties in 1860, when the compromise was entered into. The heirs of Daulat had no existing enforcible right to the share of Ratan Singh, and the entire property was recorded in the name of his widow. Under these circumstances, the parties, under the advice of the District Officer, instead of engaging in a long litigation, arrived at a mutual settlement of their claim. The real nature of the compromise is well-expressed in a judgment of the High Court of the North-West Provinces in 1868 in the suit of Mewa Kunwar against her sister Chhattar Kunwar's husband. The learned Judges say as follows:—

(3) 20 I. A. 183; 21 C. 8.

"The true character of the transaction appears to us to have been a settlement between the several members of the family of their disputes, each one relinquishing all claim in respect of all property in dispute other than that falling to his share, and recognising the right of the other, as they had previously asserted it, to the portion allotted to them respectively. It was in this light, rather than as conferring a new distinct title on each other, that the parties themselves seem to have regarded the arragement, and we think that it is the duty of the Courts to uphold and give full effect to such an arrangement."

Their Lordships have no hesitation in adopting that view, *Lala Oudh Beharee* v. *Mewa Kunwar* (4). The true test to apply to a transaction which is challenged by the reversioners as an alienation not binding on them is, whether the alienee derives title from the holder of the limited interest or life-tenant. In the present case Khairati Lall acquired no right from the daughters of Daulat, for "the compromise," to use their Lordships' language in *Rani Mewa Kunwar* v. *Rani Hulas Kunwar* (1) "is based on the assumption that there was an antecedent title of some kind in the parties, and the agreement acknowledges and defines what that title is."

In their Lordships' judgment the decisions on the authority of which the learned Judges of the High Court have held the compromise not to bind the plaintiffs, are not applicable to the present case.

On the whole their Lordships are of opinion that the judgment and decrees of the High Court of Allahabad should be reversed and those of the Subordinate Judge restored, and they will humbly advise His Majesty accordingly.

The respondents will pay the costs of this appeal and of the appeal in the High Court.

Appeal allowed.

Solicitors for the Appellants: Messrs. *Pyke Parrott & Co.*

Solicitors for the Respondents: Messrs. *T. L. Wilson & Co.*

(4) 4 Agra H. C. Rep. 82.

(s. c. 8. A. L. J. 418.)

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 627 OF 1910.

March 6, 1911.

Present:—Sir John Stanley, KT., Chief Justice, Mr. Justice Banerji and Mr. Justice Richards.

RAMESHAR UPADHYA AND OTHERS—DEFENDANTS—APPELLANTS

versus

SUBBKARAN UPADHYA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Decree—Construction—Charge—Order for sale of property—Mortgage.

One K. S. executed a sale-deed in respect of the property in dispute in favour of one B. S. for Rs. 500. The purchase-money was paid to the vendor but possession of the property was not delivered to the vendee, who consequently brought a suit to obtain possession. The suit was compromised in the following terms: "The plaintiff consents to give up his right as vendee in the property in dispute. The defendant agrees to return the purchase-money Rs. 500 with Rs. 100, the costs of the suit, total Rs. 600, to the plaintiff vendee within two years, for which payment this share (*i. e.*, the property which was sold) as well as the person of the defendant shall be liable, and until this money is paid the property in dispute cannot be alienated." Upon this compromise the Court passed a decree as follows: "Plaintiffs' claim is decreed for Rs. 600 as per compromise against the defendant and hypothecated property with interest at 1 per cent per mensem payable in two years."

Held, (*Banerji, J.*, dissenting), that the decree did not direct the sale of the property, but merely operated to create a charge upon it.

Per *Stanley, C. J.*—The meaning of the compromise was that there should be a decree against the defendant-vendor for payment of the amount of the decree, and until payment thereof was made, the property, which was the subject-matter of the suit, should stand charged with the payment of this amount. There was nothing to indicate that the parties agreed that if the money were not paid within two years, the property would be sold forthwith. It was in fact a simple money-decree with a superadded charge on property as collateral security for the payment of the amount of the decree.

Per *Banerji, J.*—The intention of the parties to the compromise was that the amount agreed to be paid should be realized by sale of the property in execution of the decree and the decree gave effect to the intention.

Fazil Howladar v. *Krishna Bundhoo Roy*, 25 C. 580; 2 C. W. N. 118; *Lal Behary Singh* v. *Habibur Rahman*, 26 C. 166; 3 C. W. N. 8; *Gobind Chandra Pal* v. *Dwarka Nath Pal*, 35 C. 837; 12 C. W. N. 849; 7 C. L. J. 492; *Baldeo Bharthi* v. *Hushiar Singh*, A. W. N. (1894) 45, referred to.

Per *Richards, J.*—A decree for sale under the Transfer of Property Act always pre-supposes the existence of a mortgage. Parties entering into an agreement for a mortgage cannot contract themselves out of the provisions of the Act, and a decree for sale cannot be obtained without complying with the formalities prescribed by the Transfer of Property Act.

If the Court which passed the decree in question intended to decree that the mortgaged property should be sold without any further suit after default in payment within two years, the Court would be passing an illegal decree.

Second appeal from the decision of the District Judge of Jaunpur.

The Hon'ble Mr. *Sundar Lal* (with him Mr. *Gokul Prasad*), for the Appellants.

Mr. *B. E O'Conor* (with him Mr. *Haribans Sahai*), for the Respondents.

JUDGMENT.

STANLEY, C. J.—The sole question in this appeal depends upon the true construction of a decree based upon a compromise of the 24th of March, 1888; whether in fact by that decree a charge merely was created, or whether or not in addition to the creation of a charge the property charged was directed to be sold.

The suit was one for sale of property comprised in a mortgage of the 17th of July, 1890, executed by Jai Karan Singh and the other sons of one Kutwaru Singh in favour of Bechu Ram, a member of the joint family of the plaintiffs. The defendants Nos. 1—13 are the representatives-in-interest of the mortgagors. The other defendants are auction-purchasers of the mortgaged property under a sale which took place on the 20th of December, 1893, purporting to be in execution of the decree of 24th of March, 1888. The circumstances which led to the passing of this decree are as follows:—On the 21st December, 1879 Kutwaru Singh executed a sale-deed in respect of his share in the village of Bahura with other property in favour of one Baij Nath Singh, the price being Rs. 500. The purchase-money was paid to the vendor but he did not deliver possession of the property to the vendee, who consequently brought a suit for possession of the property. A compromise was entered into in the following terms:—

"The plaintiff consents to give up his right as vendee in the property in dispute. The defendants agree to return the purchase-money Rs. 500 with Rs. 100, the costs of the suit to the plaintiff-vendee, total Rs. 600 within two years for which payment this share (*i. e*; the property which was sold) as well as the person of the defendant shall be liable and until this money is paid, the property in dispute cannot be alienated. Let the case be decided in accordance with this compromise

that is to say, a decree for costs be passed for the plaintiff to the extent of Rs. 600 with interest."

Upon this compromise the Court passed the following order:—"Plaintiff's claim is decreed for Rs. 600 as per compromise against the defendants and hypothecated property with interest at Re. 1 per cent. per mensem, payable in two years:"—On this order the following was drawn up, "Let the claim of the plaintiff for the sum of Rs. 600 be decreed against the defendants and the hypothecated property with interest at Re. 1 per cent. per mensem, payable in two years, in accordance with the deed of compromise. An application for execution of this decree was made on the 16th of March 1891, and was struck off for default. A second application was made on the 24th of July, of the same year, which was also allowed to go by default; as was also a further application of the 29th of October, 1892.

On the 23rd of November 1892, a fourth application was filed and the case was transferred to the Collector with the result that the auction-sale already referred to, took place. The judgment-debtor raised an objection to the sale on the ground that the decree could not be executed unless an order absolute for sale was passed under section 89 of the Transfer of Property Act. This objection was disallowed for reasons not known, this part of the record having been destroyed.

The defendants in the present suit pleaded that the mortgage of the 17th of July 1890, which was executed after the passing of the decree of the 24th of March 1888, was ineffectual as against the principal defendants (auction-purchasers), and that the plaintiffs have no right to sue for the enforcement of this mortgage against the property and have no right of redemption; that the property in dispute was sold by auction on the 20th of December 1893, in execution of the decree for enforcement of the lien created by the compromise decree of the 24th March 1888, and was purchased by these defendants, and that the right to redeem of the judgment-debtors and the plaintiffs thereby became extinct.

The Court of first instance dismissed the suit on the ground that the decree, in execution of which the defendants purchased, was a mortgage-decree and not a simple money-decree.

On appeal the learned District Judge held that the decree in question was a money-decree and not a mortgage-decree, and that it created nothing more than a charge upon the hypothecated property. He accordingly set aside the decree of the Court below and decreed the plaintiffs' claim.

In the appeal before us the correctness of the decision of the lower Appellate Court is impugned. The sole question in it is, as I have asid, whether or not by the decree of the 24th of March, 1888, a sale of the property was directed and validly directed. I am of poinion that no such order for sale was passed and that the decision of the learned District Judge in this respect is correct. The suit in which the compromise was entered into was, it is to be observed, a suit for possession of property agreed to be sold. The compromise provided that the purchase-money with costs, *i. e*; Rs. 600, should be paid by the vendor to the vendee, and that as security for this sum the property as well as the person of the defendant should be liable. The meaning of this is, that there should be a decree against the defendant-vendor for payment of the amount of the decree, and that until payment of it was made, the property, which was the subject matter of the suit, should stand charged with the payment of this amount. That this was the meaning of the compromise is emphasised by the words subsequently appearing in it, namely, that "a decree for cash be passed for the plaintiff to the extent of Rs. 600 with interest." There is nothing to indicate that the parties agreed that if the money were not paid within two years, the property should be forthwith sold. It was in fact a simple money-decree with a superadded charge of property as collateral security for the payment of the amount of the decree. There was no hypothecation of the property whatever, created by the compromise or prior thereto. By the agreement of compromise a valid charge could not have been created without registration. No charge was created other than by force of the decree The parties simply agreed that the property should be security for the payment of the debt, and that a decree of the Court should be passed creating this charge. The decree purports to have been passed *in accordance with the compromise*, and we are entitled to look at the compromise so as to interpret rightly the decree. It is drawn up in a loose and clumsy fashion, namely, "Let the claim of

the plaintiff for the sum of Rs. 600 be decreed against the defendants and hypothecated property with interest at Re. 1 per cent. per mensem payable in two years in accordance with the deed of compromise." In the first place, the word "hypothecated" is inaptly used. The property was not hypothecated. There was merely an agreement that it should be liable for payment of the sum of Rs. 600. The only decree which the Court was empowered by the compromise to pass, in my judgment, was a decree against the defendant for the sum of Rs. 600 and a declaration that the payment of this sum of Rs. 600 should be charged upon the property in question. If the Court had passed a decree for sale of the property in default of payment within two years, the decree would not have been in accordance with the compromise. The compromise did not of itself provide for the sale of the property. In view of the fact that the property was not hypothecated at the date of the decree, the true meaning to be attached to the decree is, I think, that it was a decree for money only with a superadded charge of the sum agreed to be paid upon the property specified or referred to in the compromise. The words of the decree "against the hypothecated property" means, I think, no more than this that the decretal amount should be payable out of the property charged therewith. The Court of first instance relied upon the ruling in *Lal Behary Singh* v. *Habibur Rahman* (1), in which it was held that a decree that mortgaged property be made liable for realisation of the amount of the decree was to be regarded as a mortgage-decree governed by the Transfer of Property Act though not made in the form prescribed by that Act. It also relied upon the ruling in *Fazil Howladar* v. *Krishna Bundheo Roy* (2), in which it was held that a decree which directs the realisation of money found to be due from hypothecated property is a mortgage decree and not a decree for money. In both these cases, however, there was at the date of the suit an existing mortgage. Here there was at the date of the suit neither a mortgage nor a charge. The suit was not to realise a mortgage-debt or a charge. It was a suit of a very different nature, namely, a suit for possession. It would be, in my opinion, straining the language of the decree if we were to hold that the Court intended by it not merely to create a charge but also to order a sale of the property so charged for the satisfaction of it. Moreover, if we were to hold that the Court did pass such a decree, it appears to me that it did so wholly regardless of the terms of the compromise which expressly provided that *a decree for cash* should be passed and that the property should be liable for payment of this cash.

For the foregoing reasons, I am of opinion that the lower Appellate Court took a correct view. I may here point out that the plaintiffs' mortgage was a registered document, that it was executed before the sale under which the defendants-appellants purchased, and notice was given in the sale proclamation that the property was subject to an incumbrance. The appellants, therefore, have themselves to blame if they suffer any loss in the transaction. The plaintiffs, however, in their plaint offered to redeem any mortgage holding priority to their mortgage. The charge created by the decree of the 24th of March 1888, is clearly prior to the plaintiffs' mortgage, and no provision has been made for satisfaction of it in the decree of the learned District Judge. Before, therefore, this appeal can be satisfactorily disposed of it appears to me that an issue ought to be referred to the lower Appellate Court to determine what, if any, charges existed upon the property having priority to the plaintiffs' mortgage and what amounts are due in respect of these prior mortgages.

As my learned colleague and I are not in agreement as to the true construction of the decree of the 24th of March 1888, the question whether or not that decree did anything more than create a charge upon the property referred to therein should be decided by one or more of our colleagues under section 98 of the the Code of Civil Procedure.

BANERJI, J.—This appeal arises out of a suit brought by the plaintiffs for sale of certain immoveable property mortgaged to them on the 17th of July 1890, by the descendants of one Kutwaru. The same property was sold by auction on the 20th of December 1893, in execution of a decree obtained against Kutwaru on the 24th of March 1888, and was purchased by the defendants-appellants. They contend that

(1) 26 C. 163; 3 C. W. N. 8.
(2) 25 C. 580; 2 C. W. N. 118.

the decree, in execution of which the property was sold, was one for the sale of hypothecated property and that as the mortgage of the plaintiffs is of a later date, they have priority over the plaintiff, and the property cannot be sold again. The plaintiffs, on the other hand, urge that the decree of the 24th March 1888, was a simple decree for money, and that the appellants purchased the property subject to the plaintiffs' mortgage. The Court of first instance found in favour of the appellants and dismissed the suit. The lower Appellate Court has reversed the decree of the first Court, holding that the decree mentioned above was a simple money decree.

There can be no question that if the decree of the 24th of March 1888, was a simple decree for money, the defendants-appellants who purchased the property after the date of the plaintiffs' mortgage did so subject to that mortgage. If, on the other hand, the decree was one enforcing a charge and directing a sale of specific property, the appellants have priority over the plaintiffs whose mortgage is of a later date. The decision of the case, therefore, turns on the construction of the decree.

The circumstances under which it was passed are these.—The property mortgaged to the plaintiffs was sold by Kutwaru to one Baij Nath. The latter brought a suit against the former for possession of the property. The case was compromised by the parties on the 24th of March 1888, and a decree was passed in accordance with the compromise on the same date. The terms of the compromise were set forth in the decree and have been correctly translated by the Court below as follows:—

"The plaintiff consents to give up his right as vendee in the property in dispute. The defendants agree to return the purchase-money, Rs. 500 with Rs. 100 the costs of the suit, to the plaintiff-vendee, total Rs. 600, within two years, for which payment this share as well as the person of the defendant shall be liable, and until this amount is paid, the property in dispute cannot be alienated. Let the case be decided in accordance with this compromise, that is to say, a decree for cash be passed for the plaintiff to the extent of Rs. 600 and interest." The decree was passed in the following terms:—"The claim of the plaintiff is decreed for Rs. 600 against the defendants and the hypothecated property with interest at Re. 1 per cent. per mensem, payable in two years in accordance with the compromise."

That the compromise created a charge on the property which was claimed in the suit cannot admit of any doubt. Did the decree only declare the charge or did it enforce the charge by ordering a sale? I am of opinion that it was a decree for sale. It was not drawn up, it is true, in strict accordance with the provisions of section 88 of the Transfer of Property Act, but before that Act was passed, and for many years after its enactment, decrees for sale were passed in terms similar to those of the decree in question. It was a decree for Rs. 600 "against the defendant and the hypothecated property," that is to say, for the recovery of Rs. 600 from the defendant and from the property. As the amount of the decree could be recovered from the property by the sale of it only, the decree was one for sale. It is clear from the terms of the compromise that what the parties contemplated was that there should be a charge on the property sold for the amount of the sale consideration and costs, and that if those amounts were not paid within the time fixed, the property would be sold in execution of the decree, and the said amounts should thus be realised. It was certainly not intended that if payment was not made within the stipulated period, a second suit would have to be brought to enforce the charge. The parties to the suit were settling their disputes once for all and they entered into a compromise for the purpose of putting an end to further litigation. That purpose could not be attained by a compromise which would render it necessary for the holder of the decree to bring another suit to enforce the charge. In my opinion the intention of the parties was that the amount agreed to be paid should be realized by sale of the property in execution of the decree, and that the decree gave effect to this intention. That this was contemplated by the parties is further manifest from the fact that when execution of the decree was sought, the judgment-debtors raised objections on the ground that an order absolute for sale had not been obtained after decree, and that the decree, as it stood, was a preliminary decree for sale. This objection was overruled by the Court, and throughout the proceedings

the property was treated as hypothecated property, was sold as such and was described in the certificate of sale as hypothecated property. The compromise created a lien, and the decree ordered that lien to be enforced. I am of opinion that the decree was not one for money only, nor was it a decree which merely declared a charge, but that it directed sale of the property the subject of the charge. The words "a decree for cash" in the compromise meant, as it seems to me, a decree for recovery of money as distinguished from a decree for recovery of the property—and did not mean a money-decree as distinguished from a decree for sale. In *Fazil Havildar* v. *Krishna Bandhu Rai* (2), the decree ran as follows: "It is ordered .....that the sum of Rs. 323 claimed..... plaintiff *do get from the* hypothecated property." It was held that the decree was not a money-decree but a mortgage-decree. Similarly, in *Lal Behari Singh* v. *Habibur Rahman* (1), the decree was to the effect that the "property be made liable for realization of the decretal amount." It was held that the decree was a mortgage decree governed by the Transfer of Property Act, though not made in the form prescribed by the Act. These cases support the view contended for by the appellants. The case of *Gobinda Chandra Pal* v. *Dwarka Nath Pal* (3), relied on by the lower Appellate Court is distinguishable. In that case the decree only declared a charge and did not order realization of the decretal amount form the property, that is, by the sale of it. In *Baldeo Bharthi* v. *Hushiar Singh* (4), although the compromise created a lien the decree passed was a money-decree only and not a decree against the property, as in the present case. Whether the Court was right in making a decree against the property or was competent to make a decree for recovery of money by sale of specific property in a suit for recovery of property, is immaterial. The fact remains that a decree was passed and became final and was binding on the parties. It was after the passing of this decree that the mortgage in favour of the plaintiffs was effected. That mortgage was subject to the decree. It was open to the plaintiffs as subsequent mortgagees to discharge the decree and thus make the property available for the recovery of the money borrowed from them on the security of it. They did not do so, but allowed the property to be sold in execution of the earlier decree for the realization of a prior charge. The purchasers have, therefore, acquired priority over them and the property cannot be sold again. In my judgment the decision of the Court of first instance is correct and this appeal must prevail. I would allow the appeal, set aside the decree of the lower Appellate Court, and restore that of the Court of first instance. I, however, agree in referring the question of law which arises in the case to a third Judge under section 98 of the Code of Civil Procedure.

The appeal was laid before Mr. Justice Richards for the determination of the question whether or not the decree of the 24th of March 1888, did anything more than create a charge upon the property referred to therein.

RICHARDS, J.—The facts connected with this appeal have been so very fully dealt with by both the learned Judges of this Court before whom the appeal came, that it is unnecessary for me to refer to them in any detail. The sole question before me is whether or not, under the circumstances, the decree of the 24th March, 1888, is to be deemed a decree under the Transfer of Property Act, or whether it merely operated to create a charge on the property referred to in the decree. The decree itself was not in the form prescribed by the Transfer of Property Act. It is pointed out, no donbt, that at the time that the suit was brought, neither the public nor the Courts were as familiar with the provisions of the Transfer of Property Act as they afterwards became. The fact, however, remains that the decree is not in the prescribed form and does not expressly direct the sale of the property. A decree for sale under the Transfer of Property Act always pre-supposes the existence of a mortgage. Parties entering into an agreement for a mortgage cannot contract themselves out of the provisions of the Act, and a decree for sale cannot be obtained without complying with the formalities prescribed by the Transfer of Property Act. It would seem, therefore, that if the Court which passed the decree of the 24th March 1888, intended to decree that the mortgaged property should be sold without any further suit after default of pay-

(3) 35 C. 837; 12 C. W. N. 849; 7 C. L. J. 492.
(4) A. W. N. (1895) 45.

ment within two years, the Court was passing an illegal decree. In the cases relied upon by the defendants in which the decree was held to be a decree of the same property, there were mortgages and suits were mortgage-suits in which the appropriate relief was a decree for sale. It seems to me that in such a case it is the duty of the Court construing the decree to struggle to see whether an interpretation cannot be given which would make the decree operative. The considerations are very different where to construe the decree as a decree for sale we would be attributing to the Court the making of a decree which was certainly inappropriate if not illegal. In my opinion the decree can only be held to operate as creating a charge on property.

The case will accordingly be referred back to the Honourable the Chief Justice, who referred the matter to me.

JUDGMENT.—The plaintiffs in their suit on the mortgage of the 17th July 1890, admitted that if any prior incumbrances existed over the property, the subject-matter of that mortgage, they would be prepared to discharge these prior mortgages. The Court below has g ven a decree to the plaintiffs without regard to any subsisting charges. That Court ought to have ascertained whether there were any, and if so, what prior mortgages or charges. Before, therefore, we can satisfactorily dispose of this appeal, we must refer the following issue to the lower Appellate Court under Order XLI, rule 25, namely:—

What, if any, charges or incumbrances existed over the property comprised in the mortgage of the 17th of July 1890, having priority to the plaintiffs' mortgage; and what amounts, if any, are due in respect of any such prior mortgages or charges, and to whom are these amounts payable.

We refer this issue under the order aforesaid and direct the lower Appellate Court to take such relevant evidence as the parties may adduce and return its finding with its reasons to this Court as soon as convenient. The parties will have the usual ten days for filing objections.

Issue referred.

CALCUTTA HIGH COURT.

CIVIL RULE NO. 4201 OF 1910.

March 27, 1911.

Present:—Mr. Justice Mookerjee and Mr Justice Caspersz.

SUKMOY SARKAR—DEFENDANT—PETITIONER

versus

SHASHI BHUSHAN BHATTACHARYYA

PLAINTIFF—OPPOSITE PARTY.

Limitation Act (XV 1877), Sch. II, art. 99—Failure of consideration—Special facts of individual case—Lease granted on payment of premium—Dispossession of lessee—Suit for recovery of premium—When time begins to run.

Whether a suit is barred under Article 97 of the Limitation Act, 1877, or not, must depend upon the special facts of each individual case, because it is only with reference to such circumstances that the Court can determine the date of the failure of consideration.

Where a lessee was evicted by a person successfully claiming a superior title, and the lessee sued his lessor for the amount of premium paid for the lease:

Held, that time ran against the plaintiff from the date when he was actually evicted from the land, and not from the date when the successful claimant obtained a decree against him for possession

Bassu Kuar v. *Dhum Singh*, 11 A. 47; *Hanuman Kamat* v. *Hanuman Mandur*, 19 C. 123; 18 I. A. 158 and *Amma Bibi* v. *Udit Narain Misir*, 31 A. 68; 11 Bom. L. R. 525; 9 M. L. J. 295; 6 M. L. T. 89; 1 Ind. Cas. 890; 9 C. L. J. 512, distinguished.

Ram Chandra Singh v. *Tohfah Bharti*; 26 A. 519; *Kul Kunwar* v. *Chatar Singh*, 5 A. L. J. 480; A. W. N. (1908) 185; 30 A. 402; and *Ram Jaggi Rai* v. *Kauleshar Rai*, 5 A. L. J. 484; A. W. N. (1908) 185 *Note*; 30 A. 405, relied upon.

Rule against the decree of the Small Cause Court Judge of Jangipur; dated June 22, 1910.

Babus *Ram Chandra Majumdar* and *Upendra Narain Bagchi*, for the Petitioner.

Babu *Monindra Lal Banerjee*, for the Opposite Party.

JUDGMENT.—The sole question for consideration in this rule is, whether the suit is barred by limitation. The plaintiff took settlement of certain lands from the defendant, and his allegation is, that when the lease was granted, there was an agreement between the parties that if the lessee should be evicted by reason of any flaw in the title of the lessor, the latter would refund Rs. 100 paid as premium for the transaction. The case for the plaintiff is, that after he had been in possession for a certain length of time, he and his lessor were sued by the *patnidar* from the latter who claimed to recover possession of the property as included within the *patni* previously granted to him. This suit was

successful and the result was that on the 16th August 1906, the plaintiff was dispossessed in execution of the decree obtained by the *patnidar*. The plaintiff commenced the present action on the 1 th July 1909 for recovery of the premium. It was contended on behalf of the defendant that the suit was barred by limitation, because it had not been commenced within three years from the date of the decree in the suit brought by the *patnidar*. The learned Small Cause Court Judge has held that time ran as against the plaintiff from the date when he was evicted from the land. In our opinion, there is no room for controversy that the decision of the Court below is correct.

On behalf of the defendant-petitioner reliance has been placed upon the decision in the cases of *Bassu Kuar* v. *Dhum Singh* (1); *Hanuman Kamut* v. *Hanuman Mandur* (2) and *Amma Bibi* v. *Udit Narain Misra* (3) which are, however, all clearly distinguishable. In the first and third of the cases mentioned, a suit had been brought for specific performance of the contract of transfer. That suit failed and it was ruled by their Lordships of the Judicial Committee that the cause of action of the plaintiff who had been defeated, arose when the adverse decision was given against him in the suit for specific performance of the contract. In our opinion, whether a suit is barred under Article 97 or not, must depend upon the special facts of each individual case, because, it is only with reference to such circumstances that the Court can determine the date of the failure of consideration. In the case before us, under the contract of tenancy between the plaintiff and the defendant, the lessor was bound to secure the lessee quiet possession of the land, so that there was no complete failure of consideration till the lessee had been evicted by a person successfully claiming a superior title. The view we take is supported by the decision of the learned Judges of the Allahabad High Court in the case of *Ram Chandra Singh* v. *Tohfah Bharti* (4) and is in accord with that taken in *Mul Kunwar* v. *Chater Singh* (5) and *Ram Jaggi Rai* v. *Kauleshar Rai* (6); where the failure of consideration was held to have occurred when the transferee was dispossessed, although in these latter cases the learned Judges applied Article 116 of the second Schedule of the Limitation Act inasmuch as the covenant was embodied in a registered instrument. We may add that there is no question that if Article 83, or Article 115 is deemed applicable to the case before us, the suit is in time.

The result is that the rule is discharged with costs. We assess the hearing-fee at two gold *mohurs*.

Rule discharged.

(1) 11 A. 47.

(2) 19 C. 123; 18 I. A. 158.

(3) 31 A. 68; 11 Bom. L. R. 525; 19 M. L. J. 295; 6 M. L. T. 89; 1 Ind. Cas. 890; 9 C. L. J. 512.

(4) 26 A. 519.

(5) 5 A. L. J. 480; A. W. N. (1908) 185; 30 A. 402.

(6) 5 A. L. J. 484; A. W. N. (1908) 185 *note*; 30 A. 405.

PUNJAB CHIEF COURT.

FULL BENCH.

ORIGINAL MATRIMONIAL JURISDICTION

CASE NO. 2 OF 1911.

May 22, 1911.

Present:—Sir Arthur Reid, KT., Chief Judge, Mr. Justice Kensington and Mr. Justice Rattigan.

HENRIETTA ALEXANDRA GALE—PETITIONER

versus

JAMES FRANK HONDURAS GALE—RESPONDENT.

Divorce Act (IV of 1860), s. 3 (1)—Jurisdiction—Suit for dissolution of marriage—Parties residing within jurisdiction but separately—"Reside or last resided together"—Punctuation, inference from—English law.

The Chief Court has jurisdiction to entertain a petition for divorce where the parties at the date of filing the petition reside within the jurisdiction of the Court, though they reside separately.

Durand v. *Durand*, 14 W. R. 416, *Wingrove* v. *Wingrove*, 14 W. R. 416, followed.

Per *Reid, C. J., and Kensington, J.*—

The word "together" in section 3 (1) of the Divorce Act must be read with "last resided" only. Had the intention of the Legislature been to make "together" apply to "reside" also, there would have been a comma after "reside" and after "resided".

Per *Rattigan, J.*—

Legal documents in strictness should not be punctuated and this rule applies equally to Acts of the Legislature.

Jurisdiction to grant dissolution of marriage ordinarily depends upon the domicil of the parties, but the Legislature of this country has made it depend on residence alone. It is doubtful whether the intention of the Legislature was not to require something in the nature of a "matrimonial house" as a substitute for domicil.

In England, Courts previously assumed jurisdiction to dissolve a marriage if the "matrimonial home" of the parties was in England. As the law now stands

the English Courts have no jurisdiction in such cases, even though the matrimonial home is in England, unless the parties are domiciled in England.

Le Mesurier v. *Le Mesurier*, (1895) A. C. 517; 64 L. J. P. C. 97; 11 R. 527; 72 L. T. 873, *Niboyet* v *Niboyet*, 4 P. D. C. A. 1; 48 L. J. P. 1; 39 L. T. 486; 27 W. R. 203, referred to.

Petition of Henrietta Alexandra Gale aforesaid for dissolution of her marriage with her husband, the respondent aforesaid, under section 10 Act IV of 1869.

Mr. *Petman*, for the Petitioner.

JUDGMENT.

REID, C. J., AND KENSINGTON, J.—The question for consideration is, whether this Court has jurisdiction to entertain a petition for divorce filed by a petitioner who last resided with her husband within the jurisdiction of the Bombay Court, and at the date of filing the petition resided within the jurisdiction of this Court. The respondent also residing at that date within the jurisdiction of this Court though living apart from the petitioner. The decision turns on the interpretation of the last paragraph of section 3 (1) of the Divorce Act, "within the local limits of whose ordinary appellate jurisdiction or of whose jurisdiction under this Act, the husband and wife reside or last resided together" *Durand* v. *Durand* (1) is directly in point. The parties therein last resided together at Madras and at the date of presentation of his petition by the petitioner the husband in the Court of the Recorder of Rangoon, he was living at one place in Burma and the respondent was living at another place in Burma. The Court held that the Recorder of Rangoon had jurisdiction. *Wingrove* v. *Wingrove* (2) is to same effect, though the facts are not so clearly stated. The punctuation of the words above cited "the husband and wife reside or last resided together" indicates clearly that "together" must be read with "last resided" only. Had the intention of the Legislature been to make "together" apply to "reside" we should have expected a comma after "reside" and after "resided." The fact that the parties resided at the date of the presentation of the petition within the jurisdiction of this Court, though not together, gives this Court jurisdiction.

Our answer to the reference, therefore, is in the affirmative.

RATTIGAN, J.—In view of the decision in *Durand* v. *Durand* (1) and of the fact that the learned Chief Judge and my brother Kensington have no doubts upon the question referred to the Full Bench, I am not prepared to differ. At the same time, I am not, I confess, fully satisfied that the word "together" was not intended to qualify the word "reside". Legal documents in strictness should not be punctuated, and I take it that the rule applies equally to Acts of the Legislature, and it may have been for this reason that the comma was omitted after "reside" and also after "resided." Jurisdiction to grant dissolution of marriage ordinarily depends upon the domicil of the parties but the Legislature of this country has, for reasons of policy, made it depend upon residence alone. But I am not fully assured that the intention of the Legislature was not to require something in the nature of a "matrimonial home" as a substitute for domicil. Prior to the decision of the Privy Council in the leading case of *Le Mesurier* v. *Le Mesurier* (3), it was understood that the Court in England would have jurisdiction to dissolve a marriage if the "matrimonial home of the parties" was in England, *Niboyet* v. *Niboyet* (4), but apparently nothing short of that sufficed to give jurisdiction to that Court, and I doubt if it would have entertained any suit for dissolution of marriage upon the bare ground that at the time of suit the husband and wife happened to be residing within the jurisdiction, though not in one home; as the law now stands, the English Courts have no jurisdiction in such cases even though the matrimonial home is in England, unless the parties are domiciled in England. It is somewhat anomalous, therefore, to hold that, while the jurisdiction of the English Court has been very considerably curtailed by the decision of their Lordships of the Privy Council, the Courts of this country are given jurisdiction to dissolve the marriage not only of parties who at sometime or other have had their matrimonial home within the local limits of the jurisdiction of these Courts, but also of persons who may never have had such a home within these limits but who happen for the time being to reside (probably for merely temporary purposes) in separate places within such limits.

(1) 14 W. R. 416.
(2) 14 W. R. 416.
(3) (1895) A. C. 517; 64 L. J. P. C. 97; 11 R. 527; 72 L. T. 873.
(4) 4 P. D. C. A. 1; 48 L. J. P. 1; 39 L. T. 486; 27 W. R. 302.

Upon the weight of authority, however, and in deference to the view of my colleagues, I agree that the answer to the reference should be in the affirmative.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1644 OF 1908.

December 12, 1910.

Present:—Mr. Justice Mookerjee and Mr. Justice Coxe.

AKRAM ALI—DEFENDANT—APPELLANT

versus

DURGA PROSONNA ROY CHOWDHRY

PLAINTIFF—RESPONDENT.

Lease, permanent, creation of, before Transfer of Property Act—Whether pattah *necessary—Whether acceptance of* kabulyat *sufficient—Proof of acceptance of* kabulyat, *whether to be direct*—Dakhila, *how to be proved—Acceptance by* tahsildar *of rent paid by tenant —Covenant against alienation—Permanent lease—No right of re-entry reserved—Effect of covenant—Transfer of Property Act (IV of* 1882*) s.* 10.

For the creation of a permanent lease before the Transfer of Property Act, it was not necessary that the landlord should grant a *pattah*. It was sufficient to create a valid tenancy if the tenant executed a *kabulyat* which was accepted by the landlord.

It is not necessary, however, to prove, by direct evidence, that the *kabulyat* was accepted. The Court may find from the conduct of the parties and from the circumstances of the case that the *kabulyat* was accepted and acted upon by the landlord.

If a tenant produces *dakhilas* and swears that he received them from the land-owner or his agent or gives other *prima facie* evidence of their genuineness, they may be taken for the purpose of proving that the rent has been paid or that the rent has been paid at a fixed rent for a certain number of years, if the landlord or his agent does not come forward to deny them.

Kirteebash v. *Ramdhun*, 7 W. R. 526 and *Surja Kanta Acharjee* v. *Baneswar Shaha*, 24 C. 251, relied upon.

It is obvious from the rule embodied in section 10 of the Transfer of Property Act, which in substance reproduces the pre-existing law on this point, that a covenant against alienation in a permanent lease, when no right of re-entry is reserved, is not operative.

Appeal from the decree of the Sub-Judge of Barisal, dated April 9th, 1910, modifying that of the Munsif of Barisal, dated March 28th 1907.

Babus *Jogesh Chandra Roy* and *Prokash Chandra Mojumdar*, for the Appellant.

Babus *Tara Kishore Chowdhury* and *Chandra Kant Ghosh*, for the Respondent.

JUDGMENT.—This is an appeal on behalf of the defendant against a decree in favour of the plaintiff-respondent in an action in ejectment. The plaintiff sought to recover possession of the disputed land upon a four-fold title, namely, a *nimhowla*, an *osat nimhowla*, a *mirash karsha*, an adverse possession for the statutory period. The foundation of the claim, however, as put forward in the Courts below, was placed substantially upon his title as *nimhowladar*. It is not disputed that the *nimhowla* interest, if it was ever created, must be based on two *kabulyats* alleged to have been executed by the predecessor-in-interest of the plaintiff on the 7th May 1874, and 13th June 1874 in favour of the landlords interested in 11-annas and 5-annas share respectively in the *zemindary*. The defence substantially was that the plaintiff had acquired no valid title, *first*, because these *kabulyats* were never accepted by the landlord; and, *secondly*, because even if they were accepted by the landlords, the interest of the *nimhowladar* was non-transferable under the terms of the contracts.

The Court of first instance dismissed the suit. Upon appeal the learned Subordinate Judge has made a decree in favour of the plaintiff, except as regards 12 *cottahs* of the disputed land which he has found is not included within the *kabulyats* which form the foundation of the title of the plaintiff.

The defendants have now appealed to the Court and on their behalf the decree of the Subordinate Judge has been assailed on two grounds, namely, *first*, that there was no valid *nimhowla* created by these *kabulyats*, as no lease was granted by the landlords in favour of the tenants, and *secondly*, that as the interest of the *nimhowladar* was not transferable under the *kabulyats*, the plaintiff as purchaser has acquired no valid title to the land in dispute. In our opinion there is no foundation for either of these contentions.

In so far as the first argument is concerned, reliance has been placed by the learned Vakil for the appellants upon the case of *Nil Mamud Sarkar* v. *Bowl Das* (1). It may be observed, however, that the *kabulyats* in the case before us were executed before the Transfer of Property Act, and it is impossible to maintain the view that for the execution of a permanent lease before the Transfer of Property Act, it was necessary that the landlord should grant a *pattah*. It was sufficient to create a valid tenancy if the tenant executed a *kabulyat*

(1) 14 C. W. N. 73; 2 Ind. Cas. 994; 10 C. L. J. 555

which was accepted by the landlords. We need not, therefore, decide whether, under the Transfer of Property Act, the law is different but we observe that a Full Bench of the Madras High Court [*Ajam Sahib* v. *Madura* (2),] has assigned weighty reasons in support of the view contrary to that maintained in *Nil Mamud* v. *Bowl Das* (1).

The question next arises whether, in the case before us, the *kabulyats* were accepted by the landlords; upon this point, we have the finding of the Subordinate Judge that the *kabulyats* were accepted and acted upon. The learned Vakil for the appellant has sought to assail this finding on the ground that the reasons given by the Subordinate Judge in support of his conclusion are erroneous in law. He has invited our attention to a passage in the judgment in which the Subordinate Judge observes that there is no direct evidence to show that the original *kabulyats* were accepted by the landlords. It is not necessary, however, to prove by direct evidence that the *kabulyats* were accepted. It was open to the Subordinate Judge to find from the conduct of the parties and from the circumstances of the case that the *kabulyats* were accepted and acted upon by the landlords. The Subordidate Judge has pointed out that immediately after the execution of these *kabulyats* rent receipts were granted to the tenants by the *Tahsildar*. A question has been raised before us as to whether these receipts have been sufficiently proved, and it has been contended that as the signatures of the *Tahsildars* upon the receipts have not been proved by direct evidence, the receipt ought not to have been received in evidence. In our opinion, this position is wholly unsustainable. It was ruled by this Court in the case of *Kirteebash* v. *Ramdhun* (3), that if a tenant produces *dakhilas* and swears that he received them from the land owner or his agent or gives other *prima facie* evidence of their genuineness, they may be taken for the purpose of proving that the rent has been paid or that the rent has been paid at a fixed rent for a certain number of years, if the landlord or his agent does not come forward to deny them. It cannot be expected that the *ryot* should in every case summon all the agents of his landlord who gave him the receipts. This view has been subsequently followed in numerous decisions of this Court amongst which reference may be made to *Surja Kanta Acharjee* v. *Boneswar Shaha* (4). The receipts, therefore, in the case before us must be taken to have been sufficiently proved. Hence, it must be taken to have been established that for a number of years, rent was paid by the *nimhowladar* and accepted by the *Tahsildar*, on behalf of the landlords. But it has been suggested by the learned Vakil for the appellants that it is not proved by the plaintiff that the *Tahsildar* had authority to accept *nimhowla kabulyats* from the tenants. It must be remembered, however, that there is no denial on the part of the landlords; indeed, there is no suggestion even that the *Tahsildars* acted in excess of their authority. Whether the *Tahsildars* had or had not acted beyond the scope of their authority was a matter peculiarly within the knowledge of the landlords, and they have made no attempt to discharge the burden that lay upon them to prove the precise limits of the authority conferred by them on their own agents. In our opinion, the conclusion at which the Court below arrived cannot be assailed in second appeal. The first ground, therefore, must be overruled.

In so far as the second ground is concerned it has been contended that as there was a covenant in the *kabulyats* against alienation, the plaintiff as transferee has acquired no enforceable title against the landlord. It must be pointed out, however, that no right of re-entry was reserved in the leases. Consequently, upon the authority of the decision in *Basarat Ali* v. *Manirulla* (5), it is clear that the assignment was operative, notwithstanding the covenant in question. It is obvious from the rule embodied in section 10 of the Transfer of Property Act, which in substance reproduces the pre-existing law on this point, that a covenant against alienation in a permanent lease, when no right of re-entry is reserved, is not operative. The principle is that the covenant is inconsistent with the interest sought to be created by the instrument. Consequently, on the grounds explained in the cases of *Tagore* v. *Tagore* (6), and *Sonatun* v. *Juggusoondree* (7), the cove-

(2) 21 M. L. J. 202; 8 M. L. T. 437; 1 M. W. N. 766; 8 Ind. Cas. 668.
(3) 7 W. R. 526.
(4) 24 C. 251.
(5) 36 C. 745: 2 Ind. Cas. 416; 10 C. L. J. 49.
(6) 18 A. 359 at p. 365.
(7) 8 M. I. A. 66 at p. 76.

nant in this case must be taken to be inoperative. The learned Vakil for the appellant has finally suggested that the view taken by this Court in *Basarat Ali* v. *Manirulla* (5) is inconsistent with that previously adopted in *Dharani Kamala Laheri* v. *Siba Sundari Debi* (8). In our opinion the latter case is clearly distinguishable and the same remark applies to the case of *Keshab Lal* v. *Haralal* (9), where, as appears from the report, there was a forfeiture clause in the lease. The view taken by this Court is, it may be pointed out, in accord with that adopted by all the other Indian High Courts, as is shown by the decisions in *Madar Saheb* v. *Sannabawa Gujranshah* (10): *Parameshri* v. *Vitlappa Shanbaga* (11) and *Netrapal Singh* v. *Kalyan Das* (12). The inference, therefore, follows that, notwithstanding the covenant against alienation in the *nimhowla kabulyats*, the plaintiff has acquired a valid title to the property. The second ground, therefore, fails.

The result is that the decree made by the Court below is affirmed and this appeal dismissed with costs.

Appeal dismissed.

(8) 35 C. 1069; 8 C. L. J. 188.
(9) 12 C. L. J. 129; 6 Ind. Cas. 685.
(10) 21 B. 195.
(11) 26 M. 157.
(12) 28 A. 400; 3 A. L. J. 196; A. W. N. (1906) 60.

CALCUTTA HIGH COURT.
CIVIL RULE No. 4934 OF 1910.
April 10, 1911.

Present:—Mr. Justice Mookerjee and Mr Justice Caspersz.

KAMINI DEBI—PETITIONER

versus

PROMOTHO NATH MOOKERJEE AND OTHERS—OPPOSITE PARTY.

Land Acquisition Act (I of 1894), s. 32—Debuttar property, acquisition of—Investment of compensation-money—Allowance of portion of money for repairs absolutely necessary—Ordinary repairs—Land Acquisition Judge—Jurisdiction to entertain application—Separate suit not necessary—Statutes, interpretation of—Words judicially construed

When *debuttar* land has been acquired, the provisions of section 32 of the Land Acquisition Act for investment of the compensation-money may be brought into operation.

The terms of clause (*i*) of the section are comprehensive enough to justify the application of a portion of the compensation-money to effect repairs absolutely essential for the preservation of the remainder of the property.

Ordinary repairs are not payable out of capital moneys, they must be borne out of income; but the Court may authorize an expenditure in the nature of repairs for the preservation of the trust estate in cases amounting to salvage. And where there is a right of entry or a statutory power of sale, if repairs are not done, the compensation-money desposited in Court may, with its sanction, be applied for the purpose of repairs.

The Land Acquisition Judge has jurisdiction to deal with an application by a *shebait* for a grant of money for repairs. The *shebait* should not bring a suit in the Civil Court for the purpose.

Procedure to be followed by the Judge in the matter suggested.

When words in a statute have been judicially construed to have a certain meaning, and have been adopted by the Legislature in a subsequent statute *in pari materia*, they must be construed according to the sense in which they have been previously used, although that sense may vary from the strict literal meaning of them.

Rule against the order of the Land Acquisition Judge of the 24-Pergannahs, dated November 18th, 1910.

Dr. *Rash Behary Ghosh* and Babu *Satish Chandra Mukherjee*, for the Petitioner.

Babus *Mohendra Nath Roy*, *Manmotho Nath Mukherjee* and *Biraj Mohan Mojumdar*, for the Opposite Party.

JUDGMENT.—The substantial question of law, which calls for our decision in this rule, relates to the true construction of section 32 of the Land Acquisition Act of 1894, and is apparently of first impression, in so far at any rate as the Courts of this country are concerned. There is no controversy as to the circumstances under which the order of the Court below, now under consideration, was made. The petitioner before us is the present *shebait* of an idol Gopal Jiu to whom considerable properties were dedicated by her father, Ram Kamal Mukherjee, under a testamentary disposition made on the 4th February 1845. Ever since the foundation of the endowment there has been litigation relating to the properties, the most recent instance of which will be found reported in the case of *Aghore Nath Mokherjee* v. *Kamini Debi* (1). By this decision, given on the 15th December 1909, the right of the petitioner to the office of *shebait* was declared.

It appears that before the petitioner had been appointed *shebait* a portion of the *debuttar* estate had been acquired, under the Land Acquisition Act by the Government at the instance of the Commissioners of the Port of Calcutta. The sum awarded as compensa-

(1) 11 C. L. J. 461; 6 Ind. Cas. 554.

tion was invested in Government securities of the nominal value of Rs. 32,500. On the 24th September 1910, the petitioner applied to the Land Acquisition Judge for an order to pay her Rs. 24,000 out of the compensation money, to enable her to improve the *debuttar* property, and to execute necessary repairs to the buildings in one of which the idol is located. This application was opposed by representatives of the founder, who have no present interest in the endowment, but may possibly, at some future time, succeed to the office of *shebait*. The Land Acquisition Judge dismissed the application on the 18th November, without any inquiry into the merits. The learned Judge held that, as the petitioner was not absolutely entitled to the compensation-money in her capacity as *shebait*, she could not claim to draw any portion of the invested funds; and that, in any event, the money ought not to be placed at her disposal, because the Court had no machinery to exercise any effective control over the expenditure.

The petitioner obtained this rule on the 28th November 1910, for reversal of the order in question, on the ground that the learned Judge had erroneously refused to exercise the jurisdiction vested in him by law. In support of the rule it has been contended that the terms of section 32 are comprehensive enough to authorise the Land Acquisition Judge to allow the petitioner to spend a portion of the compensation-money with a view to effect necessary repairs to the *debuttar* property; this position, it has been maintained, is established by the cases of *Ex parte Rector of Grimoldby* (2), *In re Aldred's Estate* (3), and *Ex parte Rector of St. Botolph* (4). In answer to this contention, it has been argued by the learned Vakil for the opposite party, that repairs and permanent improvements do not fall within clause (*i*) or clause (*ii*) of section 32 of the Land Acquisition Act, and in support of this view reference has been made to the cases of *Drake* v. *Trefusis* (5); *In re Leigh's Estate* (6); *In re Nether Stowey Vicarage* (7); *Brunskill* v. *Caird* (8); *Ex parte Rector of Newton Heath* (9); *In re Venour's Settled Estate* (10); *Vine* v. *Relagih* (11) and *In re Lord Gerard's Settled Estate* (12). The question raised is of considerable importance, and by no means free from difficulty; the solution of it must obviously depend upon the true construction of the statutory provisions on the subject.

Section 32 of the Land Acquisition Act provides for the investment of compensation, money deposited in respect of lands belonging to persons incompetent to alienate the same. The section lays down that, when the money has been invested in Government or other approved securities, the Court shall direct the payment of the interest or other proceeds arising from such investment to the person or persons who could, for the time being, have been entitled to the possession of the said land, and such monies shall remain so deposited and invested until the same be applied (*i*) in the purchase of such other lands as aforesaid, that is, other lands to be held under the like title and conditions of ownership as the land, in respect of which the compensation money shall have been deposited, was held, or (*ii*) in payment to any person or persons becoming absolutely entitled thereto.

Two questions manifestly arise upon the construction of this section, namely, *first*, whether the land acquired belonged to a person who had no power to alienate the same, in other words, whether, when *debuttar* land has been acquired, the provisions of the section for investment of the compensation money may at all be brought into operation; and, *secondly*, if the provisions of the section are applicable, whether the *shebait* is entitled to withdraw any portion of the invested funds and apply the same to effect necessary repairs to the remainder of the *debuttar* estate.

In so far as the first of these questions is concerned, we are inclined to the view that land dedicated for religious and charitable purposes is land which may properly be described as belonging to a person who has no power to alienate the same. No doubt, in the case of land dedicated to an idol, the

(2) 2 Ch. D. 225; 24 W. R. 723.
(3) 21 Ch. D. 228; 51 L. J. Ch. 942; 46 L. T. 379; 30 W. R. 777.
(4) (1894) 3 Ch. 544; 8 R. 649; 63 L. J. Ch. 862.
(5) 10 Ch. App. 364; 33 L. T. 85; 23 W. R. 762.
(6) 6 Ch. App. 887; 40 L. J. Ch. 687; 25 L. T. 644; 19 W. R. 1105.
(7) 17 Eq. 156.
(8) 16 Eq. 493; 43 L. J. Ch. 163; 16 Eq. 493; 21 W. R. 943.
(9) 44 W. R. 645.
(10) 2 Ch. 525 at p. 526.
(11) (1891) 2 Ch. 13; 60 L. J. Ch. 675.
(12) (1893) 3 Ch. 252; 63 L. J. Ch. 23; 69 L. T. 393.

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idol may be deemed as the person to whom the land belongs; but, as was pointed out by their Lordships of the Judicial Committee in *Jagadindra Nath Roy* v. *Hemanta Kumari Devi* (13), although there is no doubt that an idol may be regarded as a juridical person capable as such of holding property, it is only in an ideal sense that property is so held, and assuming the religious dedication to have been of the strictest character, the fact remains that the possession and management of the dedicated property belong to the *shebait*. This carries with it the right to bring whatever suits are necessary for the protection of the property and every such right of suit is vested in the *shebait*, not in the idol. Without any undue violence, therefore, to the language used by the Legislature in section 32, sub-section (1), we may hold that when land dedicated to an idol or to religious and charitable purposes generally, has been acquired, it is land belonging to the *shebait* or trustee who had no power to alienate the same. We are further of opinion, that no difficulty is created by the expression "who has no power to alienate the same," because although the *shebait* may, in special cases, have the power to alienate a portion of the *debuttar* estate, he is ordinarily incompetent to deal with the corpus of the dedicated property. Consequently when such dedicated property is acquired under the Land Acquisition Act the presumption is that it belonged to a person not competent to alienate it; and, therefore, the provisions of section 32 may be brought into operation [see *Mrinalini Dasi* v. *Abinash Chander Dutt* (14), where section 32 of the Land Acquisition Act was held to apply to cases in which land in possession of a Hindu widow as heiress to her husband is acquired, though in certain contingencies, a Hindu widow may be competent to alienate absolutely a part of the estate inherited by her from her husband]. We must consequently hold that in the case before us the compensation-money was rightly invested under section 32 of the Land Acquisition Act, and this is the settled practice of the Land Acquisition Court.

In so far as the second question is concerned, the answer depends upon the effect to be attributed to clauses (*i*) and (*ii*) of section 32, sub-section (1), of the Land Acquisition Act. The learned Vakil for the petitioner has contended, that the terms of clause (*i*) are comprehensive enough to justify the application of a portion of the compensation-money to effect repairs absolutely essential for the preservation of the remainder of the property. It may be observed that the clause relied upon speaks of the application of the compensation-money in the purchase of other lands, and *prima facie*, it is not easy to see how money, applied for the purpose of repairs, however, necessary they may be, can be deemed to be money applied for the purchase of land. But the learned Vakil for the petitioner has argued that the clause in question is based on section 69 of the Lands Clauses Consolidation Act, 1845, and ought to be interpreted in the same manner as the corresponding section of the English statute. This, in our opinion, is a legitimate mode of interpretation of statutory provisions, because, as observed by Blackburn, J., in *Mersey Docks* v. *Cameron* (15), where an Act of Parliament has received a judicial construction putting a certain meaning on its words, and the Legislature in a subsequent Act *in pari materia* uses the same words, there is a presumption that the Legislature used those words intending to express the meaning which it knew had been put upon the same words before, and unless there is something to rebut that presumption, the Act should be so construed, even if the words were such, that they might originally have been construed otherwise. In other words, as James, L. J. put it in *Exparte Campbell* (16), where once certain words in an Act of Parliament have received a judicial construction in one of the superior Courts and the Legislature have repeated them without any alteration in a subsequent Statute *in pari materia* the Legislature must be taken to have used them according to the meaning which a Court of competent jurisdiction has given them. To the same effect is the observation of Sir John Jarvis, C. J., in *Rackmabaye* v. *Lullubhoy* (17), that when words in a Statute have been judicially construed to have a certain meaning, and have been adopted

(13) 31 I. A. 203; 32 C. 129; 7 Bom. L. R. 765.
(14) 11 C. L. J. 533; 14 C. W. N. 1024; 6 Ind. Cas. 508.
(15) 11 H. L. C. 443 at p. 480; 20 C. B. (N. S.) 56; 35 L. J. M. C. 1; 11 Jur. (N. S.) 746; 12 L. T. 643; 13 W. R. 1069.
(16) 5 Ch. App. 703.
(17) 5 M. I. A. 234 at p. 250.

by the Legislature in subsequent Statutes *in pari materia*, they must be construed according to the sense in which they have been previously used, although that sense may vary from the strict literal meaning of them. Now, in the case before us, section 69 of the Lands Clauses Consolidation Act, 1845, upon which section 32 of the Land Acquisition Act is modelled, provides—we need only quote so much of the section as is relevant to our present purpose – as follows:—"If the compensation which shall be payable in respect of any lands or any interest therein taken by the promoters of the undertaking from any person having a partial or qualified interest only in such lands and not entitled to sell or convey the same, the same shall be paid into the Bank in the name and with the privity of the Accountant-General of the Court of Chancery; and such monies shall remain so deposited, until the same be applied to some one or more of the following purposes, that is to say, (1) in the purchase or redemption of the land tax or the discharge of any debt or encumbrance affecting the land or (2) in the purchase of other lands to be conveyed, limited or settled upon the like uses and purposes, and in the same manner as the lands in respect of which such money shall have been paid stood settled; or (3) if such money shall be paid in respect of any buildings in removing or re-placing such buildings or substituting others in their stead; or (4) in payment to any party becoming absolutely entitled to such money."

It will be observed, that the second clause in this provision corresponds with the first clause in section 32 of the Land Acquisition Act. Now, with reference to this clause, it has been held in numerous decisions in England that the Court may sanction the application of the compensation-money to effect repairs and improvement upon the remainder of the trust property. But the learned Vakil for the opposite party has contended, that the decisions in England are by no means uniform and that no rule can be deduced from them to be applied in the construction of our Statute. It may be conceded that there has been some divergence of judicial opinion upon this point in England, and that the cases are by no means easy to reconcile. But upon an examination of the authorities, to which we shall presently refer, the following rules will be found to be deducible: —

(1) Ordinary repairs are not payable out of capital monies; they must be borne out of income; but the Court may authorise an expenditure in the nature of reparis, for the preservation of trust estate, in cases amounting to salvage. The cases of *In re Leigh's Estate* (6); *Clarke* v. *Thornton* (18); *Ex parte Barrett* (19); *In re Venour's Settled Estates* (10) *Drake* v. *Trefusis* (5); *In re Vicar of Queen's Camel* (20) and *In re Belfast Water Commissioners* (21) afford illustrations of the first branch of this rule; see also *In re Montagu* (22) and *In re Parlington* (23). As an illustration of the second branch of the rule, reference may be made to *In re Aldred's Estate* (3) where the proposed expenditure which was sanctioned was found necessary to the preservation of the trust estate [see also *Ex parte Rector of Grimoldby* (2)].

(2) Where there is a right of re-entry or a statutory power of sale, if repairs are not done, the compensation-money deposited in Court may with its sanction be applied for the purpose of repairs. As illustrations, reference may be made to *In re Davie's Estate* (24) and *In re Barney* (25), where, if repairs had not been effected, action would have been taken by the authorities under the Metropolitan Building Act and the Public Health Acts, respectively. In the former of these cases which appears to be one of the earliest in which a question arose as to the true interpretation of section 69 of the Lands Clauses Consolidation Act, 1845, Knight Bruce, L. J., and Turner, L. J. held that whether the case was or was not within the words of the Act of Parliament, it was plainly within its equity and spirit, and reference was made to an earlier case decided in the same manner by Lord Eldon.

(3) The purchase-money of glebe lands or ecclesiastical lands, may be applied in improvement and in the purchase of other lands. Illustrations of this rule may be found in *Ex parte Rector St. Botolph* (4) and *Brunskill* v. *Caird* (8) while *In re Nether Stowey Vicaage* (7) and *Ex parte Hartington* (26) are cases on the other side of line.

(18) 35 Ch. D. 307; 56 L. J. Ch. 302; 56 L. T. 194; 35 W. R. 603.

(19) 19 L. J. Ch 415; 15 Jur. 3.

(20 (1863) 11 W. R. (Eng.) 503.

(21) (1870) 5 Eq. 63. (22) (1897) 2 Ch. 8.

(23) (1902) 1 Ch. 711; 71 L. J. Ch. 472; 86 L. T. 194; 50 W. R. 388.

(24) 3 Degg & J. 144; 27 L. J. Ch. 712; 4 Jur. (N. S) 1029; 6 W. R. 844

(25 (1894) 3 Ch. 562; 63 L. J. Ch. 673; 8 R. 459; 71 L. T 185; 43 W. R. 105.

(26) (1875) L. T. 248; 23 W. R. 484.

(4) The Court may order money in deposit representing the compensation for a churchyard to be applied towards the repair of the chancel or the chapel, and even to pay the Parliamentary costs of the Rector. An illustration of this rule will be found in *Ex parte Pennington* (27).

(5) Where re-building is necessitated by the dilapidated state of the buildings the money in Court will not be applied to such re-building when the costs have already been met by the Rector [*Williams* v. *Aylesbury Ry. & Co* (28); *Ex parte Rector of Newton Heath* (9) and *In re Stock's Estate* (29). On the other hand, *Mathews* v. *Wilson* (30) is apparently an authority for the contrary view. The case of *Vine* v. *Raleigh* (11) merely exemplifies the distinction between a trust to purchase land and a trust to effect repairs, while the cases of *In re Gerard's Settled Estate* (12) and *In re Thomas* (31) which turned upon the construction of the Settled Lands Act, 1890, have no direct application to the case before us.

The first and fourth of these rules show that the Court has repeatedly allowed part of the deposit money to be applied for repairs of the trust estate, specially when, but for such repairs, statutory action might be taken against the trustee. That this position may be supported in this country on grounds of justice, equity and good conscience is manifest. It is for the benefit of the community that the land is taken for public purposes. The principle on which this power is exercised was thus stated by Grotius in 1625 (De Jure Billi et. Pacis, Lib IIIC. 20 section 7, Eng. Tr. 1728: p. 697; Whewell, p. 417). "The property of subjects is under the eminent domain of the State, so that the State or he who acts for it may use and even alienate and destroy such property, not only in the case of extreme necessity, in which even private persons have a right over the property of others, but for ends of public utility, to which ends those who founded civil society must be supposed to have intended that private ends should give way. But it is to be added that when this is done the State is bound to make good the loss to those who lose their property." Hence, as such power is exercised for the benefit of the public, interference with private rights need not exceed the limits essential for that purpose and that purpose alone. Consequently, the Legislature has provided that when land belonging to a person with a qualified power of alienation has been acquired under the Statute, the money should be held in deposit so that the ultimate beneficiaries may not be prejudiced. Money can be shuffled out of sight as land cannot be; so long, therefore, as the property continues in the shape of land, the beneficiaries are amply protected against unauthorized alienation by the trustee; but if, when the land has been converted into money the funds are placed at the absolute disposal of the trustee, the beneficiaries may be left without adequate remedy, if the fund is improperly applied by the trustee. Consequently, as pointed out by this Court in the case of *Marinalini* v. *Abinash Chunder Dutt* (14), even when land has been converted into money by reason of proceedings under the Land Acquisition Act, the money ought to be regarded as still impressed with the character of real estate [*Kelland* v. *Fulford* (32), *Ex parte Walker* (33); *In re Harrop's Estate* (34) *Midland Counties Ry. Co.* v. *Oswin* (35) and *In re East Lincolnshire Ry. Coy.* (36); as to the last of those cases see *In re Tugwell* (37).] In other words, the position of the parties is by legal fiction deemed to be the same as if the land had never been converted into money; their rights and obligations are not effected by the transformation. But, if this doctrine is maintained for the protection of the beneficiaries, it ought not also to be applied to fetter the trustee needlessly.

This rule is recognised in other systems of jurisprudence as well-founded on broad principles of justice, equity and good conscience. Thus, in the case of *In re Board of Street Opening* (38) the Supreme Court of New York held that where an award has been made for land of a lunatic taken for public purposes, the compensation money is to be treated as real estate for all purposes, so that

(27) 84 L. T. 808; 17 T. L. R. 614.
(28) 9 Ch. App. 684; 43 L. J. Ch. 825; 31 L. T. 521.
(29) 42 L. T. 46.
(30) (1883) W. N. 111.
(31) (1900) 1 Ch. 319; 69 L. J. Ch. 198; 48 W. R. 409.
(32) 6 Ch. D. 491; 47 L. J. Ch. 94; 25 W. R. 606.
(33) (1853) 1 Drewry 503.
(34) (1857) 3 Drewry 726.
(35) (1844) 1 Coll C. C. 74; 13 L. J. Ch. 209; 3 Railw. 497; 8 Jur. 138.
(36) 1 Simons N. S. 260.
(37) 27 Ch. D. 309; 53 L. J. Ch. 1096; 51 L. T. 83; 33 W. R. 132.
(38) (1895) 35 N. Y. Sup. 499; 89 Hun. 525.

the Committee would not be entitled to absolute possession; it would be retained in Court to be applied in the same manner and for the same purposes as the real estate might have been applied if it had never been converted into money [see also *Ex parte Van Vorst* (39); *Brown* v. *Rome Ry. Co.* (40); *Peavey* v. *Wolfborough* (41)] The same question was raised in the case of *Kearney* v. *Kean* (42) where the land acquired belonged to a person who had not an absolute power of disposition over it. The Supreme Court held that the fund must still be considered as land, and must be retained in Court to be such within the same manner as the land could have been treated if there had been no conversion.

In the case before us, there is no room for controversy that if the land had never been converted into money it would have been competent to the *shebait* to alienate a portion of it for repairs essential for the preservation of the *debuttar* estate [see *Devasikamani* v. *Palaniappa* (43)]. It would, therefore, not be right to place such a construction upon the provisions of the Land Acquisition Act as would paralyse the management of the endowment. The cardinal principle is that the endowment is not to be prejudiced by reason of the transformation of the land into money; but such prejudice may result not only if the fund placed absolutely at the disposal of the *shebait* is misapplied by him, but also if the fund, treated as unalterably invested, is placed permanently beyond the reach of the *shebait* who can, under no circumstances, avail himself of a portion of it to meet the most urgent and paramount needs of the endowment. We are of opinion, therefore, that we should follow the principles deducable from the decisions on section 69 of the Lands Clauses Consolidation Act, 1845, and interpret section 32 of the Land Acquisition Act liberally, so as to enable the Court to deal with the fund in its custody for the ultimate benefit of the endowment.

It may be added that the second clause of section 32 may, if liberally interpreted, seem at first sight comprehensive enough to cover the case before us. The Statute provides that the money is to remain deposited and invested until it can be applied either in the purchase of other lands or in payment to any person becoming absolutely entitled thereto. The language of this provision would, however, be unduly strained if we were to hold that a *shebait* becomes absolutely entitled to such portion of the fund as may be needed for the protection of the *debutter* estate. The corresponding expression "absolutely entitled to such money" in section 69 of the Lands Clauses Consolidation Act, 1845, has been interpreted to mean "entitled to his or her own use" [*Kelland* v. *Fulfold* (32).] A trustee can, therefore, be hardly regarded as a person absolutely entitled and the decision in *In re Habson's Trust* (44), which supports the view that trustees may be treated as persons absolutely entitled, was doubted in *In re Smith* (45). It is worthy of note, however, that in *Ex parte Trustee of Tid* (46) the Court allowed the purchase-money of charity property acquired by a Railway Company to be paid to the trustees of the charity [see also *In re Lathropp's Charity* (47) and *Mayor of Sheffield* v. *Trustees of St. Williams School* (48)]. On the other hand, the Court ordered the fund to be invested and the dividend to be paid out to the treasurer of the charity in *Ex parte Governors of Norfolk Clergy* (49) while *In re Faversham Charities* (50) it was ruled that the proceeds of the sale of charity lands could not be paid out of Court to the trustees of the charity without the consent of the charity Commissioners. [see also *In re Spurstowes' Charity* (51). *In re Hobson's Trust* (44) *Ex parte St. Alphege* (52) and *In re Clergy Orphan Corporation* (53).] On the whole, we are inclined to the view that a *shebait* cannot rightly be described as a person absolutely entitled to the fund even when it is established that part of the fund is needed to be applied for the protection of the *debutter* estate. The *shebait*, even if the fund is placed at his disposal,

(36) 2 N. J. Eq. 292.
(40) 86 Ala. 206; 5 South 195.
(41) 37 N. H. 286.
(42) 3 Canada Sup. Ct. R 332.
(43) 20 M. L. J. 967; 9 Ind. Cas. 281.
(44) 7 Ch. D. 708; 47 L. J. Ch. 310; 38 L. T. 365; 26 W. R. 470.
(45) 40 Ch. D. 386.
(46) 17 W. R. (Eng.) 758.
(47) 1 Eq. 467; 35 Beav. 297; 13 L. T. 784; 14 W. R. 326.
(48) (1903) 1 Ch. 208; 72 L. J. Ch. 71; 51 W. R. 380, 88 L. T. 157.
(49) (1882) W. N. 53.
(50) 5 L. T. 787; 10 W. R. 291.
(51) 18 Eq. 279; 43 L. J. Ch. 512; 30 L. T. 355; 22 R. W. R. 566.
(52) 55 L. T. 314.
(53) (1894) 3 Ch. 145; 64 L. J. Ch. 66.; 7 R. 549; 17 L. T. 450; 43 W. R. 150.

can apply it only for the purpose of the endowment, and cannot, therefore, be properly described as a person absolutely entitled thereto. We, therefore, prefer to rest our decision on the ground that the case falls within the first clause of section 32 of the Land Acquisition Act, interpreted in the light of the decisions on section 69 of the Lands Clauses Consolidation Act, 1845, from which the provisions of the Indian Statute have been borrowed.

The learned Vakil for the opposite party has, however, contended that in any view of the matter, the Land Acquisition Judge has no jurisdiction to deal with an application of this kind, and he has suggested that the proper course for the *shebait* to adopt is to bring a suit in the Civil Court. There is, in our opinion, no substance in this contention. In the *first* place, if the literal construction suggested on behalf of the opposite party is adopted, and if it is ruled that the compensation-money must remain deposited and invested till it can be applied in the purchase of other lands, in the strict sense of the expression, a suit for declaration that in the events which have happened a part of the fund can be applied for the protection of the endowment would be futile, for no Court would be competent to make a decree in contravention of the provisions of the statute as interpreted by the opposite party. In the *second* place, it is difficult to appreciate, against whom such suit could be brought. It has been suggested that the person next entitled to succeed to the office of *shebait* may be joined as defendant; but it is conceivable that such person might not be in existence at the time when the contingency happened. Moreover, if such person gave his consent to the application of the fund, the position would not be improved. The concurrence of two persons, each of whom, when in office, has a qualified right of alienation, cannot strengthen the position of either of them.

But the learned Vakil for the opposite party has further contended, that as section 32 does not expressly define the mode in which an application of the character now before us should be made and entertained the Court has no jurisdiction to take cognizance of the matter. We are unable to give effect to this contention as well founded. It is possible that the precise contingency which has happened in this case was not contemplated by the framers of the statute. But upon first principles, the position may be justified that, as under section 32, the fund is placed in the custody of the Court, jurisdiction is by implication conferred upon the Court to deal with all questions that may arise as to the application of the fund in its custody. The true maxim of our law is, as Lord Abinger said in *Russell* v. *Smyth* (54), to amplify its remedies and without usurping jurisdiction to apply its rules to the advancement of substantial justice. Again, as was pointed out by Domat in a well known passage (Civil Law 12, 17) quoted in the judgment of this Court in the case of *Mrinalini Dasi* v. *Abinash Chunder Dutt* (14), "Since laws are general rules, they cannot regulate the time to come, so as to make express provisions against all inconveniences which are infinite in number and that their dispositions should express all the cases that may possibly happen. It is, therefore, the duty of the Judges to apply the laws not only to what appears to be regulated by their express dispositions, but to all the cases where a just application of them may be made, and which appear to be comprehended within the express sense of the law or within the consequences that may be gathered from it." The Land Acquisition Judge has obviously jurisdiction to make an inquiry when a claim to the fund is put forward by a person who asserts that he has become absolutely entitled thereto, or when it is suggested that suitable land is availabe for the purchase of which the fund may be applied. On the principles explained above we must, therefore, hold that the Land Acquisition Judge has ample authority to deal with the question under consideration and to pass such orders in the matter as the interests of justice demand. In our opinion, the conclusion is inevitable, that the application by the *shebait* to withdraw a portion of the compensation money in deposit must be entertained and investigated on the merits.

It is now necessary to give directions as to the manner in which the inquiry should be conducted, and the lines on which the final order should be given. Some guidance in this respect is afforded by the procedure adopted in the case of *In re London County Council Ex parte Pennington* (27). The Court will first take evidence as to the truth or otherwise of

(54) (1842) 9. M. & W. 810 at p. 818; 60 R. R. 904; 1 D. N. S. 929; 11 L. J. Ex. 308.

the allegations made in the petition of the *shebait*. Possibly, one expert witness on the side of the petitioner and another on the side of the objector may be sufficient for the purpose, though we do not desire to hamper the discretion of the lower Court in this matter. As the properties in question are situated at a short distance from the Court premises, it is possible that a local investigation by the learned Judge himself might facilitate the deteremination of the question of the present condition of the *debuttar* properties. If it is proved that the *debuttar* properties need repairs and improvements, such as cannot be effected out of the current income, the *shebait* should be called upon to submit an estimate of the cost by a reliable firm of contractors; the objector must be afforded an opportunity to examine, and, if necessary to challenge the estimate. After the estimate has been settled by the Court, the work will be entrusted (on a formal contract) to a firm of contractors selected or approved by the Court, and as the work progresses, such portion of the fund in deposit as may be needed for the propose, will from time to time be paid to the contractor.

We observe in this connection, that it is alleged in the petition of the *shebait* that part of the property is in such an insanitary condition, that action has been taken by the Calcutta Municipal Corporation, and she has already been fined. If this is established, suitable steps must be taken for the improvement of the property; and in this contingency the case will fall within the first and second rules laid down above. On behalf of the objectors it has been stated, on the other hand, that they apprehend that, as the *shebait* is a *pardanashin* Hindu lady advanced in years, the work of repair and improvement cannot possibly be supervised by her personally, and that if any large sum is placed at her disposal it may be misapplied by her advisers, and dependents, who, it is alleged, are impecunious; we are not in a position to express any opinion as to the truth of these allegations. The Judge will be able to pay the contractors after calling for a report from some expert and this procedure should be noted in the contract to execute the work. The Court has ample power to give suitable directions so that a proper contract to complete the repairs and to effect the necessary improvements on the property may be made, varified and carried out under its guidance. To enable the Court to determine what sum should be spent for the purpose, three elements must be taken into consideration, namely, *first*, the present condition of the property; *secondly*, the income of the endowment and the surplus left therefrom after payment of the current expenses; and, *thirdly*, the amount of compensation-money in deposit; to sum up, the test to be applied is, whether the work undertaken is essential for the ultimate benefit of the endowment.

The result, therefore, is that this rule must be made absolute, and the order of the Court below, discharged. The case will be remanded to the Land Acquisition Judge, in order that he may deal with it on the lines indicated in this judgment. The costs of this rule will abide the ultimate result of the proceedings in the Court below. We assess the hearing fee at three gold *mohurs*.

Rule made absolute.

(s. c. 9. M. L. T. 476.)

MADRAS HIGH COURT.

FIRST CIVIL APPEALS NOS. 7, 97 and 98 OF 1905.

February 20, 1911.

Present:—Sir Ralph Benson Judge, and Mr. Justice Sundara Aiyar.

VUGAMUDI SUBRAMANIA REDDI AND OTHERS—DEFENDANTS—APPELLANTS

versus

VUGAMUDI RAMACHANDRA REDDI AND OTHERS—PLAINTIFF AND DEFENDANTS—RESPONDENTS.

Partition suit—Mesne profits—Arbitration award—False assertion by plaintiff—Title by limitation.

Where in a suit for partition the plaintiff asked for mesne profits, and the claim was disallowed on the ground that he had falsely represented that there was no complete award by arbitration while in fact there was:

Held, on appeal, that mesne profits must be allowed with respect to the properties to which the plaintiff had established his title when there was no evidence that he waived the right to mesne profits in regard to them.

Where in the same suit, partition was claimed in respect of a certain item of property which had been sold without the document being registered:

Held, that as the plaintiff did not show that the family was dispossessed of this item of property in question within 12 years prior to the suit, the title of the transferee must be held to have been perfected by limitation.

SUBRAMANIA REDDI *v.* RAMACHANDRA REDDI.

Appeal against the decree of the District Court of Nellore, dated the 31st October 1904, in O. S. No. 44 of 1901.

JUDGMENT.

APPEALS NOS. 7 AND 97 OF 1905.

The plaintiff instituted the suit to which the appeal relates for partition of properties alleged to belong to him and defendants Nos. 1 to 4 jointly. The plaintiff's father, Venkata Reddi, the father of the first and second defendants and the father of the third defendant were brothers. The fourth defendant's husband, Venkatanarayana Reddi, was the son of a sister of Venkata Reddi and his brothers and lived with the plaintiff and his uncles as if he were a member of the undivided family. The plaintiff alleges that, owing to quarrels in the family, his father, and his uncles and Venkatanarayana Reddi made a reference to certain arbitrators for the division of the family properties between them; that the arbitrators made a partial division of the debts due to the family and of some of the immoveable properties and a complete partition of the cattle, sheep, goats, household utensils, and moveables and, that, owing to the death of plaintiff's uncles and Venkatanarayana Reddi, and two of the arbitrators the partition was not completed, the arbitration fell through and no award was given. The other defendants were made parties on the ground that they were in possession of some of the properties of which partition is claimed. The 16th defendant is the mother of the 1st defendant and was impleaded long after the suit, as some of the properties claimed were alleged to belong to her. Defendants Nos. 1 to 4 contended that the plaintiff's allegation about the arbitration falling through was untrue, that the arbitrators passed an award which is filed as Exhibit III on the defendant's side, that the award made was a complete one, that the suit was barred by limitation, and that the plaintiff was not entitled to any relief in the suit. Various contentions were raised with respect to particular items of the properties claimed in the plaintiff's schedules. We shall hereafter refer to such of them as are material for the disposal of this appeal.

The District Judge found that the plaintiff's case that no award was passed was false. We accept his finding on that question for the reasons set out at length in his judgment.

We now proceed to deal with the contention of the parties with respect to the particular items to which the appeals relate.

Outstandings.—The plaintiff contended in the lower Court at the hearing of the suit that the arbitrators acted illegally in deciding that outstandings to the extent of Rs. 9,200 belonged to the 16th defendant and in awarding them to her as she was not a party to the reference, and that the outstandings were not really due to her but to the family. This contention was allowed by the District Judge, the plaintiff was awarded his share of the outstandings. The appellants contend that under the *muchilika* executed by the parties to the arbitrators (Exhibt A) the arbitrators were entitled to award the amount to the sixteenth defendant, and that the sixteenth defendant subsequently became a party to the arbitration proceedings, that the plaintiff acquiesced in the award, that in any event the arbitrators having decided between the plaintiff and the defendants Nos. 1 to 4 that the outstandings were not due to the family the plaintiff cannot now re-agitate the same question against them, and that as against the sixteenth defendant the plaintiff has not proved the right to any relief as it is not established either that she is in possession of the bonds, evidencing the outstandings or that she has recovered any amounts on them. Exhibit A empowers the arbitrators *inter alia* to decide the disputes between the parties with respect to the debts due to the family by others on accounts and bonds and in respect of the properties of the female children and Kodalu (that is daughters-in-law) of our family. That arbitrators say in their award that the sixteenth defendant Venkata Lakshmamma claimed the outstandings as due to her, that the member of the family excepting the plaintiff admitted her claim, and that the plaintiff said he was not aware of it, and on inquiry they found that the outstandings belonged to the sixteenth defendant. It is strenuously urged by the appellants that the sixteenth defendant became a party to the reference by making the claim and was allowed to do so by the executants of Exhibit A and the plaintiff is now estopped from disputing the award in her favour. This contention appears to be well-founded. See III, Cyclopædia, page 689. It is enough to rest our decision with regard to this item on the ground that the

plaintiff is precluded by the decision of the arbitrators from claiming the outstandings as against defendants Nos. 1 to 4, and that there is no evidence that the sixteenth defendant either obtained possession of the bonds or has collected any amounts on them within six years before the suit. We must allow the appeal with respect to this item.

Item No. 87—The next item relates to the plaintiff's claim to the *pattedu* lands. The plaintiff's case with regard to these lands is that they were excluded from the *muchilika*, that he was not aware of the fact of the *muchilika*, that these lands belonged to the family and that the fact was suppressed by the other parties to the reference fraudulently from the arbitrators. We find that the sixteenth defendant who claims item 87 in this appeal admitted that she was not in possession of the lands and had no right to it. The appeal must, therefore, be disallowed with respect to this item.

Items Nos. 27 to 29—We next deal with items 27, 28 and 29. The District Judge allowed the plaintiff his claim with regard to them, but we are unable to agree with him. There is no evidence whatever that they belonged to the family at the time of the reference to arbitration. The defendants' case was that they were purchased by them subsequently. The plaintiff is not entitled to any relief with respect to this item.

Items Nos. 70 to 74—The defendants' case with regard to these items was that the plaintiff sold his one-fourth share to them for Rs. 150 as per Exhibit A. The District Judge held the sale to be invalid as it was not made by a registered instrument and he allowed the plaintiff his share in them on his paying back the consideration received by him. The District Judge is clearly right with respect to these items.

Items Nos. 75, 76 and 80—The whole of these items was awarded to the plaintiff by the District Judge on his paying back the purchase-money he received on the sale of these items to Sesha Reddy without a registered instrument. The plaintiff having sued for only a one-fourth share of these items, the lower Court was clearly wrong in awarding to him the whole. We modify the decree with regard to these items by directing that the plaintiff shall recover one-fourth of these items on payment of one-fourth share of Rs. 165 received by him as consideration money.

Items Nos. 15 and 34—We confirm the District Judge's decision with regard to these items as we have not been referred to any evidence to prove that these items were sold by the plaintiff.

Items Nos. 85 and 86—We are of opinion that the District Judge is right in holding that the defendants failed to prove that the plaintiff relinquished his share of these items. He will be awarded his one-fourth share of these items on payment of one-fourth of Rs. 19-8-0, his share of the expenses incurred by the defendants in the litigation with respect to them.

The next item refers to some bricks and tiles claimed by the plaintiff. The District Judge was clearly wrong in his decision with regard to them as the bricks and the tiles were not manufactured on any land belonging to the family. The fact that some of the earth for making them was taken from some land belonging to the family is quite insufficient to sustain the plaintiff's claim. The plaintiff does not claim any damages on account of the removal of the earth.

The last item we have to deal with relates to the plaintiff's share of the trees standing on some family land; with respect to this it is enough to make the judgment of the lower Court clear by declaring that the plaintiff's right is to a fourth share of the trees in the items in which the plaintiff gets a share according to the decree in this case.

With respect to the plaintiff's claim to a one-fourth share of the sum of Rs. 700 awarded to the fourth defendant by the arbitrators the appeal is allowed, for the reasons already given with respect to the amount awarded by them to the sixteenth defendant.

APPEAL NO. 98 OF 1908.

This appeal is by the 11th, 18th, 19th, 6th, 7th, and 15th defendants in the suit. The 11th defendant claims item 51 but as the sale on which he relied was not by a registered instrument as required by law, we must confirm the judgment of the lower Court. The fourteenth defendant claims items 62 to 66. Though there was no registered instrument in this case the sale was in the year 1888 and it lay on the plaintiff to prove that the family was dispossessed of this item within 12 years prior to the suit, and he has failed to do so. The fourteenth defendant's

title has, therefore, been perfected by limitation. We reverse the judgment of the lower Court with regard to these items.

The sixth defendant claims item No. 83; with respect to this item the District Judge gives no reason for awarding a share to the plaintiff except that it was purchased in 1882 by Seshu Reddi. But it was sold to the sixth defendant in 1882, and he is debited in the family accounts with the consideration-money in that year. The sixth defendant's possession on the date of the suit being admitted in the plaint and there being no evidence that he obtained possession within twelve years prior to the suit we must reverse the judgment with respect to this item also.

The seventh defendant claims item No. 92. He alleges that this item was sold to him by Seshu Reddi in 1893. He produces no sale-deed. We disallow the appeal with regard to this item.

The fifth defendant claims item No. 96. For the reasons given with respect to the claims with regard to the outstandings, we reverse the judgment with respect to this item and hold that the plaintiff is not entitled to a share of it.

Mesne profits—It is contended that the plaintiff is not entitled to any mesne profits, as he came to Court with a false case that there was no award passed by the arbitrators. We are, however, unable to agree with this contention with respect to the properties to which the plaintiff has established his title, as there is no evidence that the plaintiff waived the right to mesne profits with regard to them, and as there is nothing shown which would disentitle him to recover them. We must confirm the judgment with regard to the mesne profits with respect to the items to which according to our judgment the plaintiff has been found entitled.

The decree of the lower Court will be modified in accordance with our findings. The parties will pay and receive proportionate costs in each of the three appeals here and in the Court below.

Decree modified.

(s. c. 9 M. L. T. 480.)

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 474 AND 475 OF 1909.

February 15, 1911.

Present:—Mr. Justice Munro and Mr. Justice Sankaran Nair.

RAVIA BIVI AMMAL MINOR—PLAINTIFF—APPELLANT

versus

KADIR BATCHA ROWTHAR AND OTHERS—DEFENDANTS—RESPONDENTS.

Burden of proof—Release—Suit to set aside a release-deed—Failure of consideration.

Plaintiff brought a suit to set aside a release-deed on the ground that there was failure of consideration. Defendant admitted that the consideration mentioned in the deed was not true but contended, nevertheless, that there was consideration for the release-deed:

Held, that the burden of proving the failure of consideration lay on the plaintiff.

Second appeals against the decrees of the District Court of Tanjore, in Appeal Suits Nos. 242 and 203 of 1908, presented against the decrees of the Court of the District Munsif of Mannargudi in Original Suits Nos. 169 and 170 of 1906, respectively.

JUDGMENT.

MUNRO, J.—I think the decrees are right. The plaintiffs sued for a declaration that a deed of release executed in favour of the first defendant was invalid and for partition and delivery of their shares in certain property.

The consideration mentioned in the deed of release Exhibit I is a cash payment of Rs. 1,000. The plaintiffs alleged that there was no cash payment and that though there was another consideration, that consideration failed. The District Judge rightly held that the burden of proof was on the plaintiffs and found that they had not proved the consideration they set up and consequently had not proved failure of consideration so as to entitle them to have Exhibit I set aside. On the finding I think the suits were rightly dismissed. No doubt the first defendant also admitted that the real consideration for Exhibit I was not that set out in the document. The admission made by the first defendant was not, however, one upon which a decree could be given for the plaintiffs for he still contended that there was consideration and it was the plaintiff's case that there was failure of consideration. On the pleadings had no evidence been given, the plaintiff's suits must have been dismissed. I would, therefore, dismiss the second appeals

with costs.

SANKARAN NAIR, J.—I agree that the second appeals should be dismissed with costs.

Appeals dismissed.

(S. C. S. A. J. 503.)

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 630 OF 1908.

June 12, 1909.

Present:—Mr. Justice Banerji and Mr. Justice Tudball.

DAMBAR SINGH—PLAINTIFF—APPELLANT

versus

BALWANT SINGH AND ANOTHER—

—DEFENDANTS—RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 146, Sch. 4, No. 6—Suit for damages—Distraint—Cause of action, when accrues—Knowledge of plaintiff—Limitation.

Under No. 6 of the 4th Schedule to the Agra Tenancy Act, the limitation for a suit for compensation for wrongful acts of a distrainer, brought under section 146, is three months from the date on which the right to sue accrued. Such right to sue accrues when the plaintiff's property is lost, destroyed or damaged or he has knowledge of the loss, destruction or damage.

Second appeal from a decision of the District Judge of Aligarh, reversing a decree of the Assistant Collector, First Class, of Etah.

Dr. *Satish Chandra Banerji* (with him Mr. *Govind Prasad*), for the Appellant.

Mr. *J. N. Chaudhri*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for compensation brought under section 146 of the Agra Tenancy Act. The plaintiff is a tenant of the first defendant Raja Balwant Singh. The Raja caused the crops growing on the plaintiff's land to be distrained on the allegation that a sum of Rs. 223 was due to him for arrears of rent. The plaintiff brought a suit on the 2nd of May 1906, under section 142 of the Act, to contest the distraint. That suit was decreed on the 2nd of August 1906, the Court holding that Rs. 86-12-0 only was due for arrears of rent. Thereupon the suit out of which this appeal has arisen was instituted on the 31st of October 1906. The plaintiff claimed Rs. 700 as compensation, but the Court of first instance granted him a decree for Rs. 500.

This decree was set aside by the lower Appellate Court on several grounds, one of which was that the claim was barred by limitation.

We are of opinion that the decision of the Court below as to limitation is correct.

Under No. 6 of the 4th Schedule to the Tenancy Act the limitation for a suit for compensation for wrongful acts of a distrainer, brought under section 146, is three months from the date on which the right to sue accrued. We have, therefore, to see when the plaintiff's right to sue accrued. The present suit was brought under the second paragraph of section 146 on the ground that the distrained property was damaged and destroyed by reason of the defendant not having taken proper precautions for the keeping and preservation thereof. It appears that under section 143 security was furnished and the Court made an order for the release of the property on the 2nd of May 1906. On the 31st of May 1906, the plaintiff made an application informing the Court that all the property distrained had not been made over to the surety. Thereupon the Court directed the Amin to submit an explanation, and Amin sent a report stating that he had made over to the surety some more property on the 9th of June 1906, and that the remainder of the property alleged to have been distrained was not forthcoming. It is thus manifest that the property in respect of which compensation is now claimed had been destroyed, if at all, prior to the 9th of June 1906. It was when the plaintiff's property was lost, destroyed or damaged or he has knowledge of the loss, destruction or damage that the plaintiff's cause of action for brining a suit under section 146 arose. This, as we have pointed out, took place sometime before the 9th of June 1906, and that was the latest date on which it came to his knowledge that his crops had been lost, damaged or destroyed. His cause of action, therefore, accrued at least on the 9th of June 1906, and as the suit was brought after three months from that date it was time-barred. On this ground the appeal fails. We dismiss it with costs.

Appeal dismissed.

GAJ KUMAR CHAND *v.* LACHMAN RAM.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2703 OF 1910.

April 12, 1911.

Present—Mr. Justice Mookerjee and Mr. Justice Casperz.

GAJ KUMAR CHAND—DEFENDANT—APPELLANT

versus

LACHMAN RAM AND OTHERS—PLAINTIFFS—RESPONDENTS.

Specific performance—Addition of defendant—Plaint not amended—Petition treated as part of plaint—Agreement to be specifically performed to be definite—Degree of certainty—Extrinsic evidence—Claim of specific performance found to be excessive—Where original claim found to be unsustainable—Specific Relief Act (I of 1877), s. 22—Discretion of Court, what means.

The plaintiffs brought this suit against defendant No. 1 for the specific performance of a contract. Subsequently, they prayed that defendant No. 2 might be added as a defendant, because he had, with full notice of the prior contract in favour of the plaintiffs, taken a conveyance of the property from defendant No. 1. The application was granted and defendant No. 2 was added as a defendant. The plaint, however, was not amended. It was objected on the part of defendant No. 2 that as the plaint stood it did not disclose any cause of action against him and ought to be dismissed:

Held, that as no objection was taken on this ground by defendant No. 2 in his written statement, and as the application may be treated as part of the plaint, the suit should not be dismissed against defendant No. 2 on that ground.

All agreements in order to be executed in a Court of equity must be certain and definite. But that is sufficiently certain which can be made certain. Therefore, the principle is that the description must be such as to enable the Court to determine with certainty, with the aid of such extrinsic evidence as is admissible under the rules of evidence, what property was intended by the parties to be covered thereby.

Where the plaintiff has asked for specific performance of an agreement and it is found that the claim was excessive, he may be allowed to succeed on the basis of an alternative claim for a more limited right. But if the plaintiff gives evidence in support of the original claim which is found unsustainable, he cannot succeed on a different claim contrary to his own evidence.

Section 22 of the Specific Relief Act provides that the jurisdiction to decree specific performance is discretionary; but the discretion is neither arbitrary nor capricious but a sound judicial discretion regulated by the established principles of equity.

The circumstances stated in section 22 are illustrative and not exhaustive.

A contract which, although not illegal, is detrimental to the public welfare, should not be enforced in equity.

The relief lies in the discretion of the Court only in so far as it must necessarily judge whether, under the circumstances of the case, the contract is or is not an equitable one, but if it is determined that the contract is fair and reasonable, and that the conduct of the plaintiff has not been unconscientious, there is no room for the application of judicial discretion.

Appeal from the decree of the District Judge of Shahabad, dated July 25th, 1910, reversing that of the Sub-Judge of Arrah, dated January 31st, 1910.

Dr. *Rash Behary Ghosh*, Babus *Provash Chandra Mitter* and *Raghu Nath Singh*, for the Appellant.

Mr. *S. P. Sinha*, Counsel, Babus *Mohendra Nath Roy* and *Chandra Sikhar Prosad Singh*, for the Respondents.

JUDGMENT.—This is an appeal on behalf of the second defendant in a suit to enforce specific performance of a contract by the first defendant in favour of the plaintiffs for sale of a house. The subject matter of the litigation is a house in the town of Arrah which admittedly belonged, at one time, to a wealthy resident of that place by name Baij Nath Singh. Baij Nath mortgaged the property to David Yule and Andrew Yule, who obtained the usual mortgage-decree against the mortgagor and his sons and grandsons on the 23rd December 1897. At the execution sale which followed, the property was purchased by the mortgagees on the 3rd September 1900. It appears that part of this property consisted of a temple dedicated to the Jain Saint, Paresh Nath Swami. On the 31st December 1902, some of the Jain inhabitants of the city commenced an action against the Yules and their mortgagors for a declaration that so much of the property as was covered by the temple, was inalienable and the title thereto had not been affected either by the mortgage transaction or by the sale consequent thereon. On the 5th August 1903, a consent decree was made in this suit, and the portion to which the Jains laid claim as their temple, was declared to be *debuttar* not capable of alienation by the mortgagors. Meanwhile, on the 27th July 1903, David Yule, on behalf of himself and Andrew Yule had executed a conveyance of the house in favour of the first defendant Gopal Das, from whom both the parties to the present litigation claim to have derived title. In this conveyance, the vendor explicitly stated, that the northern boundary of the house conveyed was the portion the sale whereof had been postponed by reason of the title suit to which reference has already been made. The result of the transaction was, that Yule conveyed to

Gopal Das all that he was competent to convey, subject to the result of the suit by the Jains.

According to the plaintiffs, Gopal Das entered into a contract with them on the 2nd December 1908 to convey the house purchased by him from Yule for a sum of Rs. 5,000 out of which Rs. 500 was advanced on that very date. The vendor-defendant, however, faild to perform his part of the contract and the result was, that on the 5th January 1909, the plaintiffs commenced the present action against the first defendant Gopal Das for specific performance of the contract of sale. On the 16th February 1909 the plaintiffs prayed that the second defendant by name Gaj Kumar Chand might be added as a defendant because he had subsequently, with full notice of the prior contract in favour of the plaintiffs, taken a conveyance of the house from the first defendant. This application was granted, and Gaj Kumar Chand was added as a defendant. The plaint, however, was not amended, and, as it still stands in its original form, it does not disclose any cause of action against the second defendant. Some stress has been laid by the appellant on this circumstance, and it has been suggested that the claim should on this ground fail as against him. There is obviously no substance in this contention. No doubt, the plaint ought to have been amended, and appropriate allegations inserted therein to establish a cause of action against the second defendant. But no objection was, on this ground, taken by the added defendant in his written statement, and the application of the 16th February 1909, may, without impropriety, be treated as part of the plaint. The defence of this purchaser-defendant, with which we are now most closely concerned, was, that on the 20th December 1908 the first defendant had entered into a contract for transfer of the property to him for Rs. 4,500 out of which a sum of Rs. 400 was paid on that occasion and that the coveyance was drawn up on the 23rd December 1908, presented for registration on the 21st January 1909, and actually registered on the 6th February following. The purchaser further pleaded, that he was a *bona fide* purchaser for value without notice of the alleged contract with the plaintiffs and denied the truth of all the material allegations made in support of their case.

The learned Subordinate Judge found on the evidence that the first defendant had, on the 21st December 1908, contracted with the plaintiffs to sell the house to them, and received part of the consideration-money on that date. But he also held that on the previous day the vendor had contracted to sell the house to the second defendant, and had received from him Rs. 400. In this view, the Subordinate Judge refused to make a decree for specific performance of the contract, but he directed the return of the deposit amount paid by the plaintiffs to their vendor. The plaintiffs appealed to the District Judge who found that the prior contract alleged by the second defendant had not been established and that the agreement set forth by the plaintiffs was genuine and that it had been performed in part; in this view, he made a decree for specific performance of the contract against the first defendant as he found expressly that the second defendant had taken his conveyance with full knowledge of the contract in favour of the plaintiffs.

The second defendant has now appealed to this Court, and on his behalf the decision of the District Judge has been assailed substantially on five grounds, namely, *first*, that the property agreed to be conveyed was so inadequately described that its precise boundaries were uncertain, and that consequently specific performance ought to be refused by reason of the uncertainty and vagueness of the subject-matter of the contract; *secondly*, that the Court, in the exercise of its judicial discretion, ought to refuse specific performance of the contract, because if the contract is executed, it may interfere with the use of the temple by members of the Jain Community; *thirdly*, that as the son of the vendor was jointly interested in the property with his father, and as he had not been a party to the contract nor to the present litigation, the title was sufficiently doubtful to justify the dismissal of the suit; *fourthly*, that as the plaint has not been amended and does not disclose any cause of action against the second defendant the suit should fail as against him; and *fifthly*, that upon the facts found, the inference may legitimately be drawn that the second defendant had no not ce of the alleged contract.

In so far as the fourth and fifth grounds are concerned, it may be stated at once, that

there is no substance in either of them. It is true that the plaint was not amended, but throughout the trial in the original Court the case proceeded on the assumption that the plaint had been amended, and it is, in our opinion, too late to urge that the suit ought not to have been allowed to proceed against the second defendant. Upon the question, whether the second defendant had notice of the contract alleged by the plaintiffs the findings of the District Judge are explicit and conclusive. According to the learned District Judge, the second defendant got the conveyance from the first defendant with knowledge of the contract in favour of the plaintiffs, and there was no earlier contract in favour of himself. It is impossible for us in second appeal to interfere with this finding of fact. It is true that the learned District Judge states in another portion of his judgment, that he is unable to find with absolute precision the date on which the conveyance in favour of the second defendant was executed, and he seems to have suspected that it was possibly antedated; but his opinion is clear that, whenever it might have been executed, the execution took place after the second defendant had knowledge of the contract with the plaintiffs. The fourth and fifth grounds may, therefore, be dismissed from consideration as manifestly untenable, and we are concerned substantially with the first three grounds which we now proceed to consider in the order stated above.

In support of the first ground, it has been argued that the subject-matter of the contract has been described with such lack of precision that no Court of equity will decree specific performance thereof, because, as Lord Rosslyn said in *Walpole* v. *Orford* (1), it is a general proposition that all agreements, in order to be executed in a Court of equity, must be certain and definite. Our attention has been invited to the description of the boundaries contained in the notice served on the 1st January 1909, by the plaintiffs upon their vendor. In this notice the house is described as the *kothi* of Baij Nath Singh and the northern boundary to which alone exception is taken on the ground of indefiniteness is described as the *kothi* of Babu Saligram Singh. In the plaint also this description of the northern boundry is re-produced; and in the decree drawn up in favour of the plaintiff, as might have been expected, the same description re-appears. Upon these materials it has been argued on behalf of the second defendant that as the plaintiffs cannot ask for specific performance of a contract of sale of any part of the house which includes the Jain temple and as the boundaries given in the notice and plaint do include the temple, the suit must fail. The first branch of this contention has never been disputed by the plaintiffs, but they do not admit the validity of the further argument of the appellant that not merely the temple but also what is vaguely described as its appurtenant apartments were intended to be excluded from the contract. From an examination of the title-deeds of the vendor, it is clear that he had a good title to the building excepting the portion decreed in favour of the Jains in the Suit of 1902, and the intention of the plaintiffs was to purchase from him the portion which he was competent to convey. In the conveyance by the Yules to Gopal Das, executed on the 27th July 1903, the northern boundary of the house purchased by him is described as follows:—"Part of the said *kothi* whose sale has at present been put off on account of title suit, and after that the *kothi* of Babu Saligram Singh." No doubt, in the notice of demand for specifice preformance of the contract the northern boundary is simply described as the *kothi* of Babu Saligram Singh: but it is plain that the intention of the vendor was to convey and of the purchaser to buy that portion of the house only to which the transferor had a good title under his conveyance, read with the decree in the suit of the Jains. It may be conceded that, at first sight, there does seem to be some uncertainty as to the northern boundary of the property intended to be conveyed, but the indefiniteness, upon examination turns out to be more apparent than substantial. Under such circumstances, the maxim is applicable "*Certum est quod certum roddi potest*," that is sufficiently certain which can be made certain. This principle has been repeatedly applied to cases of specific performance of contracts. To take one illustration, where an agreement in writing for the sale of a house did not describe the particular house but stated that the deeds were in the possession of A. the Court held the agreement sufficiently certain

(1) 3 Ves. 402; 4 R. R. 38.

since the house might be easily ascertained by reference to the deeds [*Owen* v. *Thomas* (2) and *Plant* v. *Bourne* (3)]. Again, in *Monro* v. *Taylor* (4), where a contract was made to sell an estate within certain ascertained boundaries described as partly freehold and partly leasehold; it was deemed not void for uncertainty because the purchaser was entitled to have it reduced to certainty by the boundary of the properties of different tenures being ascertained or shown to be capable of being so [see also *Wylson* v. *Dunn* (5).] The principle is, that the description must be such as to enable the Court to determine with certainty, with the aid of such extrinsic evidence as is admissible under the rules of evidence, what property was intended by the parties to be covered thereby. The description need not be given with such particularity as to make a resort to extrinsic evidence unnecessary. Reasonable certainty is all that is required, and extrinsic proof is allowed in order to apply, not to alter or vary, the written agreement. In the case before us, the notice of demand of specific performance read along with the title-deeds of the vendor and the decree in the suit of the Jains expressly mentioned therein, leaves no room for controversy as to what was intended to be sold.

The learned Vakil for the appellant has, however, contended that the plaintiffs are not entitled to any relief at all, because the description of the property claimed in the plaint is comprehensive enough to include the temple and its appurtenances, and that although in the Court below, their Pleader expressly stated that the temple was not purchased and was not claimed, the appurtenances were not expressly abandoned. It has also been suggested, on the authority of the cases of *Lindsay* v. *Lynch* (6), *Legal* v. *Miller* (7) and *Marshal* v. *Berridge* (8), that where the plaintiff has asked for specific performance of an agreement and it was found that the claim was excessive, he could not be allowed to succeed on the basis of an alternative claim for a more limited right. The cases relied upon, however, are clearly distinguishable. They proceed on the ground that as the plaintiff had given evidence in support of the original claim, which had been found unsustainable, the Court would not allow him to succeed on a different claim contrary to his own evidence. In the case before us, however, there is no inconsistency between the claim put forward in the notice of demand of performance, and the claim to which the plaintiffs have adhered in the course of the litigation. The plaintiffs have, in substance, sought a conveyance of that portion of Baij Nath *kothi* to which the first defendant had a good title. Consequently, no question arises as to whether the party defendant meant to contract to the extent that he is sought to be charged as in *Harnett* v. *Yielding* (9). To use the language of Pomeroy (Specific Performance, section 145), it is impossible to say that any term of this contract is expressed in so inexact, indefinite or obscure language that the intent of the parties cannot be sufficiently ascertained to enable the Court to carry it into effect. See also *Lohmann* v. *McArthur* (10). The first objection, therefore, taken on behalf of the appellant must be treated as substantial but the decree as drawn up must be amended; and we shall give directions later on to guard against any possible dispute when the conveyance comes to be executed.

In support of the second ground urged on behalf of the appellant it has been contended that the Court should, in the exercise of its discretion, refuse specific performance of this contract, and reference has been made to section 22 of the Specific Relief Act which provides that the jurisdiction to decree specific performance is discretionary and the Court is not bound to grant such relief merely because it is lawful to do so, but the discretion of the Court is not arbitrary, but sound and reasonable guided by judicial principles and capable of correction by a Court of appeal. It has been argued on behalf of the appellant that the second defendant who has purchased this property is a Jain, and that the Jain Community are likely to take serious offence if the property

(2) 3 Myl. & K. 353; 3 L. J. Ch. 205.
(3) 3 (1897) 2 Ch. D. 281 at p. 288; 66 L. J. Ch. 643; 76 L. T. 820; 46 W. R. 59.
(4) 8 Hare 51.
(5) 34 Ch. D. 569. 56 L. J. Ch. 855; 56 L. T. 192; 35 W. R. 405; 51 J. P. 452.
(6) 2 Sch. & Lef. 1; 9 R. R. 54.
(7) 2 Ves. Sen. 299.
(8) 19 Ch. D. 233 at p. 241; 51 L. J. Ch. 329; 45 L. T. 599.
(9) 2 Sch. & Lef. 549 at pp 554, 556.
(10) 3 Ch. App. 496; 18 L. T. 806; 16 W. R. 877.

in the immediate neighbourhood of their temple is allowed to pass into the occupation of the plaintiffs who are goldsmiths by caste and profession. In answer to this contention, the learned Counsel for the plaintiffs-respondents has argued that the circumstances under which the Court may properly exercise a discretion to decree specific performance are formulated in section 22 of the Specific Relief Act, and as the present case admittedly does not come within the scope of the grounds so specified, it is obligatory on the Court to decree specific performance. It has further been contended that the reasons assigned by the appellant ought not to carry any weight because the portion of the house now in controversy was in the occupation of the Yules for a time, and that if it now passes into the possession of the plaintiffs, there is no reasonable ground for apprehension that they will, in any way, interfere with the performance of religious services by the Jains or attempt to interrupt their access to the temple. After careful consideration of the arguments addressed to us, we are not prepared to adopt the view suggested by the learned Counsel for the respondents as to the scope of section 22 of the Specific Relief Act. The section first sets out the general rule, and then specifies, in three successive paragraphs, circumstances under the first two of which the Court may properly exercise a discretion not to decree specific performance, whilst under the third it may appropriately give a decree. The circumstances so stated are clearly illustrative and the enumeration, in our opinion, was not intended to be exhaustive. As pointed out by Mr. Justice Story in his classical Treatise on Equity Jurisprudence (section 750), it is not possible to lay down any rules and principles which are of absolute obligation and authority in all cases and define exhaustively the special circumstances under which relief may properly be granted or withheld. It would be waste of time to attempt to limit the principles on the exception which the complicated transactions of the parties and the ever changing habits of society may, at different times and under different circumstances, require the Court to recognise or consider. The fact, therefore, that the circumstances specified in section 22 of the Specific Relief Act are not identical with those of the present litigation is by no means conclusive upon the question, whether or not specific performance should be granted in this case. It must be remembered, as was observed in *Rudolph* v. *Covell* (11) and *Sweeney* v. *O'Hora* (12), that it is always desirable to make the least draft which is possible upon this undefined power of discretion and to determine causes upon established rules. It is further worthy of note that specific performance is not a matter of discretion in any particular sense, as contrasted with many other equitable remedies; whilst the relief is discretionary, so are very many of the powers which Courts of equity possess and exercise. The discretion, therefore, is neither arbitrary nor capricious but a sound judicial discretion regulated by the established principles of equity [*Haywood* v. *Cope* (13) and *Harris* v. *Robinson* (14)]. As a matter of fact, the body of precedents is so great, and the special rules deducible from them are so numerous that the cases are relatively infrequent in which the Court is obliged to fall back upon general notions of abstract justice. Now, in the case before us, what are the special facts upon which reliance is placed? It is suggested that gross offence may be given to the Jain Community if premises in the immediate neighbourhood of their temple pass into the possession of the plaintiffs. We are unble to attach any weight to this consideration. The Jain Community clearly are not entitled to take up the position that no person of a different religious persuasion is to have property near their temple. As a matter of fact, this very property at one time belonged to the Yules, who purchased it at the execution sale long after the temple had been built. There is no foundation for the suggestion that the plaintiffs may be intolerant of the performance of religious services by the Jains in their temple, and may be inclined to molest or annoy them. If, however, the plaintiffs should misconduct themselves in the manner suggested, the Jains have ample protection afforded to them by the provisions of the civil and criminal law. No doubt, the doctrine has sometimes been re-

(11) 5 Iowa 525.

(12) 43 Iowa 34.

(13) 25 Beav. 140.

(14) 21 Can. Sup. Ct. 390.

ISMAIL MOLLAH *v.* JADU NATH.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 2892 OF 1908.

March 8, 1911.

Present:—Mr. Justice Mookerjee and Mr. Justice Caspersz.

ISMAIL MOLLAH AND OTHERS—DEFENDANTS—APPELLANTS

versus

JADU NATH SRIMANI—PLAINTIFF—RESPONDENT.

Assignment of debt—Validity to be tested by what law—Transfer of Property Act (IV of 1882), ss. 130, 131—Notice to debtor.

The validity of an assignment must be tested with reference to the law as it stood at the time when it was made.

Abdul Aziz v. *Appayasami*, 27 M. 131; 31 I. A. 1 at p. 9 and *Baidya Nath* v. *Kaminikant*, 6 C. L. J. 572, relied upon.

The provision of section 131 of the Transfer of Property Act, as it originally stood, did not invalidate a transfer of an actionable claim made without notice: it merely suspended the operation of the assignment as against the debtor until notice had been given.

Kalka Prasad v. *Chandan Singh*, 10 A. 20, referred to.

Appeal from the decree of the Sub-Judge of Khulna, dated July 2nd, 1908, reversing that of the Munsif of Satkhira, dated August 31st, 1907.

Babu *Bipin Behary Ghosh*, for the Appellants.

Babus *Surendra Chandra Sen* and *Troilakya Nath Ghosh*, for the Respondent.

JUDGMENT.—This is an appeal on behalf of the defendants in a suit to enforce a mortgage-security. The facts, so far as it is necessary to state them for the decision of the question of law raised before us, may be briefly narrated. On the 5th July 1889 three persons Sami Mollah, Akim Mollah and Hamijuddi Mollah executed a mortgage in favour of one Atul Behary Set. Upon his death his interest as mortgagee vested in his mother Harani Moni Dasi. On the 11th January 1894, Harani Moni assigned her interests as mortgagee to her son-in-law and his brother by name Ram Krishna Nandi and Rakhal Chandra Nandi. On the 18th February 1897, the mortgagor paid to Harani Moni whatever was due to her upon the mortgage. The mortgage instrument was alleged by her to have been lost after the death of her son and she accordingly executed a release which was duly registered. On the 7th April 1901, Ram Krishna assigned his interest in the mortgage to the present plaintiff, who on the 24th June 1903 obtained a similar assignment from the representatives of Rakhal in respect of their interest. On the 12th April 1905 the plaintiff commenced this action to enforce the security, and claimed Rs. 90 as the principal amount due under the mortgage together with Rs. 360 as interest thereon. The defendants resisted the claim on the ground that the assignments were forgeries, that the plaintiff had not acquired any valid interest as mortgagee and that the suit was not maintainable as no notice had been served on the mortgagor under the Transfer of Property Act. The defendants also pleaded that the whole of the sum due on the mortgage had been paid by them in good faith to Harani Moni on the 18th February 1897, and that in view of such payment, they could not be made liable a second time for the claim of the plaintiff.

The Court of first instance found upon the question of notice that no notice was required to be served under the law. As to the reality of the transactions on which the plaintiff based his title, the Court found that they were fictitious, that the first assignees were related to the assignor, and that the second assignee was also a near relation of the first assignor. The Court finally held that as the defendants had paid whatever was due to Harani Moni, they could not be made liable a second time.

Upon appeal by the plaintiff, the Subordinate Judge thought that the case had not been sufficiently investigated and remanded the case for re-trial. The original Court, after this remand, affirmed the previous decision and dismissed the suit. Upon appeal by the plaintiff, the Subordinate Judge held that the two assignments were not fictitious and that the plaintiff had thereunder acquired a valid interest in the mortgage-security. The Subordinate Judge appears also to have held that the defendants had made the alleged payment to Harani Moni; at any rate he expressly set aside the finding of the original Court upon this point. In this view, the Subordinate Judge has made the usual mortgage decree in favour of the plaintiff.

The defendants have now appealed to this Court, and on their behalf it has been argued that the validity of the first assignment which is the root of the title of the plaintiff ought to be tested with reference to the law

as it stood at the time of the assignment; that, judged from this point of view, the assignees had no enforceable claim as against the mortgagors because no notice was served in accordance with the provisions of section 132 of the Transfer of Property Act as it stood before its amendment in 1900, and that consequently the suit ought to be dismissed. In answer to this argument, it has been contended by the learned Vakil for the plaintiff-respondent, that the provisions of section 131 of the Transfer of Property Act before its amendment in 1900 have no application to the case of an assignment of a mortgage-debt, that at any rate the Subordinate Judge has found that the mortgagors had notice of the assignment, and that consequently the payment made by them to the assignor on the 18th February 1897 is of no avail.

In the first place, it is clear that the validity of the assignment must be tested with reference to the law as it stood at the time when it was made *Abdul Aziz* v. *Appayasami* (1); *Baidya Nath* v. *Kaminikant* (2). Section 131 as it stood at that time provided as follows: "No transfer of any debt shall have any operation against the debtor until express notice of the transfer is given to him, unless he is a party to or otherwise aware of such transfer." It was ruled by this Court in the case of *Muchiram* v. *Ishan Chuckerbutty* (3) that this provision was applicable to cases of assignment of mortgage-debts, and as the decision mentioned was by a Full Bench of this Court, it is binding upon us. Consequently, under section 131, the assignment could have no operation against the debtors (mortgagors) so long as express notice of the transfer was not given to them, unless they were parties to or otherwise aware of such transfer. This provision, as pointed out by Mr. Justice Mahmood in *Kalka Prasad* v. *Chandan Singh* (4), does not invalidate a transfer made without notice; it merely suspends the operation of the assignment as against the debtor until notice has been given. This is in accordance with the law as settled in England. Reference may be made to the case of *In re Lord Southampton's Estate* (5) where it is pointed out, upon the authority of the earlier decision in *Jones* v. *Gibbons* (6), that for the validity of the assignment, it is not necessary to give notice to the mortgagor; but although it is not necessary to give notice of the assignment of the mortgage, the transferee exposes himself, by taking a transfer and by not giving any notice, to a risk, as after the assignment, the mortgagor may make the mortgage of no avail by paying the mortgagee [*Mathews* v. *Wallwyn* (7).] In other words, although it is not necessary to give any notice, any payment after assignment without notice to the mortgagee is a good payment as against the transferee. Now, in the case before us, the payment was made by the mortgagors to the assignor after the assignment. It has not been argued anywhere throughout this litigation that express notice was given as contemplated by section 132 of the Transfer of Property Act; but the suggestion has been made that the mortgagors became otherwise aware of the assignment. It may be observed in this connection, that section 131 leaves it an open question what notice will suffice to fix the debtor with liability under the assignment. But it is fairly clear that what is intended is, that the debtor should not be bound unless he is aware of the transfer. It does not appear, in substance, to have been intended that the debtor should be bound in the same way as if he had received express notice thereof in writing, unless there has been constructive notice. Actual knowledge of the transaction need not be brought home to the debtor [*Sahadev* v. *Shekh Papa Miya* (8).] Now, in the case before us, there were three mortgagors. There is no evidence on the record to show, as regards two of these, that they were aware of the assignment before payment was made to the assignor. As regards the third, the evidence, if believed, indicated that a demand was made from him by the assignees after they had obtained an assignment from Harani Moni. The evidence, however, does not show that the fact of the transfer was intimated even to this mortgagor. Consequently, upon the materials on the record, it is impossible to hold that the three mortgagors were aware of the assignment within the meaning of section 131 of the

(1) 27 M. 131; 31 I. A. 1 at p. 9.
(2) 6 C. L. J. 572.
(3) 21 C. 568. (4) 10 A. 20.
(5) 16 Ch. D. 178 at p. 186; 43 L. T. 678; 29 W. R. 231; 50 L. J. Ch. 218.
(6) 9 Ves. 407 at p. 410; 7 R. R. 247.
(7) 4 Ves. 118.
(8) 29 B. 199.

Transfer of Property Act. If, then, they had not such notice, the payment made by them to the assignor would be a sufficient discharge of the debt and may be pleaded as against the assignee of Harani Moni. The learned Vakil for the respondent has suggested that, in this view, the case should be remanded for fresh investigation and that the plaintiff should be allowed an opportunity to adduce evidence (show that the mortgagors were aware of the assignment. After anxious consideration of all the circumstances of the case, we have arrived at the conclusion that we ought not to send the case back for further inquiry. The transactions upon which the plaintiff relies are by no means free from suspicion, and there is obvious danger that evidence may be manufactured, if the plaintiff is allowed at this distance of time, and at this late stage of the case, to adduce oral evidence upon the question, whether he or his predecessor-in-interest intimated to the mortgagors the fact of the assignment. Besides, the plaintiff as assignee of the mortgage was bound to set out in his plaint specifically the circumstances which alone would entitle him to enforce the security; this he has not done.

The result, therefore, is that this appeal must be allowed, the decree of the Subordinate Judge reversed and the suit dismissed. Each party will, however, pay his own costs throughout the litigation.

Appeal allowed.

PUNJAB CHIEF COURT.

FULL BENCH.

SECOND CIVIL APPEAL No 200 OF 1910.

May 22, 1911.

Present:—Sir Arthur Reid, KT., Chief Judge, Mr. Justice Kensington and Mr. Justice Rattigan.

Musammat RAM DITTI—DEFENDANT—APPELLANT

versus

AMAR SINGH AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 104 (f), Sch II, cl. 21 (1) and (2)—Appeal—Order filing an award—Decree based thereon—Provisions of the Code, whether antagonistic—Intention of Legislature.

An appeal lies, under section 104 (*f*) of the Code of Civil Procedure, 1908, from an order filing an award made in an arbitration without the intervention of the Court, in spite of the fact that the Court has, under clause 21 (1) of the Second Schednle to the Code, proceeded to pronounce judgment according to the award.

Per *Reid, C. J.* and *Kensington, J.*—

The language of section 104 *(f)* is very clear and the fact that a later provision of the Code, clause 21 (2), Schedule II, bars an appeal from a decree based on an award does not cancel the earlier provision. The two provisions of the Code are not antagonistic. If the order filing an award is set aside, there is no award on which judgment and decree can be based. The absence of any ground, such as is mentioned or referred to in clause 14 or clause 15 of Schedule II, is a condition precedent to passing an order filing the award.

Janokey Nath Guha v. *Brojo Lal Guha* 33 C. 757; 3 C. L. J. 450; 10 C. W. N. 609; *In the Matter of Pleader*, 27 P. R. 1910 Cr.; 22 P. W. R. 1910 Cr.; 6 Ind. Cas. 736; *Shankar Mal* v. *Nathu Mal*, 1 P. R. 1908 (F. B.); 58 P. W. R. 1907, distinguished.

Per *Rattigan, J.*—

The two provisions of the Code are for all practical purposes in direct conflict. The result of allowing an appeal from an order filing an award is tantamount to allowing an appeal from the decree based on the award. The intention of the Legislature expressed in clause 21 (2), Schedule II, is to all intents and purposes nullified by the provision in clause (*f*) of section 104.

The intention of the Legislature is to allow an appeal from the order filing an award merely when such order dealt with the objection that the matter had not been referred to arbitration or that no award had in fact been passed.

Miscellaneous appeal from the order of the District Judge, Rawalpindi, dated 22nd December 1909, ordering the award given by B. Gurbakhsh Singh Bedi, dated 2nd April 1909, by which 32 *kanals* 10 *marlas* of land *khasra* No. 397, situate in Rawalpindi, and 20 *maunds* of grain and Rs. 20 cash annually and a house with limited rights was given to defendant and the rest of the property was given to the plaintiff, to be filed.

Bhagat *Gobind Das*, for the Appellant.

Mr. *Pestonji Dadabhai*, for the Respondents.

JUDGMENT.

REID, C. J. AND KENSINGTON, J.—The question referred to the Full Bench is, whether an appeal lies under section 104 (*f*) of the Code of Civil Procedure from an order filing an award in an arbitration without the intervention of the Court, in spite of the fact that the Court has, under clause (21) (1) of the second Schedule to the Code, proceeded to pronounce judgment according to the award. The Pleader for the appellant contended that inasmuch as section (104) (*f*) gives an appeal, that appeal is not taken away by clause 21 (2) of the second Schedule which provides that

no appeal shall lie from a decree which follows the judgment based on an award ordered to be filed, except in so far as the decree is in excess of or not in accordance with the award. This position is, in our opinion, unassailable.

Counsel for the respondent was reduced to asking us to take clause 21 (1) to pieces and to interpose the words "the Court shall order the award to be filed" between the words "has been made therein" and the words "and where no ground such as is mentioned or referred to." No authority for this proposition has been cited. *Janokey Nath Guha* v. *Brojo Lal Guha* (1), and *In the matter of a Pleader* (2), cited by Counsel for the respondent, cannot by any stretch of imagination be considered authority for the proposition. The Calcutta case interpreted sections of the previous Code which have been very materially altered in the present Code, and the Judges certainly did not treat any section as we are asked to treat clause 21 (1).

Shankar Mal v. *Nathu Mal* (3) dealt with the previous Code. In *In the matter of a Pleader* (2), the Division Bench merely interpreted a section of the Legal Practitioners Act and did not take it to pieces and re-construct it as Counsel has asked us to do.

The language of section 104 (*f*) is very clear and, in our opinion, the fact that a later provision of the Code bars an appeal from a decree based on an award does not cancel the earlier provision.

The framers of the Code, in allowing the appeal under section 104 (*f*), acted in accordance with a very generally expressed opinion that such appeal was unnecessary and the two provisions of the Code cited are not, in our opinion, antagonistic, while the fact that the judgment and decree go with the order filing the award when that order is set aside does not, in our opinion, affect the question.

If the order filing an award is set aside, there is no award on which judgment and decree can be based, and under clause 20 (1) absence of proof of any ground such as is mentioned or referred to in "paragraph" 14 or "paragraph" 15 of the 2nd Schedule (for paragraph "clause" should apparently be read) is a condition precedent to passing an order filing the award. For these reasons our answer to the reference is in the affirmative.

RATTIGAN, J.—I agree that in every case an appeal lies under section 104 (*f*) of the Civil Procedure Code, from an order filing or refusing to file an award in an arbitration without the intervention of the Court, and that paragraph 21 of the 2nd Schedule cannot be re-arranged in the manner suggested by the learned Counsel who appeared for the respondent. But I regret that I cannot subscribe to the opinion that the two provisions of the Code are not antagonistic.

With every deference, I adhere to the opinion I expressed in the referring order to the effect that the two provisions are in direct conflict for all practical purposes. It is obvious from paragraph 21 (2) of the 2nd Schedule that a decree following a judgment pronounced thereunder was intended to be final and unassailable upon appeal. But it is equally clear that such decree merely follows, as a matter of course, when once the order filing the award has been passed under sub-clause (1) of paragraph 21, and that the result of allowing an appeal from the order filing the award is tantamount to allowing an appeal from the decree. Every objection that can possibly be urged by the person who objects to the filing of the award has, *ex hypothesi*, been heard and decided against him before the order filing the award is passed; the Court then proceeds to pass the latter order and immediately thereafter pronounces judgment and a decree follows as a matter of routine. I presume the Legislature had some object in view in enacting that "no appeal shall lie from such decree except in so far as the decree is in excess of or not in accordance with such award." But if so, its intentions are, to all intents and purposes, nullified by the provision in clause (*f*) of section 104 of the Code which allows in unqualified terms a right of appeal from every order filing an award, and thereby renders it possible for the appellant indirectly to assail a decree which was clearly intended not to be assailable directly. I accept the proposition that this right of appeal must be maintained, and that the Courts must give full effect to it, despite the fact that by so doing they will enable the appellant to attack a decree which was intended to be *sacro sanc*. If I may venture, with all respect and diffidence to say so, I am

(1) 33 C. 757; 3 C. L. J. 450; 10 C. W. N. 609.
(2) 27 P. R. 1910 Cr.; 22 P. W. R. 1910 Cr; 6 Ind. Cas. 736; 69 P.L.R. 1910; 11 Cr. L. J. 396.
(3) 1 P. R. 1908 (F. B.); 58 P. W. R. 1907.

inclined to agree with the argument that the intention of the Legislature was to allow an appeal from the order filing an award merely where such order dealt with the objections that the matter had not been referred to arbitration or that no award had in fact been passed, and I believe it was with reference to such matters that the consensus of opinion was that an appeal should be permitted. But as it stands, paragraph 21 (1) of the second Schedule goes far beyond this, and directs that the order filing the award is to be passed when the Court finds (1) that the matter has been referred to arbitration; (2) that an award has been made thereon; and (3) that no ground such as is mentioned in paragraph 14 or paragraph 15 is proved. We must take this paragraph as it stands, and we must also maintain the right of appeal given by clause (*f*) of section 104, but I think we must admit that by so holding we shall be compelled in many cases, of which the present is a type, to render nugatory the provisions of paragraph 21 (2) of the Code. This will be the indirect result of our decision, but I can see no way out of the difficulty, and my only object in adding these few lines is to make it clear that I fully recognize the consequences and that I am not able to accept the view that the two provisions of the Code are not antagonistic.

Appeal allowed.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 91 OF 1910.

May 11, 1911.

Present:—Mr. Justice Chitty and Mr. Justice N. Chatterjea.

JANKI NATH ROY CHOWDHURI AND OTHERS—DEFENDANTS—APPELLANTS

versus

PROMOTHA NATH ROY CHOWDHURY AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 23—Remand by lower Appellate Court—Second decision by first Court and lower Appellate Court—Subsequent appeal from remand order without appealing from second decree of lower Appellate Court—Appeal incompetent.

A suit was remanded by the lower Appellate Court on November 25th, 1909. The suit was decreed by the first Court on January 10th, 1910. The defendant appealed but the appeal was dismissed on July 13th, 1910. In the meantime on February 28th 1910, the defendant appealed from the order of remand dated November 25th, 1909, but did not appeal from the decree of the lower Appellate Court dated July 13th, 1910:

Held, that the appeal was incompetent and could not proceed.

Madhu Sudan Sen v. *Kamini Kanta Sen*, 32 C. 1023; 9 C. W. N. 895 and *Baikuntha Nath Dey* v. *Nawab Salimulla*, 12 C. W. N. 590; 6 C. L. J. 547, followed.

Uman Kunwari v. *Jurbandhun*, 30 A. 479; 5 A. L. J. 447; A. W. N. (1908) 195; 4 M. L. T. 162, dissented from.

Appeal from the order of the Sub-Judge of Mymensingh, dated November 25th, 1909, reversing the decree of the Second Munsif of Tangail, dated March 10th, 1909.

Babu *Bhupendra Chandra Guha*, for the Appellants.

Babu *Jogesh Chandra Roy*, *Mukunda Nath Roy* and *Naresh Chandra Sen Gupta*, for the Respondents.

JUDGMENT.—This is an appeal from an order of remand. It appears that the plaintiffs brought a suit against the defendants for a declaration for title to and from *khas* possession of certain lands. The judgment of the first Court was passed on the 10th March 1909 in favour of the plaintiffs. Against that decree defendants Nos. 1 to 3 appealed. On the 25th November 1909, the lower Appellate Court remanded the case purporting to do so under Order XLI, rule 23, but in form remanding it under Order XLI, rule 25. The suit was taken up by the Court of first instance and again decreed on the 10th January 1910, the decision again being in favour of the plaintiffs.

Defendants Nos. 1 to 3 filed an appeal against that decision. We are not given the precise date of the filing of that appeal; but on the 13th July 1910, the lower Appellate Court decided the case by dismissing that appeal. On the 28th February 1910, that is, between the date of the second decree of the Court of first instance and the date of the decree of the lower Appellate Court, the present appellants preferred this apppeal to this Court.

A preliminary objection has been taken that this appeal cannot proceed. The respondents rely upon the case of *Madhu Sudan Sen* v. *Kamini Kanta Sen* (1). That suit was decided under the Civil Procedure Code of 1882; but in this respect there seems to be no difference between the old Code and the new. There the late Chief Justice remarked, "If a party desire to avail himself of the privilege

(1) 32 C. 1023; 9 C. W. N. 895.

conferred by section 588 in relation to an order of remand he ought to do so before the final disposal of the suit. He cannot be permitted to wait until after the final disposal of the suit and then to appeal against the interlocutory order without appealing from the decree in the suit." This decision was followed by Mr. Justice Stephen and Mr. Justice Mookerjee in the case of *Baikuntha Nath Dey* v. *Nawab Salimulla Bahadur* (2). Mr. Justice Mookerjee remarked that, "when a litigant has the right to choose between two remedies which are not co-existent but alternative, he may select and adopt one as better adopted than the other, to work out his purpose; but once he has made his choice, and adopted one of the alternative remedies, his act at once operates as a bar as regards the other and the bar is final and absolute." That is the principle upon which this Court has acted in disallowing such appeals as the present. It is true that the Allahabad High Court has taken a different view in the case of *Uman Kanwari* v. *Jarbandhan* (3). But the decisions of this Court are binding on us in preference to those of the Allahabad High Court. Since the decision of the case reported in *Uman Kunwari* v. *Jarbhandhan* (3) this Court has again taken the same view in the case of *Mackenzie* v. *Narsingh Sahai* (4). It is true, however, that that case is not precisely in point, as the question there was of an appeal from a preliminary decree in a partition suit after the final decree had been passed. The case of *Palani Chetty* v. *Rangiadoss Naidu* (5), which has been cited to us, is not in point, and it may be remarked that the decision at which the learned Judges in that case arrived, has been disposed of by the enactment of section 105 of the Civil Procedure Code of 1908. The second clause to that section does not meet the present case but applies rather to the converse case.

Then, following those decisions of this Court to which we have referred, we allow the preliminary objection and dismiss this appeal with costs, the hearing-fee being assessed at two gold *mohurs*.

Appeal dismissed.

(2) 12 C. W. N. 590: 6 C. L. J. 547.
(3) 30 A. 479; 5 A. L. J. 447; A. W. N.(1908) 195; 4 M. L. T. 162.
(4) 1 Ind. Cas. 413; 36 C. 762; 10 C. L. J. 113.
(5) 32 M. 83; 4 M. L. T. 479; 1 Ind. Cas. 746.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 128 OF 1911.

May 17, 1911.

Present:—Mr. Justice Rattigan and Mr. Justice Shah Din.

Lala RAM NARAIN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Dr. RAM KISHEN AND OTHERS—DEFENDANTS—RESPONDENTS.

Company—Director or manager—Acts bona fide done—Liability—Chairman, position of—Suit for damages, against chairman, when lies—Internal management of Company's affairs—Court's power to interfere—Companies Act (VI of 1882), s. 92—Declaratory suit—Declaration of no practical use to plaintiff—Civil Procedure Code (Act V of 1908), s. 99, O. I, rr. 5, 10 (3)—Corporate body cannot be made co-plaintiff without its consent—Right of share-holders to sue in Company's name—Misjoinder of causes of action and parties—Defendants not prejudiced by misjoinder—Practice—Appeal.

Acts *bona fide* done by a Director or Manager of a Company are valid notwithstanding any defect that may afterwards be discovered in his qualification, and this not only between the Company and outsiders but also between the Company and its members.

A Chairman who presides over a meeting of a Company is neither wholly a ministerial officer nor wholly a judicial officer; his duties are of a "mixed nature," and he is not liable to be mulcted in damages, if, acting *bona fide* according to the best of his judgment and without malice, he erroneously excludes a share-holder from voting and also declares him to be ineligible as a Director of the Company.

A share-holder, who has been wrongfully refused the right of voting or of election as a Director, cannot maintain an action for damages against the Chairman of a Company without alleging and proving that the latter was actuated by malice in ruling against him. In such cases, the mere deprivation of a man's legal right does not entitle him to damages.

Whether a certain person was or was not a qualified Director, whether or not a certain person was qualified to act as Chairman of a general meeting, and whether certain persons were or were not duly elected as Directors of a Company, are matters which relate exclusively to the internal management of a Company's affairs. With such matters the Court declines to deal at the instance of any person other than the Company itself, unless there be something illegal, oppressive, fraudulent or *ultra vires* on the part of the Company *qua* Company, or on the part of the majority of the Company, so that they were not fit persons to determine it. People ought as far as possible to be allowed to manage their own affairs without interference by a Court of law.

A declaration which is of no practical use to plaintiff ought not to be granted.

Under rule (3) of Order II, Civil Procedure Code, no person (including a corporate body) can be made a plaintiff without his (or its) consent which means, *consent expressly given*.

It is a general rule that an individual share-holder of a Company is not competent to make use of the name of the Company as plaintiff in an action and the rule is similar with regard to a number of share-

holders. If they institute a suit in the name of the Company they must show that they have been authorised by a majority at a general meeting of the Company to do so, or that they have exhausted all reasonable means of obtaining the institution of the suit by the Company or that the case is one of urgency, in which latter event they institute the suit at their peril and subject to their being able to satisfy the Court that they have the support of the majority.

Therefore, where a share-holder used the Company's name without its authority as a co-plaintiff and there was no urgency or justification for his so doing, the Court struck out the name of the Company as a co-plaintiff.

The mere fact that the relief prayed for does not affect each defendant equally does not render the frame of a suit bad on the ground of misjoinder. But even where a suit is bad for misjoinder but there is no material prejudice to the defendants on the merits, an Appellate Court will not reverse the decree of the lower Court on this technical ground.

Appeal from the order of the District Judge, Amritsar, dated the 23rd January 1911, decreeing plaintiffs' claim in part.

Messrs. *Grey* and *Beechey*, for the Appellants.

The Hon'ble Mr. *Shadi Lal* and Mr. *Parker*, for the Respondents.

JUDGMENT.—On the 19th March 1910, plaintiff No. 1, Lala Ram Narain, filed a plaint in the Court of the District Judge of Amritsar and in this plaint he complained of certain wrong done to him as a share-holder of the Amritsar Cotton Mills Company Limited, at the annual general meeting of the members of that Company which was held on the 27th February 1910. The said plaint runs as follows:—

"1. That the plaintiff, Lala Ram Narain, is and has for some years been, a registered share-holder of the Amritsar Cotton Mills Company, the Head Office of which is at Amritsar, owning in his own right 81 shares and was the registered share-holder and owner of such shares, on the 27th February, 1910 when the annual ordinary general meeting of the share-holders was held at Amritsar.

"2. That the plaintiff, Lala Ram Narain, was present at the said meeting and had come to vote at such meeting and with that view, in accordance with Article 59 of the Articles of Association, had previously deposited, at the registered office of the Company more than 48 hours before the meeting, 145 proxies comprising 1082 votes, of which a list is herewith appended, and thus the said plaintiff was in possession of 1082 votes under the proxies and 33 votes under his own shares which 1125 votes he intended to use at the meeting.

"3. That the defendant No. 1, Dr. Ram Kishen, acted as Director and Chairman at the said meeting though he was not duly qualified to act as such and was not even a Director of the Company by the reason of the facts (*a*) that he was then holding, and for some time had been holding, an office of profit, *viz.*, that of Medical Officer drawing a salary of Rs. 300 per annum under the Company, and was thus under Article 82 incapable of acting as Director, and (*b*) that his son, Sri Kishen, who is joint with him in food and estate as a member of a joint Hindu family, was also holding an office of profit *viz.*, that of Engineer on a salary of Rs. 200 per mensem, under the Company.

"4. That at the said meeting the plaintiff, Lala Ram Narain, was not permitted by defendant No. 1, Dr. Ram Kishen, to vote either in respect of his own shares or the proxies held by him, and was, under defendant No. 1's order as Chairman, excluded from taking part in the meeting, and that the total number of votes held by him in his own right and under the proxies greatly exceeded the total number of votes held by the other voters present at the meeting, many of whom also were willing to vote with the plaintiff, and that, by the unlawful and unwarranted action of the said defendant No 1, the plaintiff was deprived of his rights, and resolutions were passed at the meeting contrary to his wishes and that of the majority of the share-holders.

"5. That at the said meeting the plaintiff, Lala Ram Narain, was put up for election as a Director and duly seconded, but the defendant No. 1 unlawfully and unwarrantably ordered that the said plaintiff's election could not take place giving as a reason that the said plaintiff did not hold the requisite number of shares, which was not a fact, and illegally prevented the said plaintiff from being elected as Director whereupon defendants Nos. 2, 3 and 4 were wrongly and invalidly elected and the said plaintiff was also wrongly excluded from taking part in the voting.

"6. That but for the fact that defendant No. 1, Dr. Ram Kishen, was in the Chair and unlawfully and wrongly prevented plaintiff from voting and from being put up for election, the plaintiff, Lala Ram Narain,

would have been elected a Director and the election of defendants Nos. 2, 3 and 4 would have been passed at the meeting and as a consequence the proceedings and resolutions passed at the meeting of 27th February and especially the election of defendants Nos. 2, 3 and 4 are null and void.

"7. That the defendants Nos. 1—8 are professing to be, and to act, as Directors of the said Company whereas the Board of Directors, for the reasons aforesaid, is not duly constituted and the defendants Nos. 1, 2 3 and 4 are not legally qualified and elected Directors and cannot act as such, and that the defendants Nos. 1 to 8 are intending unlawfully to carry out the resolutions passed on the 27th February at the aforesaid meeting and to pay dividends at the rate of 6 per cent. per annum to the share-holders.

"8. That the defendants Nos. 1 to 8 have been given notices of suit and warned against carrying out the resolutions of 27th February and against acting as Directors, but they, nevertheless, have not heeded the notices.

"9. That the cause of action arose on the 27th February 1910 (and subsequently) at Amritsar.

"10. That plaintiff values his claim for the declaratory decree and injunction mentioned below at Rs. 3,000 and his claim for damages at Rs. 2,500, total value of suit for jurisdiction and for purposes of Court fee being Rs. 5,500.

"11. That it is prayed that a decree be passed (1) declaring that the resolutions passed at the meeting of the share-holders on the 27th February and, in particular, the resolutions authorizing the payment of dividends to the share-holders and electing defendants Nos. 2, 3 and 4 as Directors, and the proceedings of the meeting excluding the plaintiff from voting and from being elected as Director are null and void, and that an injunction be issued to the defendants Nos. 1 to 8 restraining them, or such of them as the Court may order, from acting as Directors and from carrying out the resolutions aforesaid and paying the dividends, and that the plaintiff, Lala Ram Narain, may be awarded the sum of Rs. 2,500 as damages against defendant No. 1, Dr. Ram Kishen, or such defendants as may be held liable to plaintiff for the injury done to him on the facts above stated, and that the costs of the suit may be awarded to plaintiff and such further or other relief as the plaintiff may be found entitled to.

"I, Ram Narain, plaintiff, state that the facts stated above in paragraphs Nos. 1, 2, 3, 4, 5, 6, 7, 8, 9, 10 are true to my knowledge.

"(Sd.) RAM NARAIN,
"(Sd.) H. BEECHEY,
Counsel for plaintiff."

It is admitted that this plaint was signed and verified by Lala Ram Narain alone and that it was on his own initiative, and without any reference to the Directors of the Company or to the share-holders of the Company, that the name of the Company was added as a co-plaintiff. With this plaint Lala Ram Narain presented an application (through his Counsel, Mr. Beechey) in which he pointed out that the "real voice" of the Company was on plaintiff's side and that the latter was suing for himself, but also in reality for the Company and the majority of the share-holders. Plaintiff, therefore, prayed in this application that the Court might be pleased, under Order I, rule 8, of the Civil Procedure Code, to permit him to sue on behalf of the aforesaid share-holders and the Company and to give notices as required by the said rule." Plaintiff further added that "if the Court be not pleased to allow the suit to proceed at the instance of the Company it may be pleased to make the Company a defendant along with the others."

The persons who were made defendants in the suit were the Directors of the Company each in his individual capacity.

Upon the said application the District Judge passed the following order:—"Under Order I, rule 8, Civil Procedure Code, I appoint plaintiff to sue on behalf of the 145 share-holders whose proxies he held for the meeting of the Company on the 27th July 1910, and also on behalf of the Company. Notice to such share-holders and the Company to be given by advertisement in three consecutive issues of the "Tribune" and "Hindustan" newspaper, and in one issue of the "Punjab Government Gazette." This order was dated the 19th March 1910.

The defendant Directors, both by separate petition and in their written statement, took exception to the impleading of the Company as a co-plaintiff. They pointed out that under Article 74 of the Company's Articles of Association it was only the Directors of the

Company who could sue or be sued in the name of the Company and that the plaintiff had no authority from the Company to use its name as a co-plaintiff. Of the 145 share-holders to whom notice had been issued under Order I, rule 8, eighteen applied to the Court to be made co-plaintiffs and their prayer was granted. The District Judge, by his order, dated the 21st May 1910, held that the plaintiff, Ram Narain, was justified in impleading the Company as a co-plaintiff inasmuch as on the allegations in the plaint the interests of the Company were on the same side as his, and that it was not necessary for the plaint to be signed and verified by the plaintiff Company as well as by plaintiff No. 1 [*Chandi Mal* v. *Dewa Singh* (1)]. The suit, therefore, proceeded with Lala Ram Narain as plaintiff No. 1, the Amritsar Cotton Mills Company Limited, as plaintiff No. 2 and various share-holders as plaintiffs Nos. 3—20. In addition to this plaintiff No. 1 was, under the order of the District Judge, dated the 19th March 1910, suing on behalf of the remaining share-holders in whose names he held proxies for the meeting of the 27th February 1910.

In addition to pleading that Lala Ram Narain was incompetent to implead the Company as a co-plaintiff, the defendant-Directors pleaded that (1) there was a misjoinder of parties and causes of action; (2) that the claim for damages against defendant No. 1 was personal to plaintiff No. 1; (3) Ram Narain's shares were in pledge with the Allahabad Bank since 1907, and that he was, therefore, not in full enjoyment of his rights as a share-holder on the 27th February 1910; (4) some of the proxies held by plaintiff No. 1 were invalid and he had no right to make use of 33 of his own votes; (5) defendant No. 1 was the lawful Chairman of the meeting and plaintiff No. 1 had accepted him as such; (6) the resolutions passed at the meeting were perfectly valid and good; and (7), plaintiff No. 1 was ineligible as a candidate for a Directorship as his shares were in pledge with the Allahabad Bank and nonetheless so because the Bank had, after the closing of the Company's books for transfer purposes, notified the Secretary of the discharge of the said lien. Defendants further generally pleaded that plaintiff No. 1 had suffered no loss and was not entitled to any relief. The District Judge, by his order of the 21st August 1910, to which we have already referred, held that there was no misjoinder of persons or causes of action, "inasmuch as the legality or illegality of the resolutions passed at the general meeting which is of the essence of the suit as a matter in which both the Company and the share-holders are equally interested and in which both alike are entitled to relief as against those whose wrongful action was the cause of such illegality." In this order he further held that "if the Chairman of the Board of Directors so misconducts the proceedings of the General Meeting of the Company as to invalidate all the resolutions passed at that meeting, the Company has an obvious cause of action against the Chairman and the other Directors who support him."

Issues Nos. 1 and 2 having thus been determined, the District Judge proceeded with the trial of the case upon the other issues which were as follows:—

"(3) Are the proceedings of the meeting of the 27th February 1910, null and void for reason of the facts (*a*) that the meeting was not duly held and convened having been presided over by a person who was not competent to so preside? (*b*) that the plaintiff (*i.e.*, Ram Narain) was improperly excluded by the Chairman from voting or taking part in the proceedings?

(4) Is plaintiff entitled to (*a*) the declaration sought in paragraph 11 of the plaint, and (*b*) to any and if so, what damages?

After taking the evidence of the parties, the District Judge held (1) that the Chairman, Dr. Ram Kishen, was not disqualified under Articls 82 of the Articles of Association, from being either a Director or the Chairman of the meeting simply because prior to his election as such Director, he held the post of Medical Adviser to the Company at a fixed salary of Rs. 300 *per annum*, or because his son Sri Kishen, with whom he was not a partner, held the post of Engineer to the Company on a salary of Rs. 200 *per annum*; (2) that whether or not at the date of the meeting the lien of the Allahabad Bank upon Ram Narain's shares had been duly discharged, the pledge of such shares did not amount to a "transfer," and left the owner of the share in full enjoyment of his rights as a share-holder, and that consequently even if there had been no discharge of the lien, Ram Narain was entitled to vote at

(1) 48 P. R. 1896.

the meeting and was eligible for the Board of Directors; (3) that there was no proof that Ram Narain would have been elected a Director had his name been submitted to the meeting; (4) that consequently Ram Narain was not entitled to a declaration that the election of the three Directors at that meeting was null and void, or to an injunction restraining the latter from acting as such Directors; (5) that the Chairman acted *bona fide*, though erroneously, in declaring that Ram Narain was not entitled to vote or to be proposed as a candidate for a Directorship, and (6) that Ram Narain was, therefore, entitled merely to nominal damage against the said Chairman Dr. Ram Kishen. The District Judge accordingly dismissed the suit in respect of the prayer for declaration and injunction, but granted Lala Ram Narain a decree for one *pie* only as against Dr. Ram Kishen, defendant No. 1. He further directed that Lala Ram Narain and Dr. Ram Kishen should bear their own costs, but that the former should pay the cost of the remaining defendants.

From this decree Lala Ram Narain (joining the Company as a co-appellant) and Dr. Ram Kishen have both appealed, and we have heard the case argued at very considerable length by the learned Counsel who appeared on their respective behalfs. Before proceeding to deal with these arguments, we may at once note that Mr. Grey for the appellant, Lala Ram Narain, frankly admitted that it was not the intention of his client to impeach in any wise the acts *bona fide* done during the last year by any of the Directors of the Company whether such Directors were or were not duly elected at the meeting of the 27th February 1910. Both Mr. Grey and Mr. Beechey assured us that Lala Ram Narain had no desire to embarrass the Company by challenging any of the action, of such Directors, provided, of course, there had been no fraud or other misconduct on their part, and that their client and his friends accepted as entirely valid and binding everything done by these Directors in the *bona fide* discharge of their duties, although they may not have been legally elected to their posts as Directors. This undertaking on the part of Ram Narain renders it unnecessary for us to deal at length with this aspect of the case, but we may observe, in passing, that it is well-established law that the acts *bona fide* done by a Director or Manager are valid, notwithstanding any defect that may afterwards be discovered in his qualification, and this not only betweeen the Company and outsiders but also between the Company and its members section 92 of the Indian Companies Act, 1882. ["The Laws of England" Volume 5, pages 214, 241, *Dawson* v. *African Consolidated Land and Trading Company* (2); *British Asbestos Company* v. *Boyd* (3) and Article 80 of the Company's Article of Association.]

A number of minor points, which were urged more or less seriously in the Court of the District Judge, have been dropped in this Court, and the only questions upon which we are now asked to give a decision are the following :—

(1) Was it competent to Lala Ram Narain to implead the Company as a co-plaintiff, with himself against the wishes of the Directors and without the express authority of a meeting of the share-holders?

(2) If the Company was wrongly impleaded as such co plaintiff, should not its name be struck out as such plaintiff? If so, can any decision be given on the merits of the case which will be binding on the Company as such?

(3) Is the frame of the suit bad on the ground of misjoinder of persons and causes of action, and, if so, what are the consequences of such misjoinder?

(4) Was defendant No. 1, Dr. Ram Kishen, disqualified from acting as Director of the Company and as Chairman of the meeting held on the 27th February 1910? If so, are the whole of the proceedings of that meeting null and void, so far as concerns the election of Directors?

(5) Was Lala Ram Narain on the date of the said meeting not qualified to vote as a share-holder or to be proposed for election as a Director? If he was duly qualified in both respects, was the election of Sardar Bhagwan Singh, Sardar Buta Singh and Rai Bahadur Gagar Mal, as Directors, invalid owing to the ruling of the Chairman that Lala Ram Narain was not eligible for the Board of Directors ?

(2) 77 L. T. 392; 67 L J. Ch. 47; 46 W.R 132; (1898) 1 Ch. 6.

(3) (1903) 2 Ch. 439; 73 L. J. Ch. 31; 88 L. T. 703, 51 W. R. 667; 11 Manson 88.

(6) Does a claim for damages lie against defendant No. 1, in any case?

(7) To what relief, if any, is plaintiff No. 1 entitled?

We find it unnecessary, in the view that we take, to give any decision upon the third question. We are, however, inclined to hold that the suit was not bad on the ground of misjoinder either of persons or of causes of action. All the plaintiffs, including the plaintiff-Company were interested in the cause of action which accrued to Ram Narain when he was declared not to be qualified either to vote as a share-holder or to be proposed for election as a Director, and they all are equally interested in the further question whether the election of Directors at the meeting of the 27th February 1910 was good or invalid. On the other hand, the various defendants were, as Directors of the Company, interested in plaintiff's cause of action as stated in the plaint (Order I, rule 3, and Order II, rule 3) and the mere fact that the relief prayed for did not affect each defendant equally would not render the frame of the suit bad (Order I, rule 5). Furthermore, even if the suit had been open to objection on the ground of misjoinder, there has been no material prejudice to the defendants on the merits, and the decree of the District Judge could not be reversed merely on this technical ground (section 99, Civil Procedure Code).

But we need not discuss this point at length as, in our opinion, the appeal of plaintiff, Lala Ram Narain, must fail on other grounds.

In the first place, we must hold that the Company was unjustifiably impleaded as a co-plaintiff. Lala Ram Narain admittedly had not the authority of the Company for impleading it as a co-plaintiff and for putting its name on his plaint in such capacity. The application which he filed with his plaint makes this clear and the want of authority is not denied. Now no person, and *a fortiori* no incorporated Company, can be made a plaintiff without his or its consent (Order I, rule 10 (3), Civil Procedure Code, and this we take to mean *consent expressly given*. In the present case, it is urged that the Company as such had notice of the suit and that as the Company did not repudiate the action brought in its name, it must be taken to have "consented" to it. But "consent" in this sublause means, consent given expressly, and we know that the Directors, who, under Article 74 of the Articles of Association, in the ordinary course of things alone are entitled to sue or be sued in the name of the Company, immediately repudiated this action on behalf of the Company. It is a general rule that an individual share-holder is not competent to make use of the name of the Company as a plaintiff in an action, and the rule is the same with regard to a number of share-holders. Before they can institute a suit in the name of the Company, such share-holders must show either that they have been authorised by the majority at a General Meeting of the Company to institute the suit or that they have exhausted all reasonable means of obtaining the institution of the suit by the Company, or that the case is one of urgency, in which latter event they institute the suit at their peril and subject to their being able to satisfy the Court that they have the support of the majority. (See Buckley's Companies Act, 7th Edition, pages 522-523; *Marshall's Valve Gear Company* v. *Manning Wardle and Company* (4); The Laws of England, (Volume 5, pages 318-319]. In the case of *La Compagnie de Mayville* v. *Whitley* (5), a Director of a Company, Mr. Seal, brought an action in the name of the Company to prevent certain of his co-Directors from carrying out a resolution appointing a certain third person Director in his place and appointing Solicitors and Bankers. Seal, therefore, obtained a memorandum signed by five of the seven signatories to the memorandum of association authorizing him to use the name of the Company in his proposed action. Subsequently, a meeting of the Company was held and a resolution passed to have the name of the Company struck out as used without authority. Upon these facts, and upon the motion to strike out the name of the Company as plaintiff, Lindley, L. J., observed (at page 803): "Mr. Seal had no authority whatever to use the name of the Company in their proceedings. If what was done on the 24th February is valid, the appointment of the Solicitor is valid and Mr. Seal could not possibly have any authority at all. But he says 'I brought this action and served this writ before that meeting when all I knew was the

(4) (1909) 1 Ch. 267; 100 L. T. 65; 15 Manson 379; 25 T. L. R. 69; 78 L. J. Ch. 46.

(5) (1896) 1 Ch. 788; 65 L. J. Ch. 729; 74 L. T. 441; 44 W. R. 568.

irregular meeting of the 14th February'. But what authority has he even in that case? He has not got the authority of any meeting of the share-holders. He has got the authority of five out of the seven subscribers, it is true; got by him, I suppose, by sending round and asking them for their sanction. But that authority seems to me not worth the paper it is written upon. If authority is wanted to use the name of the Company, it must be authority got from the proper quarter – either from the Directors or from the share-holders convened for the purpose. This is neither one nor the other." Kay, L. J., added, "The proper course [as is pointed out in *Fooss* v. *Harbottle* (6) and has been held ever since], in the case of any matter which relates to the internal management and trade affairs of a Company, is to call a meeting, and that is practically the only remedy which this Court allows a Director or share-holder of a Company to take; otherwise, we should have Companies torn to pieces by litigation of this kind. The Court has always set itself resolutely against such litigation."

Mr. Beechey, in support of plaintiff Lala Ram Narain's action in impleading the Company as co-plaintiff, relied upon the observations of Jessel, M. R., in the case of *Pendar* v. *Lushington* (7), but we do not think that that very learned Judge's *dicta* afford him any support. The Master of the Rolls was there dealing with a case in which it was imperative that action should be taken without delay in order to prevent Directors from acting in a certain way. The matter was one of which a share-holder, as such, could not complain in his individual capacity owing to the well-established rule laid down in the leading case of *Foss* v. *Harbottle* (6) and as a result the action was brought, though without express authority, in the name of the Company. In the circumstances, the Master of the Rolls held that he was not called upon to strike out the name of the Company *at the stage of the proceedings*. He observed, "the Company being a proper plaintiff and the question being one of which the Company might complain, the majority of the Company *being of that opinion and there not being time to call a general meeting*, what is the Court to do? Is it to refuse justice altogether and say, it being a case for an injunction, that the Directors are to have for several weeks (for the Articles require three weeks notice of a general meeting) the power of destroying the property and rights of the share-holders? It would be an absolute denial of justice, and it appears to me that the Court of Appeal in the case of *Macdougall* v. *Gardiner* (8) have deliberately taken that view. James, L. J., says, any one of the share-holders might have filed his bill in the name of the Company, and then if the Directors had said, you are not the Company, the majority do not act with you but with us, the Court would, as it has done in other cases, have taken the means of ascertaining which party, the plaintiffs or the defendants, really represent the majority, and I suppose the Lord Justice means that the Court may direct a meeting to be held. But, what is the Court to do in the meantime *if it is satisfied that a real majority is at the time in favour of bringing the action*? Surely, the Court ought to grant the injunction in order to keep things *in statu quo on the assumption that the majority at the former meeting have not changed their mind*?

. . . . . I think I ought not to take away the name of the Company on the record, but to let the summons stand over, leaving either party to call a meeting to decide whether the Company's name is to be sued or not."

Now, it is quite clear that the Master of the Rolls did not intend in this case to depart from the general rule as above enunciated. On the contrary, he granted a temporary injunction because he saw no reason to doubt that the plaintiff had the majority of share-holders behind him. The former meeting had proved that this was the case and it was upon this assumption, and also because the matter was one of urgency, that the temporary injunction was granted. It is also to be noted that the Master of the Rolls directed the summons to stand over in order that a general meeting of the Company might be called to consider the question. The facts of the case to which we have referred are entirely different from those in the case before us. Here, there is no question of urgency and plaintiff, Lala Ram Narain, cannot point to any meet-

(6) 2 Hare 461.
(7) 6 Ch. Div. 70; 46 L. J. Ch. 317.
(8) 1 Ch. D. 13; 45 L. J. Ch. 27.

ing in which the majority of the share-holders have expressed an opinion favourable to the institution of the present suit. As we have already remarked, circumstances may exist in which it is competent to one or more share-holders to use the name of the Company in a suit against the Directors of the Company, but those cases are exceptional, and in the present case we can find no justification for the use of the Company's name as a co-plaintiff. There is no urgency, and it was open to plaintiff as a share-holder to convene a meeting of the Company to authorize his use of the Company's name. He has not availed himself of this opportunity, despite the fact that the defendants-Directors challenged his right to make such use of the Company's name, and that, under the provisions of the Civil Procedure Code, no "person" (including a corporate body) can be made a plaintiff without his (or its) consent.

We must accordingly strike out the name of the Company as a co-plaintiff.

Obviously, in view of the relief sought it would be idle to grant a decree as regards the declarations and injunction for which he prays, unless the Company is a party to this suit; otherwise, any such declaration or injunction would be ineffectual against the Company and, therefore, practically valueless. For this reason, we would have been prepared to act under Order I, rule 10 (2), of the Civil Procedure Code and add the name of the Company as a co-defendant in the suit, were it not that (for reasons to be given) we do not feel called upon to do so, as, in our opinion, plaintiff's claim must fail in respect of all the reliefs for which he prays.

Plaintiff, Lala Ram Narain, in his appeal before us, asks for the following reliefs:—

(1) a declaration that on the 27th February 1910 he was entitled to vote at the general meeting, and that he was qualified to be a Director of the Company;

(2) a declaration that the election of defendants Nos. 2, 3 and 4 was null and void, because (*a*) Dr. Ram Kishen, the Chairman of the Meeting, was not qualified to act as such;

(*b*) plaintiff was wrongfully excluded from offering himself for election;

(3) an injunction to restrain the defendants-Directors from acting as such Directors;

(4) substantial damages against defendant No. 1, Dr. Ram Kishen, for having unlawfully deprived plaintiff of his legal rights as a duly qualified share-holder and candidate for a Directorship.

We shall deal with these points *seriatim*.

(1) It is admitted that plaintiff is *now* entitled to vote at all Meetings of the Company and is fully qualified to be a Director of the Company, if he is elected. A declaratory decree affirming his rights on the 27th February 1910 would, therefore, be of no more than academical interest, unless it is further held that by reason of his exclusion from voting and from offering himself as a Director all subsequent acts of the Directors who were then elected, are invalid and that the election of these Directors must be cancelled. With the latter question we shall deal presently, but we may anticipate by saying that, in our opinion, that is a matter which it is not open to the plaintiff as a share-holder to challenge in the Courts. As to the other question; we need say no more than that plaintiff's learned Counsel have stated that it is not plaintiff's intention to contest the validity of acts done *bona fide* by such Directors, merely on the ground of the irregularity in connection with their election. The District Judge has, in the exercise of his discretion, refused to grant this declaration; and in view of the fact that it would be of no practical use to plaintiff, we see no reason to interfere with his order.

(2) and (3) The question whether Dr. Ram Kishen was or was not a duly qualified Director; whether he was qualified to act as Chairman of the General Meeting, and whether defendants Nos. 2, 3 and 4 were or were not duly elected Directors of the Company, are matters which, in our opinion, relate exclusively to the internal management of the Company's affairs. With such matters the Court declines to deal at the instance of any person other than the Company itself[*Foss* v. *Harbottle* (6); *Mozley* v. *Alston* (9)

(9) 1 Ph. 719; 4 Railw. Cas. 636; 16 L. J. Ch. 217; 11 Jur. 315.

Macdougall v. *Gardiner* (8)]. In the words of James, L. J., in the case last cited,—"Nothing connected with internal disputes between the share-holders is to be made the subject of a bill by one share-holder on behalf of himself and others, unless there be something illegal, oppressive or fraudulent;—unless there is something *ultra vires* on the part of the Company *qua* Company, or on the part of the majority of the Company, so that they are not fit persons to determine it; but every litigation must be in the name of the Company if the Company really desire it. Because there may be a great many wrongs committed in a Company, there may be claims against Directors, there may be claims against officers, there may be claims against debtors; there may be a variety of things which a Company may well be entitled to complain of but which, as a matter of good common sense, they do not think it right to make the subject of litigation: and it is the Company, as a Company, which has to determine whether it will make anything that is a wrong to the Company, a subject-matter of litigation, or whether it will take steps itself to prevent the wrong from being done. If the majority of the Company really are in favour of any particular share-holder who has been interfered with improperly by misconduct of a Director, by misconduct of a Chairman, by miscarriage of a Meeting or of certain share-holders at a particular date—if the Company think that any share-holder has anything which ought to be made the subject of complaint, there is never any difficulty whatever arising from the apparent possession of the seal by the Directors, or by any such cause, in filing a bill in the name of the Company if the majority of the Company desire it to be filed. . . . . , . . the whole question comes back to a question of internal management; that is to say, whether the meeting ought or ought not to be held in a particular way; whether the Directors ought or ought not to have sanctioned certain proceedings which they are about to sanction; whether one Director ought or ought not to be removed, and whether another Director ought or ought not to have been appointed. If there is some one managing the affairs of the Company who ought not to manage them, and if they are being managed in a way in which they ought not to be managed, the Company are the proper persons to complain of that."

In the same case Melish, L.J., remarked—"Looking at the nature of these Companies, looking at the way in which their Articles are framed; and that they are not all lawyers who attend these meetings, nothing can be more likely than that there should be something more or less irregular done at them—some Directors may have been irregularly appointed, some Directors as irregularly turned out or something or other may have been done which ought not to have been done according to the proper construction of the Articles. Now, if that gives a right to every member of the Company to file a bill to have the question decided, then, if there happens to be one cantankerous member or one member who loves litigation, everything of this kind will be litigated; whereas, if the bill must be filed in the name of the Company, then, unless there is a majority who really wish for litigation, the litigation will not go on. . . . . In my opinion, if the thing complained of is a thing which in substance the majority of the Company are entitled to do or if something has been done irregulary which the majority of the Company are entitled to do regularly, or if something has been done illegally which the majority of the Company are entitled to do legally, there can be no use in having a litigation about it, the ultimate end of which is only that a meeting has to be called and then ultimately the majority gets its wishes. . . . . The majority are the only persons who can complain that a thing which they are entitled to do has been done irregularly . . . . In my opinion that is the rule to be maintained. Of course if the majority are abusing their powers and are depriving the minority of their rights, that is an entirely different thing and then the minority are entitled to come before this Court to maintain their rights, but if what is complained of is something which the majority are entitled to do, has been done or undone irregularly, then, I think it is quite right that nobody should have a right to set that aside or to institute a suit in Chancery about it except the Company itself." [See also *Russell* v. *Wakefieled Waterworks Company* (10)

(10) 20 Eq. 474; 44 L. J. Ch. 496; 32 L. T. 685; 23 W. R. 887.

and *Cf. Alexandar's case* (11)]. In the present case there is no suggestion that the majority of the Company are abusing their powers or depriving plaintiff of his rights; on the contrary, his rights are now fully admitted and the sole question is whether the persons who were elected Directors at the meeting of the Company on the 27th Februany 1910 are to be allowed to retain their office, their election having been, according to plaintiff, brought about by irregularities or even illegalities. This, according to the authorities, is a matter solely for the Company to determine and it is not open to an individual share-holder to raise the question *suo motu* by proceedings in Court as remarked by Bowen, L. J in the case of *Harben* v. *Phillips* (12),—"No one can doubt that the Court ought not to interfere in the conduct of the Company's business further than is absolutely necessary. A meeting of the share-holders is at once looked to as the source from which help can come. People ought to be allowed as far as possible to manage their own affairs without interference by a Court of Law."

(4) The last question is whether, upon the assumption that p'aintiff was wrongly excluded from voting at the meeting of the 27th February 1910 and was erroneously declared by the Chairman to be ineligible as a Director of the Company, plaintiff, Lala Ram Narain, is entitled to claim damages against the said Chairman? It is not asserted, and there is no evidence to suggest, that the Chairman, Dr. Ram Kishen was actuated by malice in ruling against plaintiff in both respects at the said meeting. On the contrary, it is not denied that he acted *bona fide* and the proceedings prior to the meeting show that it was only after consultation with other Directors and due consideration that the Chairman arrived at the conclusion that plaintiff was disqualified both from voting and from being put up as a candidate for the Board of Directors That conclusion may have been right or it may have been wrong, but in deciding thequestion the Chairman apparently acted with perfect honesty and to the best of his abilities as Mellish, L. J., observed in the passage of his judgment above quoted,—"all those who attend Company Meetings are not lawyers" and mistakes are frequently made. Dr. Ram Kishen is not a lawyer and he gave his decision *bona fide* and without malice and we think it would be most inequitable to hold that he was, in the circumstances, liable to be mulcted in damages because Court of Law subsequently found that he had given a wrong decision upon a question of law which necessitated very lengthy arguments of learned Counsel for its elucidation. In connection with the question of damages in cases such as the present, reliance is sometimes placed upon the judgment of Holt, C. J., in the celebrated case of *Ashby* v. *White* (13), where it was broadly laid down *ubi jus ibi remedium*" and that the mere deprivation of a man's legal right entitles the latter to damages. No reference was made by learned Counsel on either side to this case, and, perhaps from the appellant's point of view, advisedly, as there can be no doubt that the broad principle there enunciated is not now accepted as entirely correct. The more correct view of the law is now admitted to be that propounded by Abbott. C. J., in the case of *Cullen* v. *Morris* (14). In the latter case the plaintiff claimed damages against the defendant as the High Bailiff of the City of Westminster for refusing the vote of the plaintiff at the election of a citizen for the City of Westminster. In charging the Jury, the Chief Justice said,—"Then if the plaintiff had a right to vote the question is, whether the action be maintainable under the circumstances of the case. On the part of the plaintiff, it has been contended that he has a maintainable right of action without at all referring to the motives by which defendant was influenced in rejecting his vote, and independently of the proof of any malicious intention on the part of the defendant. On the part of the defendant it has been contended that an action is not maintainable for merely refusing the vote of a person who appears afterwards really to have had a right to vote, unless it also appears that the refusal resulted from a malicious and improper motive, and that if the party act honestly and uprightly according to the best of his judgment he is not amenable in an action for damages.

(11) (1900) 2 Ch. 56; (1901) 70 L. J. Ch. 767; 8 Manson 392.

(12) 23 Ch. D. 14 at p. 37; 48 L. T. 334; 31 W. R 173.

(13) 2 Lord Raymond 938; 3 Id 320; 1 Smith L. C. 10th Ed. 231; 14 Howell St. Tr. 695.

(14) 20 R. R. 742; 2 Stark, 577.

I am of opinion that the law as it has been stated by the Counsel for the defendant is correct. The returning officer is, to a certain degree, a ministerial officer but he is not so to all intents and purposes, neither is he wholly a judicial officer his duties are neither wholly ministerial nor wholly judicial they are of a mixed nature. It cannot be contended that he is to exercise no judgment, no discretion whatsoever in the admission or rejection of votes the greatest confusion would prevail if such a discretion were not to be exercised. On the other hand, the officer could not discharge his duty without great peril and apprehension if, in consequence of a mistake, he became liable to an action. It has been urged that Lord Holt who, with great honour to himself, once filled this seat, intimated his opinion that the mere refusal of the vote to a person entitled to vote would give the party a right to sue the returning officer. Whether he ever did say so or not we do not certainly know, for the reports of that case are very imperfect. No one entertains a greater veneration for that learned Judge than I do, but if he did so express himself, I am bound to deliver my opinion that he was mistaken. The case alluded to [*Ashby* v. *White* (13)] had been tried by a Jury, and upon the face of the record the defendant was charged with malice, and when a writ of error was brought the record itself was conclusive as to the malice of the defendant since the Court could look at nothing beyond the record."

This ruling was cited and approved in *Ozer* v. *Child* (15), in which it was held that a returning officer was a *quasi* Judge, and as such not subject to an action for damages if he decides honestly and without malice, though erroneously, that a certain person is not entitled to a vote. Of course, in cases when the defendant is a *purely ministerial officer* and as such bound to accept the plaintiff's vote would be ground for an action for damages without any allegation of malice [See *Pickering* v. *James* (16)]. But a Chairman who presides over a Meeting of a Company is in no sense a purely ministerial officer; he has to decide, to the best of his judgment, all questions that arise at such meeting as to the validity or invalidity of certain resolutions, as to the right of persons to vote or as to their disqualification from exercising that right and various other difficult questions. He is, in the words of Abbott, C. J., "Neither wholly a ministerial officer nor wholly a judicial Officer and his duties are of a 'mixed nature.'" To hold that a person who is placed in this responsible position is liable to an action for damages at the instance of any party who can afterwards satisfy a Court of Law that a particular ruling on the part of the Chairman was erroneous, or that it resulted in such party being deprived of a right to which he was subsequently found entitled, would be tantamount to rendering it impossible for any person to accept the duties of a Chairman which are otherwise quite sufficiently onerous and difficult. Apart from authority, we could not possibly subscribe to any such proposition and we are glad to find that authority is entirely in favour of the view which we ourselves hold.

As a result of what has been said above, we dismiss the appeal of Ram Narain and we accept the appeal of Dr. Ram Kishen and dismiss plaintiff, Ram Narain's suit *in toto*.

As regards costs, we think the most equitable order to pass is that parties bear their own costs in this and the lower Court. While we have no doubt that Dr. Ram Kishen acted honestly and without any imporper motive, we are not prepared to say that he was correct in holding that plaintiff had "no voting right" at the date of the meeting. In our opinion both parties have much to urge in favour of their respective cases and both appear te have been acting thoroughly *bona fide*.

(15) 26 L. J. Q. B. 151.

(16) L. R. 8 C. P. 489; 42 L. J. Ch. 217; 29 L. T. 210; 21 W. R 786.

CALCUTTA HIGH COURT.

CIVIL RULE NO. 14 OF 1911.

March 31, 1911.

Present:—Mr. Justice Mookerjee and Mr. Justice Caspersz.

RASIK LAL KARMAKAR—PLAINTIFF—PETITIONER

versus

CHANDRA BHUSHAN SARMA—DEFENDANT—OPPOSITE PARTY.

Vendor and purchaser—Sale of land—Mutual covenants—Whether purchaser bound to pay purchase-money before vendor performs his agreement—Earnest-money, forfeiture of.

ADHAR CHANDRA *v.* RAM CHARAN.

A purchaser is not bound to pay the balance of the purchase-money till the vendor has put the property in the condition in which it is to be conveyed to him.

Therefore, where the vendor of certain property undertook to shift a door and to put up a fence and the purchaser undertook to pay the balance of the consideration within three months: *Held*, that the purchaser was justified in not paying the balance of the purchase-money until the vendor had carried out his part of the contract, and that the purchaser was entitled to get back his earnest-money as the vendor failed to perform what he had undertaken to do.

Rule against the decree of the Small Cause Court Judge of Howrah, dated September 22nd, 1910.

Babu *Manmotho Nath*, for the Petitioner.

Babu *Debendra Chandra Mallik*, for the Opposite Party.

JUDGMENT.—This rule was granted upon an application by the plaintiff in the Court below who had sued to recover earnest-money paid by him to the defendants on account of a transaction which subsequently fell through. On the 18th April 1909 the defendants agreed to sell to the plaintiff some immoveable property. The price was fixed at Rs. 1,100 and earnest-money was paid on that occasion to the extent of Rs. 51. The document contained mutual covenants. The vendors undertook to shift a door and possibly also to put up a fence to demarcate the land to be transferred from the land retained. The purchaser undertook to pay the balance of the consideration within three months to be applied for payment to a mortgage of the property. The plaintiff sued on the 14th July 1910 on the allegation that the defendants had neither altered the position of the door nor erected the fence. The defendants resisted the claim on the ground that the plaintiff had not paid the consideration within three months and that consequently under the terms of the contract, the earnest money had been forfeited. In our opinion, the plaintiff was not bound to pay the balance of the purchase-money till the vendors had put the property in the condition in which it was to be conveyed to him. The works to be carried out were manifestly essential for the proper and undisturbed enjoyment of the property by the purchaser. The plaintiff has given evidence to show that the door had not been altered and the fence had not been erected. There is no evidence adduced on behalf of the defendants to rebut the testimony. Under these circumstances, we must hold that the plaintiff was justified in not paying the balance of the purchase-money as the defendants had failed to carry out their part of the contract.

The result is that this rule is, made absolute and the decree of the Court below set aside. There will be a decree in favour of the plaintiff for Rs. 51. But there will be no order for costs either in this Court or in the Court below.

Rule made absolute.

CALCUTTA HIGH COURT.

CIVIL RULES NOS. 601 AND 641 OF 1911.

March 7, 1911.

Present:—Mr. Justice Mookerjee and Mr. Justice Caspersz.

ADHAR CHANDRA TURKAIT—OBJECTOR—PETITIONER

versus

RAM CHARAN MANDAL AND OTHERS—AUCTION-PURCHASERS—OPPOSITE PARTY.

Bengal Tenancy Act (VIII of 1885), s. 174—Sale in execution of rent decree—Deposit by judgment-debtor—Subsequent withdrawal of deposit—Previous purchaser, application by—Allegation that deposit made with his money—Fresh deposit allowed to be made by him.

A sale was held in execution of a rent decree, and the judgment-debtor made a deposit under section 174 of the Bengal Tenancy Act. Subsequently, the judgment-debtor made an application for leave to withdraw the deposit and thereupon the Court refused to set aside the sale. Then the present petitioner appeared and alleged that he had purchased the property long ago and that the deposit was made with his money. The Court dismissed his petition on the ground that he had no *locus standi*:

Held, that, in the interests of justice, the petitioner ought to be allowed to use the name of the judgment-debtor and to make a fresh deposit now within seven days from the arrival of the record in the Court below.

Rules against two orders of the Munsif of Barnipur, one dated January 24th, 1911, rejecting, on the ground that he has no *locus standi*, the application of the objector-petitioner, for the setting aside of the sale to the auction-purchaser of the immoveable properties of the judgment-debtor, the other dated January 25th, 1911, granting the application of the judgment-debtor to the withdrawal of the money deposited by him.

Babu *Harendra Krishna Mukerjee*, for the Petitioner.

Babu *Mohini Mohan Chatterjee*, for the Opposite Party.

JUDGMENT.—We are invited in this rule to set aside an order refusing to vacate a sale held in execution of a rent decree, on the 1st December 1910. On the 22nd December following, the judgment-debtor made a deposit under section 174 of the Bengal Tenancy Act. Notice was, thereupon, issued to the decree-holder as also, the auction-purchaser. Neither of them objected to an order under that section. But the Court refused to set aside the sale because meanwhile the judgment-debtor had petitioned for leave to withdraw the application and the deposit. The present petitioner thereupon appeared and objected. He alleged that he had purchased the property at a sale held in execution of a mortgage-decree on the 11th January 1907 and confirmed on the 14th February 1907, and that, although the deposit under section 174 had been made in the name of the judgment-debtor as required by the law, it had been made really with his money. The Court declined to inquire into the truth of the allegations of the petitioner and held that the petitioner had no *locus standi*. The result was that his application was dismissed. He thereupon obtained this rule with a view to set aside the order of the Court below.

It is clear that, as this case comes from the 24-Pergannahs, under section 170 of the Bengal Tenancy Act, it is not open to the petitioner to make an application to set aside the sale under Order XXI, rule 89,of the Civil Procedure Code of 1908. It is also plain that the petitioner is not entitled to apply under sectinn 174 of the Bengal Tenancy Act, because he is not the judgment-debtor under the decree in execution of which the property has beed sold. But if his allegation is true that it was his money which was deposited by the judgment-debtor, it is not competent to the judgment-debtor to resile from the position he had deliberately taken up, to withdraw the application and the deposit, and thus, in effect, to appropriate money which does not belong to him. We think, under these circumstances, that the petitioner is not wholly without a remedy, and that, in the interests of justice, he ought to be allowed to use the name of the judgment-debtor, and to make a deposit now, especially as neither the decree-holder nor the auction-purchaser has opposed the application for reversal of the sale. As he offers to do so, it is needless, for the purposes of the present application, to inquire whether the sum previously deposited in the name of the judgment debtor, was the money of the petitioner. The petitioner is satisfied if he gets an opportunity to make a fresh deposit of the amount required, within seven days from the arrival of the record in the Court below. If such de-deposit is made, the sale will stand cancelled. If it is not made, the sale will stand confirmed. The judgment-debtor will be at liberty to withdraw the sum previously deposited and if the allegation of the petitioner be true that it was his money which was deposited in the name of the judgment-debtor, he will obviously have his remedy in a separate action.

The result is, that this rule is made absolute, the order of the Court below set aside and the case remanded to the Court of first instance in order that the order of this Court may be carried into effect. There will be no order for costs.

It is conceded that this judgment will govern Rule No. 641 of 1911 which is also made absolute without costs.

Rules made absolute.

CALCUTTA HIGH COURT,
CIVIL RULES NOS. 5448 TO 5451 OF 1910.
March 28, 1911.
Present:—Mr. Justice Mookerjee and
Mr. Justice Caspersz.
THE MAHARAJA OF BURDWAN—
PETITIONER
versus
APURBA KRISHNA ROY—OPPOSITE
PARTY.

Civil Procedure Code (Act V of 1908), ss. 73, 115—Rateable distribution of assets—"Assets held by Court," meaning of—Execution sale—Assets held when whole of purchase-money is paid—Receiver—Application for execution—Subsequent leave obtained from Court, if valid—Rival decree-holders—One decree against judgment-debtors of other decree and other persons—Whether rateable distribution allowable—Revision—Refusal to exercise jurisdiction—Erroneous interpretation of law.

Till the whole of the purchase-money of property sold in execution of a decree has been deposited, it cannot be held that the assets are held by the Court and admit of rateable distribution under section 73 of the Civil Procedure Code and consequently, till the whole of the purchase-money has been deposited by the purchaser, it is open to the decree-holders to apply for execution.

Hafez Mahomed Ali v. *Damodar Pramanik*, 18 C. 242; *Ramanathan Chettiar* v. *Subramania Sastrial*, 26 M. 179; and *Arunachellam* v. *Haji Sheikh Meera*, 34 M. 25; 8 M. L. T. 226;1 M. W. N. 688; 7 Ind. Cas. 856, relied upon.

KAILASH CHANDRA v. AKHOY NARAIN SOW.

erroneous interpretation of the provisions of section 73 of the Code. It may be conceded, as ruled by the Judicial Committee, in *Amir Hassan Khan* v. *Sheo Bakesh Singh* (9) and *Muhammad Yusuf* v. *Abdul Rahman* (10), that it is not open to this Court to interfere in the exercise of its revisional jurisdiction merely because the decision of the Court below is erroneous in law. On the other hand, it cannot be seriously disputed that the authority to interfere in the exercise of our revisional jurisdiction is not taken away merely because the Court below has assumed or failed to exercise jurisdiction upon an erroneous construction of a statutory provision. The test to be applied in the case before us is, whether the Court below has refused to exercise the jurisdiction vested in it by law; it is immaterial that such refusal is based upon a misapprehension of the true effect of statutory provisions on the subject [*Vishrambhar* v. *Vasudev* (11); *Ross* v. *Pitambar* (12)].

The result, therefore, is that these rules are made absolute, and the order of the Court below discharged. The cases, will be remitted to the Subordinate Judge in order that he may deal with them on the merits under section 73 of the Code of 1908. The petitioner is entitled to his costs in this Court.

We assess the hearing-fee in each case at two gold *mohurs*.

Rule made absolute.

(9) 11 I. A. 237; 11 C. 6.
(10) 16 I. A. 104; 16 C. 749.
(11) 16 B. 708.
(12) 25 A. 509.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 1170 OF 1909.
May 5, 1911.
Present:—Mr. Justice Woodroffe and
Mr. Justice Carnduff.
Raja KAILASH CHANDRA GOJENDRA MOHAPATRA—DEFENDANT No. 1—APPELLANT
versus
AKHOY NARAIN SOW AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Landlord and tenant—Non-transferable occupancy-holding - Mortgage of holding—Subsequent sale of holding in execution of rent-decree obtained by co-sharer landlord—Subsequent private sale—Title—Right of auction-purchaser to dispute transferability of holding.

A non-transferable occupancy-holding was mortgaged to plaintiff. Defendant No. 1, a co-sharer landlord, subsequently purchased, in execution of a money-decree for rent, the interest of some only of the tenants. After that the tenants sold the holding to the plaintiff, the mortgagee. The plaintiff sued to recover possession:

Held, that the defendant No. 1 purchased only the right, title, and interest of the judgment-debtors whose representative he was, and that he could not raise the question of the transferability of the holding which could not have been raised by the tenants.

Appeal from the decree of the Sub-Judge of Midnapore, dated February 20th, 1909, affirming that of the Munsif of Dantun, dated December 22nd, 1907.

Babu *Tarak Chandra Chakravarti*, for the Appellant.

Babu *Bipin Behari Ghosh* (Senior), for the Respondents.

JUDGMENT.

WOODROFFE, J.— I see no ground for dissenting from the judgments of the lower Courts in this case.

The defendant No. 1, appellant, is a co-sharer landlord, who purchased, in execution of a money-decree for rent, the interest of some only of the tenants of the holding on the 15th July 1905. Previous to that date there has been a mortgage executed by the tenants in favour of the plaintiffs-respondents; and subsequently, on the 4th April 1906, the tenants, in order to discharge that mortgage, sold the holding to the plaintiffs-respondents. The defendant No. 1, appellant, got into possession under his auction-purchase. The plaintiff sued to recover possession by virtue of the sale to him by the tenants.

The only question in this case is, whether the defendant No. 1 who, according to his own case, has no title to the land at all, and relies upon the possession which he has obtained only by virtue of the sale, can be heard to say that the plaintiffs obtained no title because the holding is non-transferable. To my mind, the answer to that question, is this:

The defendant No 1, as purchaser in the execution-sale, was the representative of the judgment-debtors. All that he purchase, under these circumstances, was the right, title and interest of the judgment-debtors at a date when there was a mortgage executed by the judgment-debtors. If the suit had been brought against the tenants, it could not have been contested that it would not be open to the tenants to say that what they had sold was nothing at all, because they had no

right to sell it. It appears to me that the defendant No. 1, who stands in the shoes of the tenants, cannot be permitted to take up a different position from that which it is open to the tenants to take up; and, therefore, he cannot, as the lower Courts have held, raise the question of the transferability of the holding.

We need not consider the question argued before us by the learned Pleader for the defendant No. 1, appellant, as to what would be the effect if, subsequent to the auction-purchase, the defendant had obtained the consent of the co-sharer landlords to the transfer. Possibly, the answer in such a case would have been this, that after obtaining such consent, the appellant would claim, not by virtue of any purchase from the tenants and as representing their interests but by virtue of the consent of the landlord.

In these circumstances I would dismiss this appeal with costs.

CARNDUFF, J.—I agree.

Appeal dismissed.

CALCUTTA HIGH COURT.

REGULAR CIVIL APPEAL No. 350 OF 1909.

May 2, 1911.

Present:—Mr. Justice Chitty and Mr. Justice N. Chatterjea.

ADMINISTRATOR-GENERAL OF BENGAL—PLAINTIFF—APPELLANT

versus

BHAGABAN CHANDRA ROY CHOWDHURI AND OTHERS—DEFENDANTS—RESPONDENTS.

Criminal Procedure Code (Act V of 1898), ss. 145, 146—Attachment of property by Magistrate—Appointment of Collector as Receiver—Suit for declaration of title—Consequential relief—Specific Relief Act (I of 1877), s. 42.

A Deputy Magistrate attached the property in suit, under section 146 of the Criminal Procedure Code, in a proceeding under section 145 between the plaintiff and the defendant, and appointed the Collector as Receiver of the property. The plaintiff instituted a suit for a declaration of his title:

Held, that the suit was properly framed, for, as the possession of the property was not with the defendant, the plaintiff could not be compelled to demand possession from the defendant.

Appeal from the decree of the District Judge of Noakhali, dated July 5th, 1909.

Mr. *S. P. Sinha* with Babu *Jogesh Chandra Dey*, for the Appellant.

Babu *Satish Chandra Ghosh*, for the Respondents.

JUDGMENT.—This is an appeal from a decree of the learned District Judge of Noakhali dismissing the plaintiff's suit on the ground that it was not maintainable in its present form by reason of the proviso to section 42 of the Specific Relief Act (Act I of 1877).

It appears that the Administrator-General, who is the plaintiff in the suit as administrator of the estate of the late Kumar Indra Chandra Singh Bahadur, owned a 14 annas 5-*gundas* share of *Purgunnah* Amirabad. The remaining, 1-anna 5-*gundas* share is owned by defendants Nos. 50 to 58. Defendants Nos. 1 to 7 are lessees under the Secretary of State of certain lands belonging to *Chur* Gulya Khali. A dispute arose between the proprietors of *Purgunnah* Amirabad and these lessees of Gulya Khali as to whether the lands in suit were reformations *in Gitu* of Mollah Mandalia, or whether they appertained to the *Chur* of defendants Nos. 1 to 7 that is, *Chur* Gulya Khali. We are told that the Collector, on behalf of the Secretary of State, has, as landlord of defendants Nos. 1 to 7, disclaimed any interest in the lands in dispute on behalf of the Secretary of State. In 1906, matters came to a crisis and proceedings were instituted under section 145 of the Criminal Procedure Code, the Administrator General and his co-sharers and the tenants under them being parties on the one side, while defendants Nos. 1 to 7 and the tenants under them being parties on the other. The Deputy Magistrate who heard the case was unable to decide which of the parties was in possession and he accordingly passed an order under section 146 of the Code of Criminal Procedure. He also appointed the Collector as Receiver to take possession of the lands. That was on the 19th September 1906. The Administrator-General then moved the High Court but the order of the Deputy Magistrate was confirmed by this Court on the 18th December 1906. On the 14th June 1908, this suit was filed, and the issue which the learned District Judge has decided against the plaintiff was framed by him on the 5th July 1909, when the suit came on before him for trial.

The learned Vakil for the respondents has very properly conceded that the decision of the learned District Judge is erroneous. In-

deed we cannot see how it can possibly be supported. Acting on a supposed analogy between proceedings under the Land Registration Act and an order under section 146 of the Code of Criminal Procedure, the learned District Judge has come to the conclusion that the plaintiff ought to have included in his prayer for relief a prayer for possession of this property. The analogy to which he alludes is certainly not complete, as appears from the decisions which he cites and on which he apparently relies. If an order is passed under a proceeding under the Land Registration Act which has the same effect as an order under section 145, Criminal Procedure Code, that is, to put one of the parties into the possession of the land, then, of course, the other party when filing a suit would have to claim possession from the party to whom it was given by that order of the Court. But, under section 146, Criminal Procedure Code, the order is different. Under that section the Magistrate has to decide either that none of the parties is then in possession, or that he is unable to determine which of them is then in such possession. The last course was the one which was followed in this case. He also delivered over actual possession, pending the suit in a competent Civil Court, to the Collector. It is, therefore, obvious that possession was not with the defendants, and the plaintiff could not be compelled to demand possession from them. If he had, the defendants certainly could not have given it inasmuch as they had not got it. We, therefore, think, for these reasons, that the decree of the learned District Judge cannot be supported. The judgment and decree of the lower Court are set aside and the case remanded to that Court for trial of the suit upon the merits. The appellant must get his costs of this appeal from respondents-defendants Nos. 1 to 7, the hearing fee being assessed at five gold *mohurs*.

The appellant will be entitled to a refund of the Court-fee in this appeal.

CALCUTTA HIGH COURT.

REGULAR CIVIL APPEAL No. 405 OF 1909.

April 20, 1911.

Present:—Mr. Justice Mookerjee and Mr. Justice Caspersz.

NAGENDRA BALA CHAUDHRANI—PLAINTIFF—APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA IN COUNCIL—DEFENDANT—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. VI, r. 17—Pleadings, amendment of, when to be allowed - Civil Procedure Code (Act XIV of 1882), ss. 234, 244, 248—Execution of decree—Objection that decree was made without jurisdiction, if can be taken in execution proceedings—Public Demands Recovery Act (I B. C. of 1895), ss. 15, 17 (1)—Limitation—Special period.

Under rule 17 of Order VI of the Civil Procedure Code of 1908, amendments of pleadings should be allowed when this is necessary for the purpose of determining the real questions in controversy between the parties, but leave to amend ought to be refused where the amendment is merely technical or is immaterial

The action taken in this case by the Court below in favour of the defendant to enable him at a very late stage of the suit to amend the written statement and thus to raise objections in bar to the maintainability of the suit was *held* to be open to criticism.

No Court of execution can entertain the objection that the decree under execution is inoperative in law.

Benode Lal v. *Rajendra Kumar*, 29 C. 810; *Hassan Ali* v. *Gauzi Ali*, 31 C. 179; *Rash Behari* v. *Thakur Joynanda*, 4 C. L. J. 475; *Debendranath* v. *Prasanna Kumar*, 5 C. L. J. 328, *Sundurappa* v. *Sreeramulu*, 17 M. L. J. 288; 2 M. L. T 360: 30 M. 402; *Sadindra* v. *Budan*, 9 M. 80 and *Arunachallam* v. *Murugappa*, 12 M. 503, relied upon.

Where a plaintiff asked for a declaration that the certificate which was made by the Revenue authorities against her was entirely without jurisdiction:

Held, that this is not a question within the scope of section 244 of the Civil Procedure Code of 1882 and that the suit was maintainable.

It is doubtful whether section 244 applies to proceedings in execution under the Public Demands Recovery Act.

Barhamdeo Narayan v. *Bibi Rasul Bandi*, 32 C. 691; 1 C. L. J. 360; *Umed Ali* v. *Raj Laksmi*, 33 C. 84; 1 C. L. J. 538; 10 C. W. N. 130; *Hari Charan* v. *Chandra Kumar*, 34 C. 787; 11 C. W. N. 745 and *Raghubans Sahai* v. *Phool Kumari*, 32 C. 1130; 1 C. L. J. 542, referred to.

The plaintiff alleged that a certificate was originally made against certain persons, Mukherjees, to recover a sum due under an instalment-bond executed by them for the payment of the expenses of certain works executed under the Drainage Act; that when their estate vested in the Receiver the name of the latter was improperly substituted in the place of the Mukherjees; that finally, after the purchase by the plaintiff of some of the properties belonging to the Mukherjees from the Receiver, her name was substituted in the place of the Mukherjees and the Receiver; that the procedure adopted was wholly

unauthorized, and that the certificate should be declared invalid;

Held, that the special period of limitation provided by section 15 of the Public Demands Recovery Act had no application to the suit, and that the procedure adopted by the Revenue Authorities in substituting the name of the plaintiff in the certificate was without jurisdiction.

Appeal from the decree of the Sub-Judge of Hoogly, dated June 14th, 1909.

Dr. *Rash Behary Ghose* and Babu *Harendra Narain Mitra*, for the Appellant.

Babu *Ram Charan Mitra*, Senior Government Pleader, for the Respondent.

JUDGMENT.—This is an appeal on behalf of the plaintiff in a suit for declaration that a certificate, purported to have been made against her on behalf of the Secretary of State for India in Council under the Public Demands Recovery Act, 1895, is illegal, invalid and made wholly without jurisdiction. The Subordinate Judge has dismissed the suit without any investigation into the merits, on the ground that the suit is barred under the provisions of section 244 of the Civil Procedure Code of 1882, and also under section 15 of the Public Demands Recovery Act, 1895. As the facts have not been investigated, we must assume the allegations of the plaintiff, as made in her plaint, to be correct and determine thereon whether the suit is barred, as held by the Subordinate Judge. Now, the case for the plaintiff is that, on the 12th April 1905, she purchased the property described in the schedule to the plaint, at a sale held by a Receiver appointed by this Court on its original side. The property in question belonged to a family of Mukherjees, some of whom had instituted a suit for partition on the original side of this Court an 1899. During the pendency of this suit, Receiver was appointed, and under the direction of the Court, a portion of the estate was sold for liquidation of the debts of the estate. The sale at which the plaintiff purchased has been duly approved and confirmed by the Court. Several years before the purchase of the plaintiff, steps appear to have been taken in the shape of the Rajapur Drainage Scheme, under the Bengal Drainage Act, 1880, for the improvement of various properties, which, it is alleged, included the property subsequently purchased by the plaintiff. For the payment of the expenses of the works executed under the Drainage Act, three of the Mukherjees gave the Secretary of State for India in Council an instalment-bond on the 4th February 1898. The Mukherjees made default in payment, of the sums due under the instalment-bond, and thereupon a certificate was prepared by the Collector against them, numbered as Certificate No. 507 of 1900-01. It appears that, subsequently, when the estate of the Mukherjees passed into the possession of the Receiver, his name was substituted in the certificate in the course of the year 1903-4 and later on after the purchase by the plaintiff, her name was substituted on the record on the 9th July 1906 in place of the Mukherjees and the Receiver. The plaintiff objected before the Revenue authorities that this procedure was wholly unauthorized; and that the Certificate Officers had no jurisdiction to introduce her name into a certificate against the Mukherjees for recovery of money due from them under the instalment-bond. This objection was overruled on the 17th January 1907. On appeal to the Commissioner, the order was confirmed on the 12th April following; and an application, to the Board of Revenue for revision of this order, was rejected on the 5th August 1907. On the 11th November 1907 the plaintiff commenced the present action for declaration that the proceedings of the Certificate Officer were illegal, invalid and without jurisdiction. She also asked for a declaration that neither she herself nor the property purchased by her was liable for the sum due from the Mukherjees under the instalment-bond. On behalf of the Secretary of State for India in Council the claim was resisted on various grounds, amongst which it is sufficient to mention two, namely, *first*, that the Certificate Officer had authority to substitute successively the names of the Receiver and of the plaintiff in place of the Mukherjees in the certificate: and, *secondly*, that the purchase of the plaintiff was subject to the liability to pay the sums due from the proprietors under the Bengal Drainage Act. Issues were, therefore, framed on the 21st January 1908. After the suit had remained pending for many months, at the instance of the defendant Secretary of State, two new issues were framed on the 5th June 1909 namely, *first*, that section 244 of the Civil Procedure Code of 1882 was a bar to the maintainability of the suit, and, *secondly*, that the suit was barred by the general and special rules of limitation. The Subordinate Judge, as we have already stated, has taken

no evidence in the matter but has given effect to the two objections in bar just mentioned. The plaintiff has appealed to this Court, and on her behalf the decision of the Subordinate Judge has been challenged on three grounds, namely, *first*, that the Subordinate Judge ought not to have practically allowed the written statement to be amended at a very late stage of the suit, and thus enabled the defendant to raised objections in bar not taken in the original written statement; *secondly* that the suit is not barred under section 244 of the Civil Procedure Code; and *thirdly*, that section 15 of the Public Demands Recovery Act of 1895 is no bar to the maintenance of the suit.

In so far as the first of these objections is concerned, there is, in our opinion, considerable force in it. The principle is well-settled that, under rule 17 of Order VI of the Code of 1908, amendments of pleadings should be allowed when they may be necessary for the purpose of determining the real questions in controversy between the parties [See *Collette* v. *Good* (1)]; in other words, leave to amend ought to be refused where the amendment is merely technical or is immaterial. This rule has been carried so far that, in *James* v. *Smith* (2), when a defendant had pleaded section 4 of the Statute of Frauds, he was not allowed to amend the pleading with a view to avail himself of section 7. The defendant was bound to plead the Statute, and was not obliged to plead the particular section, but as he had relied on a particular section of the Statute, it was ruled that he could not renounce the position taken up and avail himself of some other section [See also *Edevain* v. *Cohen* (3) and *Dillon* v. *Balfour* (4).] In so far as the objection that section 244 of the Civil Procedure Code was a bar was concerned, it was of a highly technical character, and the view might well be maintained that an amendment should not have been allowed for this purpose. In so far, however, as the plea of special limitation was concerned, the matter apparently stood on a somewhat different footing. If the rule of limitation relied upon was one prescribed by the Indian Limitation Act, it could not have been waived, and it could have been obligatory upon the Court to dismiss the suit even if the defendant had not relied upon the plea of limitation. It may be a matter for controversy whether that doctrine ought to be extended to the special rule of limitation embodied in section 15 of the Public Demands Recovery Act, 1895. It is worthy of note, that, in other systems of jurisprudence, the view has been maintained, that if a defendant to whom defence of the Statute is open, omits through inadvertence to plead it, the Court may allow an amendment of the pleadings and thus enable the defendant to avail himself of the defence of the Statute, if the Court is of opinion that the plea of the Statute is, in the circumstances, a meritorious one [*Archbold* v. *Earl of Howth* (5); *Bone* v. *Smith* (6).] Under these circumstances, the action taken by the Subordinate Judge in favour of the defendant, to enable him at a very later stage of the suit, to amend the written statement and t' us to raise objections in bar to the maintainability of the suit, is at least open to criticism. It is not necessary, however, to deal with this aspect of the matter further, because we are clearly of opinion that the view taken by the Subordinate Judge as to the soundness of the two objections in bar is wholly unsustainable.

In so far as the second ground urged on behalf of the appellant is concerned, it has been argued that no question can possibly arise as to any application of section 244 of the Civil Procedure Code to the present suit. The plaintiff seeks for a declaration that the certificate has been made by the Revenue Authorities, as against her, entirely without jurisdiction. This is obviously not a question within the scope of section 244. It has been repeatedly pointed out, that no Court of execution can entertain an objection that the decree under execution is inoperative in law. [*Benode Lal* v. *Brojendra Kumar* (7); *Hassain Ali* v. *Gauzi Ali* (8); *Rash Behari* v. *Thakur Joynanda* (9); *Debendra Nath* v. *Prosanna Kumar* (10) *Sundarappa*

(1) 7 Ch. 842; 47 L. J. Ch. 370; 38 L. T. 504.
(2) (1891) 1 Ch. 384; 63 L. T. 524; 39 W. R. 396.
(3) (1889) 43 Ch. D. 187; 62 L. T. 17; 38 W. R. 177
(4) (1887) 20 L. R. Ir. 600.
(5) (1864) 15 Ir. C. L. R. 420.
(6) (1867) I. R. 2 C. L. R. 244.
(7) 29 C. 810.
(8) 31 C. 179.
(9) 4 C. L. J. 475.
(10) 5 C. L. J. 328.

v. *Sreeramulu* (11); *Sudindra* v. *Budan* (12); and *Arunachallam* v. *Murugappa* (13). The question which the plaintiff seeks to raise here, is that the certificate, sought to be made against her by the Revenue Authorities, has been made wholly without jurisdiction. A question of this description cannot possibly be tried by an execution Court, and the Subordinate Judge appears to have overlooked the elementary principle that no question touching the validity of a decree, can be raised in the course of proceedings in execution of that decree. But even if the point was one which might be deemed included within the scope of section 244, the question whether section 244 is a bar to a suit of the present description, is by no means free from difficulty. The Subordinate Judge relies upon the cases of *Berhamdeo Narayan* v. *Bibi Rasul Bandi* (14); *Umed Ali* v. *Raj Lakshmi* (15) and *Hari Charan* v. *Chandra Kumar* (16) as authorities for the proposition that section 244 of the Civil Procedure Code applies to execution proceedings under the Public Demands Recovery Act. But he has overlooked that the contrary view has been maintained in the case of *Raghubans Sahai* v. *Phul Kumari* (17). In this divergence of judicial opinion it was not right for the Subordinate Judge to dismiss the suit summarily on the ground that it was not maintainable by reason of section 244; in fact, the Subordinate Judge appears to us to have very imperfectly appreciated the difficulty of the questions which he assumed arose for his consideration. The second ground upon which the judgment of the Subordinate Judge is assailed, must consequently prevail.

In support of the third ground taken on behalf of the appellant, it has been urged that section 15 of the Public Demands Recovery Act has no application to the circumstances of the present case. That section, read with section 17, sub section (1), shows that the suit contemplated is a suit in a Civil Court for cancellation of a certificate *duly made*. Here the allegation of the plaintiff-appellant is that the certificate has not been duly made; and that in fact; the procedure adopted by the Revenue Authorities has been strictly without jurisdiction. The plaintiff contends that a certificate was originally made against the Mukherjees for recovery of a sum due under the instalment-bond executed by them; that when their estate vested in the Receiver, the name of the latter was improperly substituted in the place of Mukherjees, and finally, that after her own purchase, her name was, in a wholly unauthorised manner, substituted in the place of the Mukherjee and the Receiver. The plaintiff argues upon these allegations that the procedure adopted was never contemplated by the framers of the Public Demands Recovery Act; and that, even if it is assumed that a certificate had the force of a decree for certain specified purposes, there is no provision of the law under which her name could be substituted in the place of the Mukherjees as the judgment-debtor. This aspect of the case has not been at all appreciated by the Subordinte Judge. It is difficult to perceive how the provisions of section 234 or 248 of the Civil Procedure Code under colour of which the Revenue Authorities appear to have acted, could have any possible application to the circumstances of the case before us. The original judgment-debtors are not dead: the Receiver also is alive. Upon what conceivable principle, it may well be asked, can the present plaintiff be substituted in the certificate as the legal representative of the original judgment-debtors? The principle which underlies the decisions of this Court in the cases of *Porihitlal* v. *Sabeerun* (18) and *Dhuronidhur Sen* v. *Agra Bank* (19), undoubtedly militates against the view that the plaintiff could be treated as the legal representative of the Mukherjees against whom the original certificate had been made. It is conceivable that the plaintiffs might be rendered liable for sums due under the Bengal Drainage Act, on some principle which has not been explained to us. But it seems to be fairly clear that the attempt which appears to have been made by the Revenue Authorities to fasten on the plaintiff the liability imposed on the Mukherjees by the instalment-bond was never sanctioned by the Legislature. In this connection, it is well

(11) 17 M. L. J. 288; 2 M. L. T. 360; 30 M. 402.
(12) 9 M. 80.
(13) 12 M. 503.
(14) 32 C. 691; 1 C. L. J. 380.
(15) 33 C. 84; 1 C. L. J. 538; 10 C. W. N. 130.
(16) 34 C 787; 11 C. W. N. 745.
(17) 1 C. L. J. 542; 32 C. 1130.
(18) 7 W. R. 368.
(19) 5 C. 86.

to bear in mind that, as repeatedly ruled by this Court and by the Judicial Committee, for the validity of a certificate under the Public Demands Recovery Act, the essential pre-requisite is a strict compliance with the provisions of the Statute [*Gujraj* v. *Secretary of State* (20) ; *Mahomed Abdul Hai* v. *Gujraj* (21) *Baij Nath* v. *Ramgat* (22); *Baij Nath* v. *Ramgat* (23)]. In any event, the suit as framed seeks for a declaration that the certificate has not been duly made against the plaintiff. To a suit of this description the special period of limitation provided by section .5 of the Public Demands Recovery Act has no imaginable application. In support of this view, the Subordinate Judge, we observe, placed reliance upon the case of *Gopal Das* v. *Hardeo Das* (24). But that case was of an entirely different description and was for the reversal of a sale held in execution of a certificate. A careful perusal of the judgment would have shown to the learned Subordinate Judge that the case had no direct bearing upon the question raised before him. The third ground upon which the decision of the Subordinate Judge is assailed must consequently prevail.

The result, therefore, is that this appeal is allowed and the decree of the Subordinate Judge set aside; the case is remanded to him for trial on the merits upon such evidence as may be adduced by the parties. The appellant is entitled to her costs in this Court. The costs in the Court below will abide the ultimate result. Under section 13 of the Court Fees Act, we direct that the Court-fees paid by the plaintiff upon the memorandum of appeal presented by her to this Court, be returned to her.

Appeal allowed.

(20) 17 C. 414.
(21) 20 C. 826; 20 I. A. 70.
(22) 5 C. L. J. 687.
(23) 23 C. 775; 23 I. A. 45.
(24) 5 C. W. N. 86.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 235 OF 1910.

April 21, 1911.

Present:—Mr. Justice Mookerjee and Mr. Justice Caspersz.

BISWA NATH PROSAD MAHATA—DECREE-HOLDER—APPELLANT

versus

BHAGWANDIN PANDEY—JUDGMENT-DEBTOR—RESPONDENT.

Execution of decree—Objection that decree invalid, if can be taken in execution—Mortgage-decree by consent—Instalment-decree—Order absolute—Waiver by judgment-debtor—Transfer of Property Act (IV of 1882), ss. 88, 89.

It is not open to a Court of execution to consider the validity of the decree of which execution is sought.

And a judgment-debtor cannot in execution proceedings object that the decree has not been passed by a Court of competent jurisdiction.

Nagendra Bala Chowdhurani v. *Secretary of State*, 10 Ind. Cas. 532; relied upon.

A mortgage-decree was passed by consent in these terms: "The judgment-debtor is to pay Rs. 1,200 to the decree-holder by instalments of Rs. 15 a month, upon failure to pay three instalments, the decree-holder is to become entitled to take out execution without any order absolute":

Held, that as the mortgage-decree was payable by instalments, it was not a decree in the terms of section 88 of the Transfer of Property Act and, therefore, the provisions of section 89 were inapplicable.

Bechoo Singh v. *Bichharam Sahu*, 1 Ind. Cas. 677; 10 C. L. J. 91, referred to.

An order absolute is entirely for the benefit of the mortgagor, and if he deliberately waives his right in this behalf, it is not open to him subsequently to turn round and contend that the decree-holder is not entitled to execute the decree without an order absolute.

Appeal from the order of the District Judge of Mozaffarpur, dated February 21st, 1910, confirming that of the Munsif of Mozaffarpur, dated June 22nd, 1909.

Babu *Provash Chandra Mitter*, for the Appellant.

Babu *Buldeo Na ain Singh*, for the Respondent.

JUDGMENT.—We are invited in this appeal to set aside an order by which the District Judge, in concurrence with the Court of first instance, has refused execution of a mortgage-decree made by consent of parties on the 5th February 1902. The judgment-debtor, now respondent, objected to the execution of the decree, substantially on three grounds; namely, *first*, that the decree was made without jurisdiction, *secondly*, that the

decree had not been made absolute; and *thirdly*, that the application for execution was barred by limitation. The Courts below, have concurrently held that as the decree has not been made absolute, it was incapable of execution. Upon the present appeal by the decree-holder, the learned Vakil for the judgment debtor has sought to support the decision of the Courts below not only on the ground mentioned but also on the additional ground, which was overruled by both the Courts below, that as the decree was made without jurisdiction, it was incapable of execution. Two questions, therefore, require consideration namely, *first*, whether the objection can be entertained in these proceedings that the decree is incapable of execution because it was made without jurisdiction, and *secondly*, whether it can be executed although it has not been made absolute.

In so far as the first of the points is concerned, it is manifest that it does not arise for examination in execution proceedings. As pointed out by the Court in the case of [*Nogendra Bala Chowdhrani* v. *The Secretary of State for India* (1)], where the earlier authorities on the point will be found reviewed, it is not open to a Court of execution to consider the validity of the decree of which execution is sought. The learned Vakil for the respondent has, however, suggested that it is competent to a Court of execution to refuse execution of a decree on the ground that it was not passed by a Court of competent jurisdiction. We are unable to accept this contention as well-founded. Section 44 of the Indian Evidence Act provides that any party to a suit or other proceeding may show that any judgment, order or decree, which is relevant under sections 40, 41 or 42 and which has been proved by the adverse party, was delivered by a Court not competent to deliver it or was obtained by fraud or collusion. The application of this rule, it will be observed, is limited *only* to cases in which a decree is treated as relevant under sections 40, 41 or 42 of the Indian Evidence Act. None of these sections has any application to execution proceedings. Section 40 deals with the question of relevancy of a judgment, order or decree as barring a second suit or trial. Section 41 relates to the relevancy of a judgment *in rem*; while, section 42 deals with the question of relevancy and effect of judgments relating to matters of a public nature. When, however, an application is made for execution of a decree, the execution proceeding is a continuation of the suit, it is incumbent upon the Court to execute the decree, because it is the duty of the Court to give to the successful party the fruits of the litigation. Consequently, the principle which underlies the case of *Rajib Panda* v. *Lakhan Sendh* (2) and *Nistarini* v. *Nundo Lall* (3), has no application to proceedings in execution of decrees. The inference is irresistible that it was not open to the judgment-debtor to take exception to the execution of the decree upon the allegation that the decree had not been passed by a Court of competent jurisdiction.

In so far as the second objection taken by the judgment-debtor is concerned, it is, in our opinion, entirely unsubstantial. The decree was made by consent of parties on the 5th February 1902, and was in these terms. The judgment-debtor was to pay Rs. 1,200 to the decree-holder by instalments of Rs. 15 a month; upon failure to pay three instalments the decree-holder was to become entitled to take out execution without any order absolute. It is contended on behalf of the decree-holder that the contingency contemplated by the parties has happened and he is entitled to take out execution without any order absolute. In reply, it is argued by the judgment-debtor that unless an order absolute is made under section 89 of the Transfer of Property Act, the decree is incapable of execution. There is, in our opinion, a two-fold answer to this contention. In the *first* place, the mortgage-decree was payable by instalments and was consequently not a decree in terms of section 88 of the Transfer of Property Act, so that, as explained in *Bechoo Singh* v. *Bichharam Sahu* (4), the provisions of section 89 have, by their very terms, no application. In the *second* place, although the Court may have inherent jurisdiction to make an order absolute even in cases of mortgage-decrees payable by instalments, the judgment-debtor may, as he has done here, waive his right to ask for such an order. As was pointed out in the case just mentioned, the object of an order absolute is to afford to the mortgagor an opportunity to show that the preli-

(1) 10 Ind. Cas. 532.

(2) 27 C. 11; 3 C. W. N. 660.

(3) 26 C. 891; 3 C. W. N. 670.

(4) 10 C. L. J. 91; 1 Ind. Cas. 677.

minary decree has been satisfied. Consequently, when an application for an order absolute is made by the mortgagee, decree-holder in a case not falling strictly within the letter of section 88 of the Transfer of Property Act, as it is entirely for the benefit of the mortgagor, it is competent to the Court to give notice to the judgment-debtor and to deal with the application on the merits. But it does not follow that an order absolute is necessary in the case of every conditional or contingent decree; at any rate, there is nothing to debar the judgment-debtor from waiving the advantage of an order absolute, because there is nothing to prevent the parties to a litigation from waiving the advantage of a particular law or rule, if that law or rule is not based on public policy and is intended solely for the benefit or protection of an individual in his private capacity [*Bechoo* v. *Bichharam* (4)]. As we have already explained, an order absolute is entirely for the benefit of the mortgagor, and if he deliberately waives his right in this behalf, it is not open to him subsequently to turn round and contend, as is done in this case that the decree-holder is not entitled to execute the decree without an order absolute. It follows, therefore, that the two grounds on which execution is resisted are wholly unfounded and must be overruled. The question of limitation, however, has not been considered by the District Judge, and must be investigated. We may add that it has not been suggested here that any payments have been made by the judgment-debtor towards the satisfaction of the decree, but if any such payments have been made, it will be open to the judgment-debtor to prove them in accordance with law.

The result is that this appeal is allowed and the order of the District Judge set aside, the case will be remitted to him in order that the question of limitation may be considered. The appellant is entitled to his costs both in this Court and in the Court of appeal below. The costs in the Court of first instance will abide the result. We assess the hearing-fee in this Court at three gold *mohurs*.

Appeal allowed.

CALCUTTA HIGH COURT.

CIVIL RULE No. 5044 OF 1910.

March 3, 1911.

Present:—Mr. Jusice Mookerjee and Mr. Justice Caspersz.

DEOSARAN LAL SINGH—JUDGMENT-DEBTOR—PETITIONER

versus

PRAYAG RAM SAHU—DECREE-HOLDER—OPPOSITE PARTY.

Execution of decree—Decree obtained in Sonthal Pargannahs—No arrest in execution – Transfer of decree to Court outside Sonthal Pargannahs—Whether decree may be executed by arrest of judgment-debtor.

A decree which was obtained in the Court of the Deputy Collector of Deoghur in the Sonthal Pargannahs and which could not have been executed by the arrest of the judgment-debtor if it had been executed in any of the Courts in the Sonthal Pargannahs, may be executed by his arrest, when it is transferred to any Court for execution outside the Sonthal Pargannahs.

Rule against the order of the District Judge of Patna dated November 29th, 1910.

Babu *Surendra Nath Ghoshal*, for the Petitioner.

Babu *Chandra Sekhar Prosad Singh*, for the Opposite Party.

JUDGMENT.—In this rule we are invited by the judgment-debtor to set aside an order for his arrest made in execution of a decree obtained against him on the 31st March 1908 in the Court of the Deputy Collector of Deoghar. The decree-holder obtained a consent decree for money against the petitioner and subsequently applied for transfer of the decree to the Court of the Munsif of Bankipore. The application for transfer was granted and a certificate of the amount due was forwarded in due course. It is argued before us, that inasmuch as this decree, if it had been executed in any of the Courts in the Sonthal Pargannahs, could not have been executed by the arrest of the judgment-debtor, the decree-holder is not entitled to ask for his arrest even if the decree is under execution in the Bankipore Court. There is, in our opinion, no force in this contention.

Under section 3 of Regulation III of 1872 as amended by Regulation III of 1899, sections 223 to 228 of the Code of Civil Procedure of 1882 are applicable to Courts in the Sonthal Pargannahs. The corresponding sections of the Code of 1908, namely, sections 39 to 42 are consequently applicable. It was thus competent to the Deoghar Court to transfer the decree under section 39, sub-section (1);

clause (*d*). It cannot be disputed, therefore, that the order for transfer was made with jurisdiction. Now section 42 provides that the Court executing a decree sent to it shall have the same powers in executing such decree as if it had been passed by itself. It is not disputed that if this decree had been passed by the Bankipore Court it could have been executed by the arrest of the judgment-debtor. The judgment-debtor, therefore, may be arrested in execution of this decree, although it was originally passed by the Deoghur Court.

The result is that the view taken by the Courts below is affirmed and this rule discharged with costs. We assess the hearing-fee at one gold *mohur*.

Rule discharged.

CALCUTTA HIGH COURT.
CIVIL RULE No. 1426 OF 1911.
March 30, 1911.
Present:—Mr. Justice Mookerjee and
Mr. Justice Caspersz.

SHEO PARSAN RAI—JUDGMENT-DEBTOR—PETITIONER

versus

Babu BISHUN PARGASH NARAIN SINGH—DECREE-HOLDER—OPPOSITE PARTY.

Bengal Tenancy Act (VIII of 1885), ss. 153, 153A—Execution of decree—Decree made by special officer—Order in execution made by officer not specially empowered—Appeal, whether lies—Deposit under s. 153A—Decree executed for whole amount without deducting amount deposited under s. 153A.

The test to be applied in determining whether an order in execution is appealable under clause (*b*) of section 153 of the Bengal Tenancy Act, is the qualification of the officer who passed that order and not that of the officer who passed the decree in the suit.

Therefore, when an order for the reversal of a sale in execution of a decree is made by an officer not specially empowered to exercise final jurisdiction, the order is open to appeal although the decree was made by an officer specially empowered.

Although section 153A of the Bengal Tenancy Act does not specifically prescribe the mode of applying the money deposited by a person at whose instance an *ex parte* decree is set aside, yet it is reasonably clear that the intention of the Legislature was that if at re-trial the decree is ultimately made in favour of the landlord, he should, in the first instance, apply the sum deposited towards satisfaction of his decree and take out execution for the balance only of the judgment-debt.

Rule against the order of the Sub-Judge of Mozaffarpur, dated December 15th, 1910, reversing that of the Munsif of Motihari, dated June 21st, 1910.

Babus *Baldeo Narain Singh* and *Jotish Chandra Sarkar*, for the Petitioner.

Babus *Mohendra Nath Roy* and *Krishna Prosad Surbadhikari*, for the Opposite Party.

JUDGMENT.—We are invited in this Rule to set aside an order by which the Court below, in reversal of an order of the original Court, has directed an execution-sale to be confirmed. It appears that on the 15th August 1905 the landlord, opposite party, obtained an *ex parte* decree for rent against the petitionor. He took out execution of this decree and brought the holding to sale. On the 13th May 1908, upon the application of the tenant, the decree and the sale were set aside. At the same time, under section 153A of the Bengal Tenancy Act, the tenant deposited a sum of Rs. 46-10-6 to the credit of the landlord-decree-holder. This sum represented the amount for which execution had been taken out at that stage. The suit was re-heard and on the 14th September 1908, the landlord obtained a decree. This decree substantially affirmed the previous decree but as costs were awarded on a higher scale, the landlord became entitled to recover Rs. 63-13. The landlord then took out execution for the whole of the sum; in other words, he ignored the amount which at his instance the tenant had been compelled to deposit in his favour on the 12th May 1908. The sale took place on the 3rd March 1909. The landlord was the sole bidder on the occasion, and he purchased the property for the amount due under his decree, namely, Rs. 68-13-6. It is worthy of note that in the sale proclamation, the property had been valued at Rs. 30 only, although subsequently he offered a bid in respect thereof for the whole of the judgment-debt. The sale was confirmed on the 14th April 1909. No application was made for delivery of possession till some months afterwards, and on the 18th November following the writ for delivery of possession was issued. On the 11th December, the writ was returned unserved for want of an identifier and an order was made for a fresh issue of the writ. It appears from the return of the serving officer that the writ was served on the 18th December. Two days later, the judgment-debtor made the present application to set aside the sale. He stated that he had been apprised of the execution proceedings and of the sale only a week before, when he had been arrested in execution of a subsequent

decree for arrears of rent obtained by the landlord, and he impugned the validity of the sale on the ground of fraud and material irregularity in its conduct. The Court of first instance found in his favour and directed the sale to be set aside. Upon appeal the learned Subordinate Judge has reversed that decision and directed the confirmation of the sale.

On behalf of the judgmeut-debtor, we have been invited to set aside the order of the Subordinate Judge on two grounds, namely, *first*, that the appeal preferred to him was incompetent under section 153 of the Bengal Tenancy Act; and *secondly*, that there has been no proper trial of the appeal on the merits.

In support of the first ground, it has been urged that as the decree, of which execution was taken out, was made by an officer specially empowered by the Local Government to exercise final jurisdiction, no appeal lay against the order for reversal of the sale held in execution of that decree. In support of this proposition reliance has been placed upon the case of *Shyama Charan Mitter* v. *Debendra Nath Mukerjee* (1). It has further been contended that the effect of the decision of a Full Bench of this Court in *Kali Mandal* v. *Ramsarbaswa Chakravarti* (2) has been considerably qualified, if not completely destroyed, by the explanation added to section 153 of the Bengal Tenancy Act by Act I of 1907 (B. C.). In answer to this contention, it has been argued by the learned Vakil for the landlord, opposite party, that as the order for reversal of the sale was made by an officer not specially empowered to exercise final jurisdiction, the order was open to appeal, and that it was immaterial that the decree had been made by an officer specially empowered. In our opinion, the contention advanced by the learned Vakil for the petitioner is unsustainable.

Section 153 provides—We quote only so much of the section as is applicable to the present case—that "an appeal shall not lie from any order passed in the first instance in any suit instituted by a landlord for the recovery of rent, where the order is passed by any judicial officer specially empowered by the Local Government to exercise final jurisdiction under the section, and the amount claimed in the suit does not exceed fifty rupees." It may be conceded that according to the case of *Shyama Charan Mitter* v. *Debendra Nath Mukerjee* (1) the term "suit" in section 153 includes execution proceedings, and that consequently the provisions of the section apply not merely to orders made in the course of a suit strictly so called but also to orders made in the course of execution proceedings. It may also be conceded that the effect of the decision of the Full Bench in the case of *Kali Mandal* v. *Ramsarbaswa Chuckerbutty* (2) has been considerably restricted by virtue of the explanation subsequently added to section 153. But, still, the question arises whether the test to be applied to determine whether an order is appealable under clause (*b*) of section 153 is the qualification of the officer who passes that order on the qualification of the officer who passes the decree in the suit. In our opinion, there is no room for controversy that whether an appeal lies or not must be determined with reference to the qualification of the officer who passes the order against which the appeal is preferred. The language of section 153 cannot possibly admit of the interpretation suggested by the learned Vakil for the petitioner, namely, that if the decree in the suit has been passed by an officer empowered to exercise final jurisdiction every order made in execution of the decree is final, irrespective of the quaiification of the officer by whom such order may subsequently be passed. We must hold, consequently, that the first ground upon which the decision of the Subordinate Judge is assailed cannot be sustained.

In so far as the second ground urged by the learned Vakil for the petitioner is concerned, it is argued that the case has not been properly tried by the Subordinate Judge and that he has overlooked many important considerations, with the result that he has arrived at an erroneous and unjust decision. In our opinion there is considerable force in that contention. The Subordinate Judge, in the first place, has taken an erroneous view of the fundamental point in the case. As we have already stated, the tenant-judgment-debtor on the 13th May 1908 made a deposit of Rs. 46-10-6 to the credit of the landlord when an order for reversal of the *ex parte* decree and the sale held on the basis thereof was made in his favour. The Subordinate Judge has

(1) 27 C. 484.

(2) 32 C. 957; 1 C. L. J. 476; 9 C. W. N. 721.

held that the landlord was not bound to allow credit to the tenant for the deposit so made. No doubt, section 153A does not specifically prescribe the mode of application of the money deposited by the person at whose instance the *ex parte* decree has been set aside. But it is reasonably clear that the intention of the Legislature was that if, at the re-trial, the decree is ultimately made in favour of the landlord, he should, in the first instance, apply the sum deposited towards satisfaction of his decree. In the case before us, an examination of the record shows that the deposit was made to the credit of the landlord. Consequently, it was not open to the judgment-debtor at any stage subsequent to the deposit, to apply the money for his own benefit. As the money was deposited to the credit of the landlord, he was, in our opinion, bound to apply it in part satisfaction of the decree ultimately made in his favour, and was entitled to take out execution for the balance only of the judgment-debt. In the second place, it is clear that the Subordinate Judge has completely overlooked the bearing of the important circumstance that no application was made for delivery of possession by the landlord till some months after the decree had been made and the sale had taken place. As we have already stated, the writ for delivery of possession was not issued till the 18 November 1909. The first attempt was infructuous by reason of the default of the decree-holder himself and possession was not delivered till the 18th December. Two days later, the judgment-debtor made an application for reversal of the sale, and he contended that he had been kept by the fraud of the decree-holder from the knowledge of his right to have the sale set aside. The Subordinate Judge has not considered the truth of these allegations, but has examined the case from the opposite point of view. He has stated that the decree was made after contest, and that, upon the evidence, it was clear to him that the execution proceedings had taken place regularly. He has also relied upon the circumstances that mention was made of this sale in the plaint in a subsequent suit instituted by the landlord against the tenant and that the inference was irresistible that the tenant must have read the plaint and have been thus apprised of the sale, earlier than the 18th December 1909. But there is no evidence to show that the allegations in the plaint were ever brought to the notice of the tenants. What thus appears at first sight to be a finding of fact by the learned Judge turns out, upon examination, to be based upon no evidence at all. It cannot also be overlooked that the landlord valued the property at Rs. 30 for the purpose of an entry in the sale proclamation, although he was himself prepared at a subsequent stage to offer a bid for Rs. 68. The Subordinate Judge has overlooked the bearing of this circumstance and has also failed to consider that there was no bidder present at the sale except the landlord himself. As regards the value of the property, the Court of first instance found that the holding, which comprises 7 *bighas* and 10 *cottahs*, had been purchased by the landlord for Rs. 68. The Court also found that the ordinary rate at which lands of this description are sold in that part of the country is Rs. 50 a *bigha*. The Subordinate Judge has not examined this part of the case, but, upon what materials we are not aware, has stated that the value of the property must be at least Rs. 150. But if the value be taken to be Rs. 150 and not Rs. 500 as found by the original Court, it is clear that there was a deliberate mis-statement of the value by the landlord for the purpose of the sale proclamation, and that he has purchased the property at less than half its value.

Upon a review, then, of the whole case, it appears that the landlord took out execution for a larger sum than he was entitled to do; he deliberately mis-stated its value in the sale proclamation and in the absence of all competitors purchased it for a small fraction of its real value; and finally he designedly refrained from taking out writ for delivery of possession for several months after the sale had taken place. The circumstances under which the property has been sold, therefore, do not bear careful scrutiny. The Subordinate Judge, when he reversed the decision of the Court of first instance, was, in our opinion, seriously in error and there was no proper trial of the appeal by him.

The result is that this Rule is made absolute and the order of the Court of the first instance restored. The petitioner is entitled to costs in all the Courts. We assess the hearing fee in this Court at three gold *mohurs*.

Rule made absolute.

TARABATI KOER v. JAGDEO NARAIN.

CALCUTTA HIGH COURT.
CIVIL RULE NO. 4649 OF 1910.
March 24, 1911.
Present:—Mr. Justice Mookerjee and
Mr. Justice Caspersz.
TARABATI KOER—PLAINTIFF—PETITIONER
versus
Lala JAGDEO NARAIN AND OTHERS—
DEFENDANTS—OPPOSITE PARTY.

Limitation Act (IX of 1908), s. 12—Appeal—Application for copy of judgment and decree—Decree not ready—Copy of judgment delivered—Application for copy of decree to be treated as pending—Time between date of signing decree and date when copy of decree was ready to be deducted—Revision petition treated as memorandum of appeal.

A suit was dismissed, by the first Court in which it was instituted on June 30th 1910, on July 2nd, 1910. The plaintiff with a view to file an appeal applied for copies of the judgment and decree. He filed a certain number of folios and the prescribed Court-fee. The copy of the judgment was ready on July 8th, but the decree had not then been signed by the Judge On that date one unused folio as also Court-fees of the value of Rs. 8 were returned to him. The decree was signed on July 11th, and on July 15th the plaintiff made a fresh application for a copy of the decree. This copy was ready on July 20th and he filed his appeal on August 17th, but it was dismissed on the ground that it was barred by limitation:

Held, that the plaintiff was entitled to deduct the time between the delivery of the judgment and the signing of the decree.

Bani Madhub Mitter v. *Matungini Dassi*, 13 C. 104, followed.

Held, also, that, when the copy of the judgment was ready, the unused folio ought not to have been returned as the application for a copy of the decree was still pending, and the plaintiff should not have been obliged to make a fresh application for the copy, that the application for a copy of the decree made on July 2nd should be treated as a pending application on July 11th when the decree was signed, that the plaintiff was entitled to deduct the time between July 11th and July 20th when the copy of the decree was ready, and that the appeal was filed within time:

Held, further, that the plaintiff ought to have filed a second appeal to the High Court as the order of the lower Appellate Court dismissing the appeal was a decree. The High Court treated this application for revision as a memorandum of appeal.

Rule against an order dismissing an appeal on August, 19th, 1910, preferred to the Court of the District Judge of Darbhanga, from the decree of the first Munsif of Darbhanga, dated June 30th, 1910.

Babu *Chandra Sekhar Banerjee*, for the Petitioner.

Babu *Jyotish Chandra Sarkar*, for the Opposite Party.

JUDGMENT.—The sole question for consideration in this rule is, whether the appeal preferred to the District Judge was properly dismissed as barred by limitation. The suit was dismissed by the Court of first instance on the 30th June 1910. The plaintiff, with a view to prefer an appeal, applied on the 2nd July 1910 for copies of the judgment and decree. He filed 20 folios for the purpose and also Court-fees as prescribed by the rules. The copy of the judgment was ready on the 8th July, but the plaintiff did not take delivery of it till five days later. It appears that at the time when the copy of the judgment was ready for delivery, the decree had not even been signed by the Judge; as a matter of fact, the record shows that the decree was signed on the 11th July. On the 13th July the copy of the judgment was delivered to the plaintiff, and apparently, pursuant to an order made on the 8th July, when the decree was not yet in existence one unused folio as also Court-fees of the value of Re 1-8, were returned to him. It is stated on behalf of the plaintiff that he was informed at the time that the decree had not been prepared. Consequently, on the 15th July 1910, he made a fresh application for copy of the decree. This copy was ready on the 20th July, but the plaintiff did not take delivery till the 5th August. The appeal was filed on the 17th August, and dismissed two days later on the ground that it was barred by limitation. In our opinion, the order of dismissal cannot be supported.

It is clear, upon the authority of the decision of this Court in the case of *Bani Madhub Mitter* v. *Matungini Dassi* (1), that the plaintiff is entitled to a deduction of the time between the delivery of the judgment and the signing of the decree. Consequently, time does not run against him from any date earlier than the 11th July 1910. It cannot also be disputed that, under section 12 of the Limitation Act, the plaintiff is entitled to a deduction of the time taken up not only in obtaining a copy of the decree but also in obtaining a copy of the judgment. This however, is of no assistance to the plaintiffs, because the time taken up in obtaining the copy of the judgment in this particular case falls wholly within the time which the plaintiff is entitled to deduct under t e decision of the Full Bench in *Bani Madhub* v. *Matungini* (1). He cannot, obviously, be allowed to have deduction of the same period twice over. The question, therefore, arises whether, taking

(1) 13 C. 104.

time to run against the plaintiff from the 11th July, 1910 when the decree was signed, the appeal was in time. Now, as has been already stated, the plaintiff made an application for copy of the judgment as also of the decree on the 2nd July 1910. At that time the decree was not in existence, and consequently, the plaintiff could file the folios only upon an approximate estimate of what would be actually required. When the copy of the judgment was made ready, the folios unused ought not to have been returned as the application for copy of the decree was still pending and the plaintiff should not have been obliged to make a fresh application for copy of the decree on the 15th July 1910. We may, under these circumstances, treat the application for copy of the decree made on the 2nd July 1910 as a pending application on the 11th July, when the decree was signed. Consequently, the plaintiff is entitled to a deduction of time between the 11th July when the copy of the decree was made ready. If the plaintiff is allowed a deduction of this period, there is no question that the appeal must be deemed as filed in time. It is obvious that the rules framed by this Court for dealing with application for copies (see General Rules and Circular Orders, Volume I, pages 111 to 117) have not been strictly carried out in the case before us, and that is the reason why the plaintiff has been placed in this difficulty. The view we take is supported by the decision in *Kali Sankar Bajpai* v. *Baikanta Nath Sen* (2), and *Dalali Bewa* v. *Saroda Kinkar Paulit* (3). In any event, as pointed out in those cases, even if it was necessary for us to apply the provisions of section 4 of the Limitation Act of 1908, ample grounds have been established by the plaintiff in that behalf. We hold, therefore, that the appeal was in time and ought not to have been dismissed.

We may add that a preliminary objection has been raised by the learned Vakil for the opposite party that the plaintiff has sought the assistance of this Court in a manner not authorised by law. There can be no room for controversy that the decision of the District Judge that the appeal was barred by limitation was a decree within the meaning of the Code of Civil Procedure; the plaintiff should, therefore, have appealed to this Court and not invited us to interfere by way of revision. It is open to us, however, to treat this application as a memorandum of appeal, as was done by a Full Bench of this Court in the case of *Mahomed Wahid-ud-din* v. *Hakiman* (4). But the plaintiff must pay the additional Court-fee which he would have been obliged to pay on a memorandum of appeal.

The result is that the order of the Court below is discharged and the case remitted to the District Judge in order that the appeal may be registered and heard on the merits. This order will take effect only upon payment by the plaintiff of Rs. 15-4 as Court-fee within two weeks from this date. If the Court-fees are not so paid, the rule will stand discharged with costs. We assess the hearing fees at two gold *mohurs*. If the Court-fees are paid and the case remitted there will be no order for costs in this Court.

(2) 7 C. W. N. 109.
(3) 3 C. W. N. 551.
(4) 25 C. 757; 2 C. W. N. 529.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL NO. 974 OF 1910.

May 18, 1911.

Present:—Mr. Justice Karamat Husain and Mr. Justice Chamier.

RAM KISHEN DAS—PLAINTIFF—APPELLANT

versus

TANDA MAL AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Joint family—Property purchased in the name of one member—Presumption as to its jointness.

There can be no presumption in favour of a family having any joint property nor can it be presumed that property found in the possession of any one member of a family is joint family property, unless it is shown that the family as such possessed at least some property.

Ramraj Rai v. *Salik Rai*, A. W. N. (1899) 214; *Hem Nath Rai* v. *Janki Rai*, A. W. N. (1905) 212; *Taruck Chander* v. *Jodheshur Chunder*, 19 W. R. 178; 11 B. L. R. 193; *Neel Kisto Deb* v. *Bur Chander Thakur*, 12 M. I. A. 523; 12 W. R. 51; 5 B. L. R. 13 (P. C.); *Dhuram Das Pandey* v. *Shama Soondri Dibiah*, 3 M. I. A. 229; 6 W. R. 43 (P. C.); *Gobind Chunder* v. *Dourga Parshad*, 22 W. R. 248; 14 B. L. R. 237; *Lakishman Mayaram* v. *Jamna Bai*, 6 B. 225; *Luximan Rao* v. *Mallar Rao*, 2 K. 60; 5 W. R. 67 (P. C.); *Moolji Lalla* v. *Gokuldas Vulla*, 8 B. 154; *Toolseedas Ludha* v. *Premji Tricumdas*, 13 B. 61; *Dwarka Das* v. *Jamina Das*, 13 B. L. R. 133; 9 Ind. Cas. 948, *Jagmohandas* v. *Allu Maria*, 19 B. 338; *Kunhia Lal* v. *Debi Dass*, 22 A. 141; *Lal Bahadur* v *Kanhaiya Lal*, 29 A. 244; 11 C. W. N. 417; 15 C. L. J. 340, 4 A. L. J. 227; 2 M. L. T. 147; 17 M. L. J. 228; 9 Bom. L. R. 597 (P. C.), referred to.

RAM KISHEN DAS v. TANDA MAL.

Second appeal from the decision of the District Judge of Aligarh, dated 8th August, 1910.

Mr. *Abdul Raoof*, for the Appellant.

Mr. *J. N. Chowdhri*, for the Respondents.

JUDGMENT.

CHAMIER, J.—The appellant, having obtained a decree against two brothers named Gulab Rai and Dal Chand, attached a house in Bulandshahr alleging that it was the property of the judgment-debtors. The respondent Tonda Mal objected on the ground that he had purchased the house from Gulab Rai who had been sole owner of it. The objection was allowed. The appellant then brought the present suit claiming a declaration that the house was the joint property of Gulab Rai and Dal Chand, that the sale by Gulab Rai was consequently invalid, and that the house was liable to be attached in execution of the appellant's decree. The first Court decreed the claim but that decision was reversed by the lower Appellate Court.

It has been found that the house in question was purchased by Gulab Rai at a time when he was living in union with his father and brother. But there is no evidence that the family ever possessed any joint property. If there is a presumption that the house was joint family property and the burden of proof lies on the respondent to prove that the house was the self-acquired property of Gulab Rai, the claim must be decreed, for the respondent has not attempted to prove that the house was acquired by Gulab Rai with his own funds. All that he has proved is that the house was acquired in the name of Gulab Rai alone. On the question of the burden of proof the Courts below have differed. The first Court followed the decision of Aikman, J., in *Ramraj Rai* v. *Salik Rai* (1). The lower Appellate Court followed the decision of Knox, J., in *Hem Nath Rai* v. *Janki Rai* (2).

The point came before Couch, C. J., and Glover, J. in 1873 in the case of *Taruck Chander* v. *Joodheshteer Chunder* (3)—Sir Richard Couch observed that there had been a conflict of decisions in the Calcutta High Court which it was impossible to reconcile. He referred to the decisions of the Privy Council in *Neel Kisto Deb* v. *Bur Chander Thakur* (4) and *Dharam Das Pande* v. *Shama Soondri Debiah* (5) as justifying the view that, as every Hindu family was presumably joint in food, worship and estate, if one member of the family was found to be in possession of property the presumption would be not that he was in possession of it as separate property acquired by him but as member of a joint family. His judgment in the later case of *Gobind Chunder* v. *Doorga Parshad* (6) shows that the view was not accepted by other members of the Court. In the case in *Dharam Das Pande* v. *Shama Soondari Debia* (5) their Lordships of the Privy Council said,—"It is allowed that this was a family who lived in commensality, eating together and possessing joint property. It is allowed that they had some joint property and there can be no doubt, that under these circumstances, the presumption of law is that all the property they were in possession of was joint property until it was shown by evidence that one member was possessed of separate property." This passage has often been referred to as justifying the view that property found in possession of one member of a joint family cannot be presumed to be joint family property unless there is evidence that the family possessed some joint property. But Couch, C. J., referring to this passage said,—"Now with regard to what their Lordships say as to the family being possessed of property .....to seek that the possession of one of the joint owners is the possession of all would apply to this extent that if one of them was found to be in possession of any property the presumption would be not that he was in possession of it as separate property acquired by him but as a member of a joint family." It seems to me that the passage cited from the judgment of their Lordships shows the necessity of proof that a family has some joint property before it can be presumed that property held by any one member is joint family property. My view is supported by the judgment of Melvill and Kemball, JJ., in *Lakshman Mayaram* v. *Jamna Bai* (7), in the course of which the passage in question and the decision of

(1) (1899) A. W. N. 214.
(2) (1905) A. W. N. 212.
(3) 19 W. R. 178; 11 B. L. R. 193.
(4) 12 M. I. A. 523; 12 W. R. 51; 3 B. L R. 13 (P. C.)
(5) 3 M. I. A. 229; 6. W. R. 43 (P. C)
(6) 22 W. R. 243; 14 B. L. R. 337.
(7) 6 B. 225.

the Privy Council in *Luximon Rao* v. *Mullar Rao* (8) are referred to as authorities for the proposition that when there is ancestral property by means of which other property may have been acquired then it is for the party alleging self-acquisition to prove that it was acquired without any aid from the family estate. The necessity of establishing the existence of a nucleus of joint family property before the property in possession of any one member can be presumed to be joint family property is recognised in the cases of *Mooljí Lilla* v. *Gokuldas Vulla* (9) and *Toolseydas Ludha* v. *Premji Tricamdas* (10) and *Dwarka Prasad* v. *Jamna Das* (11). The statement of Sarjent, C. J., in *Jugmohan Das* v. *Allu Maria* (12) that the decision in *Taruck Chunder* v. *Joodeshteer* (3) had always been followed by the Bombay High Court, cannot refer to the point now under consideration. In *Kanhia Lal* v. *Debi Dass* (13) Blair and Burkitt, JJ., said,—"We hold that as the defendants set up their separate acquisition in a suit for the partition of a joint family which admittedly was possessed as such of some property, the presumption of law was that the whole of the property of each individual belonged to the common stock." This is in accordance with the view taken by the Bombay High Court. In the case of *Lal Bahadur* v. *Kanhaiya Lal* (14) the Privy Council said,—"It is admitted that Durga Prasad and his sons lived together as a joint Hindu family and it is established that there was a considerable nucleus of ancestral property in his hands after the partition (between Durga Prasad and his brothers) the onus was, therefore, on the respondent to prove that his subsequently acquired property was his separate property." Their Lordships thus recognised the necessity of establishment of the existence of some joint property before the property held by all the members could be presumed to be joint. In the case decided by Aikman, J., mentioned above, there was proof that the family possessed some property that was sufficient to justify the presumption which the plaintiff wished the Court to make, and I do not understand why Aikman, J., went as far as he did. The text books treat it as settled law that there is no presumption that a family has any joint property and that it cannot be presumed that property found in the possession of any one member is joint family property unless it is shown that the family as such possessed at least some property. In Ghose on Hindu Law, 2nd Edition, page 383, Mayne's Hindu Law, 7th Edition, pages 364 and 368. The weight of authority is clearly in favour of the view stated in the text books.

For the above reasons, I would dismiss this appeal with costs.

KARAMAT HUSAIN, J.—I agree.

The appeal is dismissed with costs including in this Court fees on the higher scale.

Appeal dismissed.

(8) 2 Knapp. 63; 5 W. R. 67 (P. C.)
(9) 8 B. 154.
(10) 13 B. 61.
(11) 13 Bom. L. R. 133; 9 Ind. Cas. 948.
(12) 19 B. 338.
(13) 22 A. 141.
(14) 29 A. 244; 11 C. W. N. 417; 5 C. L. J. 340; 4 A. L. J. 227; 2 M. L. T. 147; 17 M. L. J. 228; 9 Bom. L. R. 597 (P. C.)

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 589 OF 1910.

April 25, 1911.

Present:—Mr. Justice Banerji.

BENI MADHO SINGH AND OTHERS
DEFENDANTS—APPELLANTS
versus
DEBI SARAN DUBE AND OTHERS
PLAINTIFFS—RESPONDENTS.

Adverse possession—Mortgage by trespasser—Mortgagee in possession for over 12 years—Prescriptive title complete.

A., a trespasser in respect of a certain fixed rate holding, mortgaged it to *B.* in 1884. *B.* remained in possession of the property ever since:

Held, that the possession of *B.* was equivalent to the possession of his mortgagor, and as he had been in possession for over 12 years, it must be held that *A.* and *B.* had acquired a title by adverse possession.

Second appeal from the decision of the Subordinate Judge of Jaunpur, dated the 26th February 1910.

Mr. *Haribans Sahai*, for the Appellants.

The Hon'ble Nawab *Abdul Majid*, for the Respondents.

JUDGMENT.—This appeal relates to plot No. 468, which is one of the plots of which Debi Saran, respondent, claims possession as mortgagee. His allegation is that this plot, along with other plots, was the property of the defendants Nos. 4 to 6 and was mortgaged to his predecessor-in-title under three mortgages, the last of which was exe-

cuted on the 9th of July 1895 and was a usufructuay mortgage, that he was in possession under the mortgage and that the defendants Nos. 1 to 3 wrongfully dispossessed him. These defendants are the appellants here and their contention is that plot No. 568 is their tenancy at fixed rates and they have always been in possession. Both the Courts below have found that the plaintiff or his predecessor-in-title was in possession since 1884, and that even if the plot No. 568 was the fixed rate holding of the appellants, their right to it has become extinct by reason of the adverse possession of the plaintiff and his mortgagors.

This appeal has been preferred by the defendants Nos. 1 to 3, and the first contention on their behalf is that, in view of the provisions of section 9 of the Agra Tenancy Act the land must be held to be the fixed rate holding of the appellants. No doubt under that section an entry made at the last revision of records before the commencement of the Act, recording a person as a fixed rate tenant, is conclusive proof that such person is the fixed rate tenant at the date of the entry, but it does not follow from this that he could not be dispossessed or the person who wrongfully dispossessed him and remained in possession adversely to him for more than 12 years would not extinguish his right. As the name of the defendant No. 1 was entered in the revenue papers at the last revision of settlement, it is proof that he was the fixed rate tenant at that time, but it has been found by the Court below that he has not been in possession and that the plaintiff, by virtue of the mortgage made in his favour by the predecessor-in-title of the defendants Nos. 4 to 6, has been in possession ever since 1884. The possession of the plaintiff is equivalent to the possession of his mortgagors and as he has been found to have been in possession for more than 12 years adversely to the defendants Nos. 1 to 3, it must be held that they have acquired a title by adverse possession. It is urged that the plea of adverse possession was not set up, but it is clearly said by the plaintiff in his plaint that he has been in possession as mortgagee since 1884 and the mortgagors, namely, the defendants Nos. 4 to 6, in their written statement not only asserted that the plot No. 568 belonged to them, but also stated that they were in possession of that plot through their mortgagee, the plaintiff. So that both the plaintiff and his mortgagors must be deemed to have set up an adverse title and this is manifest from the first issue framed by the Court of first instance. In view of the finding by the lower Appellate Court it must be held that any title which the appellants might have had in respect of the plot in question, has become extinct and has been acquired by the plaintiffs mortgagors and by the plaintiff by virtue of the mortgage executed in his favour. The appeal fails and is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1231 OF 1909.

April 27, 1911.

Present:—Sir Arnold White, KT., Chief Justice, and Mr. Justice Munro.

SUBBAIER—APPELLANT

versus

MONIAM SUBRAMANIA IYER AND OTHERS—RESPONDENTS.

Sale—Vendor and purchaser—Registration of conveyance and delivery of possession to vendee—Right of vendor to cancel sale—True consideration different from that recited in the sale-deed—Promise by vendee to maintain vendor for remainder of his life—Breach of agreement—Right of vendor—Transfer of Property Act (IV of 1882), s. 54.

When a deed of sale of immoveable property is registered and possession taken by the vendee thereunder, title to the property passes to the party to whom the conveyance is executed under section 54 of the Transfer of Property Act, and in the absence of fraud, undue influence, coercion or misrepresentation, the vendor is not entitled to have the deed of sale set aside even though the price is not paid or the consideration has failed. His only remedy is to recover the purchase-money.

Sagaji v. *Namdev*, 23 B. 525; *Baijnath Singh* v. *Paltu*, 30 A. 125; *Govindammal* v. *Gopalachariar*, 16 M. L. J. 524, referred to.

Where the real consideration for a deed of sale is not payment of money but maintenance of the vendor for his life, and the vendee fails to fulfil such obligation, the vendor has no right to have the sale deed set aside.

The American Law, as stated in Pomeroy's Equity Jurisprudence, Volume VI, paragraph 686, cannot be applied to India.

Second appeal against the decree of the District Court of North Arcot, in Appeal Suit No. 335 of 1907 presented against the decree o the District Munsif of Arni, in Original Suit No, 47 of 1906,

SUBBAIER v. MONIAM SUBRAMANIA IYER.

Messrs. *C. P. Ramaswami Aiyar* and *C. K. Mahadeva Aiyar*, for the Appellant.

Mr. *V. Ryru Nambiar*, for the 1st Respondent.

Mr. *D. V. Ramanuja Row*, for the 3rd and 4th Respondents.

JUDGMENT.

WHITE, C. J.—In this suit the plaintiff asked that a certain deed of sale might be set aside. The deed of sale (Exhibit I) was executed between the plaintiff and the first defendant's husband. The second defendant is the purchaser from the first defendant and is now in possession of the land in question. Now, the deed was registered, delivery of the deed was given to the first defendant's husband and, as I have said, the second defendant is now in possession under his purchase from the first defendant. The consideration recited in the deed is Rs. 300.

The case for the plaintiff is that the real consideration for the deed was a promise by the first defendant's husband that he would maintain the plaintiff, who, we are told, was an old man, for the rest of his life.

The learned District Judge considered the question whether, under section 92 of the Indian Evidence Act, oral evidence was admissible for the purpose of showing what was the real consideration for this deed of sale. The learned Judge came to the conclusion that such evidence was not admissible. For the purpose of considering the question whether the plaintiff is entitled to get this deed set aside, I assume that it is open to the plaintiff to show by oral evidence that the real consideration for the deed of sale was not the consideration stated in the deed itself but the promise to maintain the plaintiff. I am of opinion that the plaintiff is not entitled to have this deed set aside. It is not found or alleged that there was coercion, undue influence, fraud or misrepresentation of any kind at the time when ths deed of sale was registered and possession taken thereunder, being so, the title to the property in question, under section 54 of the Transfer of Property Act, passed to the party to whom the conveyance was executed. I do not know that that is contested. If it is necessary to cite authorities in support of that proposition, I might refer to the decision in *Sagaji* v. *Namder* (1), *Baijnath Singh* v. *Paltu* (2) and the decision of this Court reported in *Govindasami* v. *Gopalachariar* (3). As regards the case last mentioned the learned Judges did not decide the 1st point whether a suit would lie in the circumstances of that case by the party who executed the sale-deed to get it set aside. But it is an authority that the transfer of ownership of land by sale is effected on the execution and registration of the conveyance even though the price be not paid, so I think I may say, that where the title passes on failure of consideration or on failure to pay the agreed purchase-money, the remedy of the vendor is not to have the deed of sale set aside but to recover the purchase-money.

Then the question is, are we to apply a different principle to a case of this character where the real consideration, as we assume for the purpose of this judgment, is not payment of money but maintenance of the party conveying for his life?

The learned Vakil for the appellant has been unable to call our attention to any English or Indian authority in which this distinction has received recognition. He has however, called our attention to the law in America, which is to be found laid down in Pomeroy's Equity Jurisprudence, Volume VI, (Equitable Remedies Volume II) paragraph No. 686. The learned author there, after referring to the general rule that the mere failure by a grantee to perform a promise which formed the whole or part of the whole consideration inducing an executed conveyance gives rise to no right of recision in the grantor, says,—"This rule has been found to work a great hardship in the frequent cases where an aged person has conveyed all his property to a son or other relative on the consideration, often oral, that the grantee shall support and care for the grantor during the remainder of the grantor's life and the grantee, while retaining the land, has abandoned the performance of his obligation." No doubt the special equity in these special circumstances has been recognised by the Courts of America. I know of no English cases where this special equity has been recognised and I know of no Indian cases; and in the complete absence of authority, I do not think that we ought to import into the law of this country this very

(1) 23 B. 525.
(2) 30 A. 125.
(3) 16 M. L. J. 524.

special rule of equity which certain American Courts have applied. I think we must apply the law as laid down by the decisions of our own Courts; and, applying that law, though possibly the case may be a hard one, I think it is not possible to come to any other conclusion than that the suit was rightly dismissed. It is not necessary to discuss the other points raised and I think we must dismiss the appeal with costs of this appeal.

MUNRO, J.—I agree.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 722 OF 1909.

April 7, 1911.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Sundara Aiyar.

K. SESHADRI AIYANGAR AND OTHERS—APPELLANTS

versus

RANGA BHATTAR—RESPONDENT.

Religious endowment—Suspension of archaka *by trustee—Right to suspend pending allegations of misconduct—Suspension without notice, whether valid—Jurisdiction of Civil Courts.*

The position of a hereditary *archaka* of a temple in relation to the trustee is different from the position in which the trnstee stands to the temple committee.

A hereditary *archaka* can be dismissed by the trustee, but only for good reasons which are liable to examination by a Court of justice.

Kristnasamy Tatacharry v. *Gomatum Rangacharry* 4 M. H. C. R. 63; *Bhavani Shankar* v. *Timmanna*, 30 B. 508, referred to.

No notice is required for an *ad interim* suspension pending inquiry into a complaint against a servant entitled to hold office during good behaviour or for life.

Where the order of suspension passed on an *archaka* by the trustee is not passed as a punishment of which he was found guilty, but was an *ad interim* order preventing him from performing his office pending the investigation of the charges of misconduct against him, the order of suspension is not invalid simply because it was passed whithout notice to the *archaka*.

Seshadri Aiyangar v. *Nataraja Aiyer*, 21 M. 179, explained and distinguished.

Barton v. *Taylor*, L. R. 11 A. C. 197; 55 L. T. 158; 55 L. J. P. C. 1., referred to

In any event, the Courts will not set aside the order of suspension where, after inquiry, it has been found that it was proper and justifiable under the circumstances.

The King v. *Mayor of London*, 100 E. R. 96 and *Vijayaragava* v. *Secretary of State for India*, 7 M. 466, referred to.

Second appeal against the decree of the District Court of Trichinopoly, in A. S. No. 154 of 1906, presented against the decree of the District Munsif of Srirangam, in O. S. No. 35 of 1907.

Mr. *Rangachariar*, for the Appellants.

Messrs. *T. R. Ramachandra Aiyar* and *Rangasawmi Iyengar*, for the Respondent.

JUDGMENT.—The plaintiff in this suit was an *archaka* in the great Vishnu temple of Srirangam. He instituted the suit against the managers of the temple for the cancellation of an order of suspension passed against him by the managers and to recover damages alleged to have been sustained by him and the value of perquisites which he would have earned if the suspension had not take place. The only question for decision in the second appeal is whether the suspension, if found to have been otherwise justifiable in the circumstances, was illegal on the ground that no notice was given to the plaintiff to show cause against it before the order was passed. The District Judge held it to be illegal on the authority of certain observations contained in *Seshadri Aiyangar* v. *Nataraja Aiyers* (1).

It may be stated that at the inquiry held after the suspension, the plaintiff was found by the managers to be guilty of the offences complained of against him and he was suspended, that he committed theft and concealed property belonging to the idol, while engaged in the performance of his duties as *archaka*. We are of opinion that the decision of the District Judge is not correct and that the order of suspension cannot be held to be invalid on the mere ground of absence of notice. According to the view taken by this Court, a hereditary *archaka* like the plaintiff could be dismissed by the trustee but only for good reasons which are liable to examination by a Court of justice. See *Kristnasamy Tatacharry* v. *Gomatam Rangacharry* (2) and with regard to the dismissal of a trustee, see *Seshadri Aiyangar* v. *Nataraja Aiyar* (1), where the earlier cases are cited and examined. A different rule has, no doubt, been recently laid down in the Bombay High Court in *Bhavani Shankar* v. *Timmanna* (3) by Jenkins, C. J., and Batty, J., where those learned Judges held that the *bona fide* dismissal of a *maktesar* by a Devasthanam committee could not be reviewed by a Civil Court. As the correctness of

(1) 21 M. 179.
(2) 4 M. H. C. R. 63.
(3) 30 B. 508.

the decision in *Krishnasamy Tatacharry* v. *Gomatum Rangacharry* (2) has not been impugned before us, we accept it as sound for the purpose of this case. The plaintiff is entitled to hold the office during his life-time and on his death his heirs are entitled to succeed him. The order of suspension we have to deal with is one not passed as a punishment on the plaintiff for an offence of which he was found guilty but an *ad interim* order preventing him from performing his office pending the investigation of the charges of misconduct made against him. The suspension complained of in *Seshadri Aiyengar* v. *Nataraja Aiyar* (1) was also a similar order. That case was, however, in other respects very different from the present one. The temple committee who passed the order in that case was a statutory body whose powers had to be determined by the interpretation of the provisions of Act XX of 1883. The question was whether the right of superintendence vested in them by that Act included the right to suspend a trustee; there is certainly authority for the position that a statutory power of dismissal which, according to the decisions, a temple committee possesses does not necessarily include the right to suspend as a primitive measure. (See American Cyclopædia of Law and Procedure, Article "Officers" Volume 29, p. 1405), and *Barton* v. *Taylor* (4). The decision of the majority of the Judges in that case proceeded largely on the ground that the result of a suspension might be to create temporary vacancy in the office of trustee without provision for any one in whom the management of the temple could vest for the time being. The trustee was not a servent of the committee which possessed only the power of suspension over him conferred on it by statute. The position of an *archaka*, on the other hand, though he may have a hereditary tenure in the office, is, in our opinion, essentially that of a servant. The trustee is the representative of the temple and the *archaka* must be subject to his disciplinary authority. It cannot be said that his position in relation to the trustee is similar to the position of the trustee in relation to the committee. We may observe that Collins, C.J., in holding that the power of suspension is the same as the power of dismissal did not apparently have regard to the difference which, in our opinion, is important between punitive suspension and suspension pending inquiry which is incidental to the exercise by the trustee of his right to inquire into a charge of misconduct against the *archaka* and to dismiss him in case where serious misconduct is proved. *Seshadri Aiyengar* v. *Natraja Aiyar* (1) cannot, therefore, be taken to govern this case. What then is the rule applicable to the case of a hereditary servant in a case like the present? In our opinion the sounder view is that no notice is required for an *ad interim* suspension pending inquiry into a complaint against a servant entitled to hold office during good behaviour or for life. The nature of the office may be such that instant suspension from the functions of the office would be necessary in the interests of the institution and to hold that the officer could not be suspended without explanation received from him might be seriously detrimental to the interests of the temple. In the present case, for instance, the charge against the plaintiff was that he was actually found removing coins strewed over the deity and concealing other property which was within the precincts of the shrine. Would it be reasonable to hold that a person, regarding whom there were good grounds of suspension for such conduct, should be permitted to continue to officiate within the shrine and give him chances of repeating his offence until a formal inquiry into his conduct could be completed? We are of opinion that such a view would seriously jeopardise the interests of the institution. The suspension must be regarded as incidental to the right possessed by the trustee of inquiring into and punishing the *archaka* for any offence committed by him and may be fairly taken to come within the purview of his disciplinary jurisdiction over the servants of the temple. We have little doubt that temple trustees have generally exercised this right without question. In the American Cyclopædia of Law and Procedure, Volume 29, p. 1405, it is limited to causes where the power to suspend made use of as a disciplinary power pending charges is regarded as included within the power of removal. The power "to suspend may be exercised without notice to the person suspended and the suspension, when made in the exercise of a legal power to suspend is, irrevivable by the Courts and takes effect from the time that the order of suspension is issued and served"——See also Dillon

(4) 11 App. Cas. 197; 55 L. T. 158; 55 L. J. P. C. 1

on Municipal Corporations, Vol. I, p. 332, section 247. We do not mean to lay down that in every case where the right to dismiss exists, the right of suspension must necessarily be incidental to it. Such might possibly not be the case where the right depends upon the construction of a statute, as for example, where the right of Government to deal with a Municipal Councillor for misconduct was in question in *Vijaya Raghava Chary* v. *The Secretary of State* (5). The right may not exist also where the question depends upon the construction of the rules of a corporation or *quasi* corporation like a club. But, in the case of servants subject to the discipline of a trustee we think these analogies should not be applied.

We are also of opinion that, even if the right view should be that notice before suspension is essential in such a case, the Court should not set aside the order where after inquiry it has been found that it was proper and justifiable in the circumstances. This view is supported by the decision in *The King* v. *The Mayor of London* (6), where the Court of King's Bench in England refused to grant a mandamus against the Common Council of London to restore a clerk entitled to a life-tenure in his office on the ground of want of notice before suspension. See also Halsbury's Laws of England, Vol 8, p. 330, paragraph 743. Where an order against an officer by his superiors or by a corporate body is not liable to be reviewed by the Courts, it will, no doubt, be set aside on the ground of want of notice on a principle similar to that applicable to the decision of an arbitrator. But where the person affected by such an order has the right to appeal to the Courts against it and to have the propriety of the order examined by it, and the Court has found the order justified it will be useless to set aside the order as it could be passed again immediately after giving notice. The Courts will not order a restoration where they can see there is good ground for removal and that order to restore would be without practical and useful effect.—Dillon on Municipal Corporations, section 254. Such a case would be similar to an order passed irregularly by an inferior Court which the superior Court finds to be a proper order notwithstanding the irregularity. In *Vijaya Ragava Chary* v. *The Secretary of State for India* (5), it was held that the dismissal of a Municipal Councillor for misconduct would not be set aside by the Court merely on the ground of want of notice if the misconduct itself is proved before it.

Mr. Ramachandra Aiyer contends that his client is entitled to the profits of his office during the time that he was under suspension without notice. This proposition is, in our opinion, quite untenable as the suspension was found to be proper at the subsequent inquiry. The correct rule in such cases is, we think, that laid down at page 1406 of Volume 29, American Cyclopædia and in Dillon on Municipal Corporations, section 247, although, if the order is set aside as improper, he might be entitled to recover the profits. In the result, we reverse the decision of the lower Appellate Court and restore that of the District Munsif with costs both here and in the lower Appellate Court.

Appeal allowed.

(5) 7 M. 466.

(6) 100 E. R. 96.

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVL APPEAL NO. 21 OF 1909.

April 7, 1911.

Present:—Mr. Pratt, J. C., and Mr. Crouch, A. J. C.

TEKOOMAL SON OF TAHILMAL—DEFENDANT—APPELLANT

versus

DIN MAHOMED AND OTHERS—PLAINTIFFS—RESPONDENTS.

Sind Encumbered Estates Act (XX of 1896), s. 29—Alienation beyond life-time invalid—No title in such alienation after death.

Under section 29 of the Sind Encumbered Estates Act the share of a person, who is under the protection of the manager, cannot be alienated beyond the term of his natural life. A sale of such share is invalid as to any period after his death.

A. was entitled to a share in certain survey numbers and was under the protection of the Manager, Encumbered Estates in Sind. After discharge from management, he acquired the rest of the survey numbers and then sold the whole survey numbers to *B. B.* subsequently sold ⅓rd share of the survey numbers to *C.*

Upon the death of *A.* his heirs sued *B.* and *C.* to recover the shares which belonged to *A.* while the property was under management. The claim against *C.* was given up and the suit as against him dismissed. As against *B.* plaintiffs' claim was decreed. *B.* contended that the share awarded to plaintiffs should be reduced by ⅓rd, the share sold to *C*:

Held, that the contention was untenable. The ⅓rd

share sold to *C.* must have been out of the residue of the survey numbers, which *A.* acquired subsequent to discharge from management and to which also *B.* had an absolute title. Therefore, the sale to *C.* did not operate as an alienation of the share sued for by plaintiffs.

Mr. *Tarachand*, for the Appellant.

Mr. *Isarsingh*, for the Respondents.

JUDGMENT.—The facts that give rise to this appeal are briefly as follows: – Mahomed Kasim was entitled to a share in certain survey numbers and was under the protection of the Manager, Encumbered Estate in Sind. After the discharge from management, he acquired the rest of the survey numbers and then sold the whole survey numbers to one Tahilmal, who is the father of the appellant, Ganoomal.

Ganoomal subsequently sold a $\frac{1}{3}$rd share of the whole survey numbers to Mahomed Validad. Mahomed Validad was originally a party to the suit but the claim against him was given up and the suit as against him dismissed.

The heirs of Mahomed Kasim filed this suit to recover the share of the survey numbers which belonged to their father while the property was under management.

This share Mahomed Kasim could not alienate beyond the term of his natural life. Section 29 of Act XX of 1896.

The lower Courts have decreed the plaintiffs' claim as against Ganoomal.

In this appeal it is contended that the share awarded to the plaintiffs should be reduced by 1/3rd as 1/3rd of the survey number was alienated to Validad and in respect of Validad plaintiffs' suit had been dismissed. There is, however, no force in this contention. Under section 29 of Act XX of 1896 the sale to Ganoomal's father of the share which was under management was invalid as to any period after the death of Mahomed Kasim. At the time of the sale to Mahomed Validad, Ganoomal had no title whatever in that share. The $\frac{1}{3}$rd share sold to Mahomed Validad must, therefore, have been out of the residue of the survey numbers in which alone Ganoomal had a title. The sale, therefore, to Validad did not operate as an alienation of that share which the plaintiffs have now sued to recover.

We, therefore, confirm the decree of the lower Court and dismiss this appeal with costs.

Appeal dismissed.

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 194 OF 1910.

May, 3, 1911.

Present:—Mr. Justice Ayling.

S. M. SEETHAPATHY NAIDU—PETITIONER

versus

M. L. R. M. LAKSHMANA CHETTY: A MINOR BY HIS NEXT FRIEND, N. R. M. ANNAMALAI CHETTY—RESPONDENT.

Presidency Small Cause Courts Act (XV of 1882), s.38 —Application to Full Bench of Small Cause Court— Revision petition to High Court direct from a decision of a Presidency Small Cause Court Judge, whether lies —Civil Procedure Code (Act V of 1908), s. 115.

The High Court will not, except in very special cases, interfere in revision with the decision of a Judge of the Presidency Small Cause Court, unless the party aggrieved has first applied to the Full Court of the Presidency Small Cause under section 38 of the Presidency Small Cause Courts Act, 1882.

Angelo v. *D'Angelis*, C.R P. No. 81 of 1903, followed. *Pachai Perumal Chettiar* v. *Sanpathu Chetty*, L. P. A. No. 60 of 1910, distinguished.

Petition, under section 115 of Act V of 1908, praying the High Court to revise the decree of the Court of Small Causes at Madras, in Small Causes Suit No. 13067 of 1909, dated the 27th January 1911.

Mr. *V. Ryru Nambiar*, for the Petitioner.

Messrs. *V. V. Srinivasa Aiyangar*, and *T. Rajagopala Chariar*, for the Respondent.

JUDGMENT.—The respondent takes the preliminary objection that the petitioner might have applied to the Full Court under section 38 of the Presidency Small Cause Courts Act and, therefore, this revision petition should not be entertained. He relies on the ruling in *Angelo* v. *D'Angelis* (1), in which Miller and Sankaran Nair, JJ. laid down that this Court will not interfere in such circumstances except "in a very special case." Appellant relies on *Pachai Perumal Chettiar* v. *Sampathu Chetty* (2). But that case in no way modifies the one already quoted, inasmuch as the decision is expressly based on the peculiar circumstances of that particular case. There is nothing special or exceptional in the present case and I do not think the revision petition should be entertained. The petition is dismissed with costs.

Petition dismissed.

(1) C. R. P. No. 81 of 1903.
(2) L. P. A. No. 60 of 1910.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 809 OF 1909.

April 19, 1911.

Present:—Mr. Justice Wallis and Mr Justice Munro.

KOTTIPALAPUDI VENKATNARAYANA —APPELLANT

versus

MAGANTI SEETHAYA AND ANOTHER— RESPONDENTS.

Civil Procedure Code (Act XIV of 1882), s. 295 (b)—Mortgage—Mortgaged property sold under s. 295 (b)—Right of mortgagee plaintiff to interest on sale proceeds.

Where part of mortgaged property is sold under section 295 (*b*) of the Civil Procedure Code, 1882, the mortgagee plaintiff is entitled to recover interest on the sale proceeds and there is no duty imposed on him under the section to draw the amount out of Court and apply it in part satisfaction of the mortgage-debt.

Second appeal against the decree of the Subordinate Judge's Court at Ellore, in A. S. No. 88 of 1907, presented against the decree of the District Munsif at Ellore, in Original Suit No. 540 of 1905.

Mr. *T. Prakasan*, for the Appellant.

Mr. *P. Narayanamurthi*, for the Respondents.

JUDGMENT.—As regards the appellant's contention that the plaintiff is not entitled to recover interest on the sale proceeds part of the mortgaged property, which was sold under section 295 (*b*) of the Civil Procedure Code of 1882, on the ground that he should have drawn that amount out of Court and applied it in part satisfaction of the mortgage-debt, we are of opinion that no such duty was imposed upon him under the section.

The other point is, that certain properties belonging to mortgagors are liable under the mortgage deed to be sold in satisfaction of the mortgage before the appellant's properties and that some of such properties still remain unsold and were not included in the suit. The defendant did not raise this point in his written statement in a way in which an issue could be framed upon it and the additional written statement which he tendered subsequently was also rightly rejected for vagueness. In these circumstances, we think the objection cannot now be entertained. In the lower Appellate Court the Subordinate Judge, on a petition by the plaintiff, ordered these properties to be included among the plaint properties but as the owners were not made

parties this order was ineffective. We ought out at this stage to bring them on, as this would probably lead to a remand and re-trial. All we can do is to modify the decree excluding the properties in question. In the result, the appeal is dismissed with costs.

Appeal dismissed.

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 38 OF 1910.

April 7, 1911.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Sundara Aiyar.

H. VYDIANATHA IYER—APPELLANT

versus

K. SUBRAMANIAN PATTAR— RESPONDENT.

Limitation Act (IX of 1908), Sch. I, art. 182—Execution of decree—Decree to be taken as a whole—Starting point of limitation—Decree providing for costs of Appellate Court and for costs of lower Court after taxation—Limitation.

A decree of the High Court dated 30th July 1906 provided that appellant should pay respondent's costs in the High Court, and his costs in the lower Court "which will be ascertained and taxed by the Court." The lower Court's costs were taxed by that Court on 1st December 1906. The application for execution of the whole decree was presented on the 7th August 1909:

Held, that the decree should be taken as a whole; and that limitation for purposes of execution commenced to run from 1st December 1906, and the execution application was not barred.

The policy of the Limitation Act, in the case of execution of decrees, is to lay down a simple rule and to treat the decree as a whole, except when the decree itself directs that different portions of the relief granted are to be rendered by the defendant to the decree-holder at different times.

There is only a single starting point for limitation where there has been an appeal, review or amendment of the decree, though it might be open in some cases to the decree-holder to apply for execution of part of the decree before the proceedings in appeal, review or amendment have terminated.

Where a portion only of the amount decreed is left to be ascertained in future, limitation for execution of the whole decree runs from the date of ascertainment.

Haji Ashfak v. *Lala Gauri Sahai*, 13 C. L. J. 351. 15 C. W. N. 370; 8 A. L. J. 332; 9 M. L. T. 380; 9 Ind. Cas. 975, followed.

C. M. A. No. 74 of 1903, not approved.

Gopal Chunder Manna v. *Gosain Das Kalay*, 25 C. 594; 2 C. W. N. 556 (F. B.); *Krishnamachariya* v. *Mangammal*, 26 M. 91 (F. B.); *Abdul Rahman* v. *Moidin Saiba*, 22 B. 500; *Gauri Sahai* v. *Ashfak Husein*, 29 A. 623; A. W. N. (1907) 204; 4 A. L. J. 552; *Ratnachella*

VYDIANATHA IYER *v.* SUBRAMANIAN PATTAR.

Aiyar v. *Vencatrama Aiyar*, 29 M. 46; *Krishnan* v. *Nilakandam*, 8 M. 137; *Subramanya Chettyar* v. *Alagappa Chettiar*, 30 M. 268; 2 M. L. T. 189; *Nepal Chandra Sadhookan* v. *Amrit Lal Sadhookhan*, 26 C. 888; and *Prayag Singh* v. *Rajan Singh*, 25 C. 203, referred to.

Obiter dictum.—If the direction were that the costs of the lower Appellate Court should be paid when ascertained by the Subordinate Court, the result might be different.

Appeal against the order of the Subordinate Judge at Palghat, dated the 21st December 1909, in Appeal Suit No. 809 of 1909 presented against the order of the District Munsif of Chowghat, in M. P. No. 2022 of 1909 in O.S. No. 701 of 1901 and Second Appeal No. 915 of 1903.

Mr. *C. V. Ananta Krishna Iyer*, for the Appellant.

Mr. *T. K. Govinda Aiyar*, for the Respondent.

JUDGMENT.—The question in this case is whether the execution of the decree in Second Appeal No. 915 of 1903 of this Court is barred by limitation. The decree, which was dated the 30th July 1906, provided that the appellant in the second appeal (defendant) should pay the respondent (plaintiff) "Rs. 64-11-4 for his costs in this second appeal, Rs. 78 3 7 for his costs in the memorandum of objections and also his costs in the lower Appellate Court which will be ascertained and taxed by that Court." The costs in the lower Appellate Court were ascertained by that Court on the 1st December 1906.

The application for the execution of the whole decree was presented on the 7th August 1909, that is, more than three years from the date of the High Court decree in Second Appeal No. 915 of 1903, but within three years after the date of the ascertainment of the costs of the lower Appellate Court by that Court. The District Munsif held that the application for execution was barred except with regard to the costs of the lower Appellate Court. The Subordinate Judge modified his order and held that no portion of the decree was barred by limitation.

It is conceded that, so far as it related to the costs of the lower Appellate Court, the execution was not barred as the decree with respect to that portion became complete only within three years of the date of the application. But it is contended by the appellant that the rest of the decree is barred, as execution could have been applied for with respect to it immediately after the date of the decree of this Court in second appeal. After careful consideration, we have come to the conclusion that the decision of the lower Appellate Court is right. Article 182 of the Limitation Act prescribes the rule of limitation with respect to execution of decrees. The starting point is mentioned in the third column. Where an appeal is preferred from a decree or a review of judgment or amendment of the decree is applied for, limitation runs with respect to the execution of the whole decree only when the proceedings in appeal, review or amendment come to an end. This shows that the intention of the Legislature is to treat the decree as a whole although only a part, sometimes a very small part may be the subject of an appeal or an application for review of judgment or amendment of the decree. Different starting points for portions of a decree against the same defendant seem to be contemplated only in the case when the decree directs payments to be made on certain dates in which case limitation will run for the enforcement of each payment from the date when it is directed by the decree to be made. Although the language of columns 2, 3 and 4 might possibly be capable of a different construction, it is now fully established by judicial decisions that there is only a single starting point where there has been an appeal, review or amendment, although it might be open, in some of the cases falling within their purview, for the decree holder to apply for the execution of a part of the decree before the proceedings in appeal, review or amendment have terminated;—See *Gopal Chunder Manna* v. *Gossain Das Kalay* (1); *Kristnamacharya* v. *Mangammal* (2); *Abdul Rahman* v. *Moidin Saiba* (3) and *Gauri Sahai* v. *Ashfak Husain* (4). We think that in the present case also the decree must be taken as a whole for deciding the question of limitation. If the direction were that the costs of the lower Appellate Court should be paid when ascertained by the Subordinate Court the case might be different. We are of opinion that the decree must be interpreted as one for the payment of a certain sum of money composed of three items and

(1) 25 C. 594; 2 C. W. N. 556.
(2) 26 M. 91.
(3) 22 B. 500.
(4) 29 A. 623; A. W. N. (1907) 204; 4 A. L. J. 552.

one of these items, namely, the costs of the lower Appellate Court, was not ascertained until the 1st December 1906. It was held in *Ratnachella* v. *Venkatrama Iyer* (5), that where a decree is for the payment of a sum of money to be thereafter ascertained limitation would run only from the date of the ascertainment of the amount, a view which has been enunciated in several other cases, [see also *Krishnan* v. *Nilakandan* (6) . We are of opinion that the same rule should apply where a portion only of the amount decreed is left to be ascertained in future. It has also been decided that an application for execution of a portion of a decree or against some only of the judgment-debtors would give a fresh starting point for the execution of the whole decree. See *Subramania Chettiar* v. *Alagappa Chettiar* (7) and *Nepal Chandra Sadhookhan* v. *Amrit Lal Sadhookhan* (8).

Mr. Anantakrishnier for the Appellant relies on two cases in support of his contention. The first of them, *Prayag Singh* v. *Rajan Singh* (9), does not really decide the question and need not be further considered. The other decision is a judgment of Subramania Iyer and Boodam, JJ., in C. M. A. No. 74 of 103. The decree in that case provided for the payment of costs and mesne profits, the mesne profits being left to be ascertained subsequently in execution. The application for execution was presented more than three years after the decree but within that period after the ascertainment of the mesne profits. The learned Judges held that the application was barred with respect to the costs but not with regard to the mesne profits. The judgment with reference to execution for the costs is extremely brief and no reasons are given in support of it. With all deference to the learned Judges, we are unable to follow the decision. The policy of the Limitation Act, in the case of execution of decrees is, in our opinion, to lay down a simple rule and to treat the decree as a whole except when the decree itself directs that different portions of the relief granted are to be rendered by the defendant to the decree-holder at different times. Our conclusion is in accordance with the decision of the Privy Council in *Haji Ashfak* v. *Lala Gauri Sahai* (10), We must, therefore, dismiss the appeal with costs.

Appeal dismissed.

(5) 29 M. 46.
(6) 8 M. 137.
(7) 30 M. 268; 2 M. L. T. 189.
(8) 26 C. 888.
(9) 25 C. 203.
(10) 13 C. L. J. 351; 15 C. W. N. 370; 8 A. L. J. 332; 9 M. L. T. 280; 9 Ind. Cas. 975.

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 29 OF 1909.

March 30, 1911.

Present:—Mr. Pratt, J. C. and Mr. Hayward, A. J. C.

ASUDOMAL—APPELLANT

versus

ALI AND OTHERS—RESPONDENTS.

Limitation Act (XV of 1877), Sch. II, arts. 142, 144—*Tenant-in-common—Suit for possession—Presumption—Burden of proof - Ouster—Evidence, necessary to prove.*

The presumption is that the possession of one tenant-in-common is the possession of the other.

Although an allegation of dispossession and discontinuance of possession brings a suit *prima facie* under Article 142 of the Limitation Act, yet, in the case of a suit for possession by a tenant-in-common, the presumption arising from the possession of a defendant tenant-in-common shifts the onus on to the defendant. It is incumbent on the defendant to show that plaintiff's joint possession had ceased by virtue of an ouster.

Bandacharya v. *Shrinivas Acharya*, 5 Bom. L. R. 742; *Gangadhar* v. *Parashram*, 29 B. 300; 7 Bom. L. R. 252; *Culley* v. *Doe de Taylerson*, (1843) 11 A. and E. 1008; 3 P. & D. 539; 9 L. J. Q. B. 288 and *Fishar* v. *Prooser*, (1774) 1 Cooper 217, relied upon.

Faki v. *Babaji*, 14 B. 458 at p. 462; *Vasudev Atmaram* v. *Eknath Balkrishna*, 12 Bom. L R. 956; 35 B. 79; 8 Ind. Cas. 639; *Ittappan* v. *Manvikrama*, 21 M. 153, referred to.

Exclusive receipt of profits by one tenant-in-common for a long period without any claim or demand from the other is evidence of ouster of the nature of a denial of the rights of the tenant-in-common.

Gangadhar v. *Parashram*, 29 B. 300, followed.

Mr. *Rupchand Bhilaram*, for the Appellant.

Mr. *G. A. Kikla*, for the Respondent.

JUDGMENT.—The plaintiff sued in 1907 for possession of an undivided third share of survey numbers 214 and 236 alleging that he had been dispossessed in December 1905 by his co-owners, the defendants.

Both the lower Courts have found that plaintiff has failed to prove his title and that his suit is time-barred.

In second appeal, two points are raised. In the first place, it is said that the original

Court erred in refusing an adjournment in order to allow plaintiff to produce in evidence a *chitta* and documentary evidence connecting the *chitta* with the land in suit. And, in the second place, it is urged that the suit should not have been decided under Article 142 of the Limitation Act.

The *chitta* was produced in Court by the *Tapadar* who was summoned to produce it but was not exhibited for want of documentary evidence from the Survey Records to connect it with the land in suit. The Sub-Judge refused to allow an adjournment for the production of this documentary evidence. We think the Sub-Judge was right. The application for summons gives no specific description of the documents required but is virtually a request that the Court should require the officers in charge of the Survey Records to search their record for papers relevant to plaintiff's suit. Survey Records are open to public inspection and copies were available to the plaintiff under section 213 of the Land Revenue Code. If the *chitta* is, as is contended, a deed of grant, copies of it, and of the documents establishing its connection with the land in suit should have been annexed, to the plaint or at least listed with the plaint. If the plaintiff did not take the trouble to prepare his case before coming into Court, he could hardly expect the Court to give him an opportunity to do so while the case was proceeding. As to the question of limitation, the lower Appellate Court has applied Article 142 of the Limitation Act and decided that the suit is barred as plaintiff has failed to prove possession within 12 years of suit. Mr. Rupchand contends that Article 144 should have been applied and that the onus was on the defendant to prove adverse possession. Articles 142 and 144 were contrasted and distinguished in the case of *Faki* v. *Babaji* (1) which was followed in the recent case of *Vasudev Atmaram* v. *Eknath Balkrishna* (2). It was said that in cases falling under Article 142 the plaintiff must at the outset show possession within 12 years and cannot rest merely on proof of title while in cases falling under Article 144 the plaintiff may rest content on the proof of title in the first instance and the burden is on the defendants to show that they have had a possession inconsistent with the title of the plaintiff for more than 12 years before suit.

Now, here the plaintiff did allege dispossession in 1905 and, therefore, Article 142 applied. But the defendants were tenants-in-common with the plaintiff and it was open to the plaintiff to rely on the defendants' possession prior to 1905 as his own possession, for the presumption is that possession of one tenant-in-common is the possession of the other. This presumption shifts the onus on to the defendants to show that they were in possession prior to 1905 of the survey numbers in suit as their own property to the exclusion of the plaintiff. This consideration led the Madras High Court to decide that in a suit for possession against a tenant-in-common Article 144 should apply, for the onus falls on the defendants; *Ittappan* v. *Manvikrama* (3). This is, no doubt, true in most cases but the more correct view seems to us to be that taken in *Bandacharya* v. *Shrinivas Acharya* (4) followed in *Gangadhar* v. *Parashram* (5). Sir Lawrence Jenkins, C. J. there said at page 744: —

"For, though we think as between tenants-in-common there may be circumstances which would bring a case within Article 142, I think that here we must be guided by Article 144. But we may say in passing that when the matter is analysed, it makes little difference which of those Articles is applied, because even if Article 142 were held to be that which governs, it would, in our opinion, be incumbent on the defendant to show that his joint possession had ceased by virtue of an ouster and the facts necessary to establish that would relieve the plaintiff of much of the burden that is ordinarily cast upon him, where the case falls under Article 142 and not under Article 144".

The result is, that though the allegation of dispossession or discontinuance of possession brings the suit *prima facie* under Article 142 in the present case, yet the presumption arising from the possession of a defendant tenant-in-common shifts the onus on to the defendant and the suit

(1) 14 B. 452 at p. 462.
(2) 12 Bom. L. R. 956; 35 B. 79; 8 Ind. Cas. 639.
(3) 21 M. 153.
(4) 5 Bom L. R. 742.
(5) 29 B. 300; 7 Bom. L. R. 252.

has to be determined as if Article 144 applied.

If the plaintiff had in his plaint admitted an ouster not in 1905 but 12 years before suit he would have been barred on his own admission by Article 142, but as he pleads that the ouster is within 12 years of suit, he is entitled to rely on the defendants' prior possession and the onus is shifted on to the defendants to prove that the ouster was more than 12 years before suit. Now, as held in *Gangadhar* v. *Parashram* (5), following the English cases of *Culley* v. *Doe de Taylerson* (6) and *Fishar* v. *Prooser* (7), exclusive receipt of profits by one tenant-in-common for a long period without any claim or demand from the other is evidence of ouster of and nature of a denial of the rights of the tenant-in-common.

The Subordinate Judge found that "the defendants had been openly and in broad day light cultivating and appropriating the entire produce of the land for the last 25 years *to the entire exclusion of the plaintiff or his father* and that the suit was barred even under Article 144. The lower Appellate Court has, however, not considered the evidence from this point of view and if it finds that plaintiff has been in joint possession prior to 1905, it may come to a different conclusion as to plaintiff's title. We, therefore, treat the appeal as one disposed of on the preliminary issues as to limitation and reverse the decree of the lower Appellate Court and remand the appeal for re-admission and re-trial. The issues to be tried will be.

1. Is the plaintiff's claim barred by defendants' adverse possession for more than 12 years before suit?

2. Is plaintiff's title proved?

Costs to abide the result.

Case remanded.

(6) 11 A. & E. 1008; 3 P. & D. 539; 9 L. J. Q. B. 288.

(7) (1774) 1 Cooper 217.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 6 OF 1910.

May 10, 1911.

Present:—Mr. Justice Karamat Husain and Mr. Justice Chamier.

KESRI MAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

MOBARAK HUSSAIN—PLAINTIFF—RESPONDENT.

Mortgage—Redemption by one who believes himself to have interest in the mortgaged property—Subrogation.

A. mortgaged his property to *R.* Subsequently, in execution of a simple money-decree *A.'s* right in the property was sold and purchased by *F.*, the predecessor-in-interest of the plaintiff. Meanwhile *A.*, by a private sale, sold all his interests in his property to *T. T.* brought a civil suit to have the auction-sale in favour of *F.* set aside. The Subordinate Judge dismissed the suit but on appeal the District Judge decreed it. After the decree of the Subordinate Judge and before the decree of the District Judge *F.* paid off the mortgage-money to *R.* and redeemed the property:

Held, that as *F.* had paid the mortgage-money in the belief that his auction-sale was good and he had interest in the property, he had a right to be subrogated to the position of *R*, the mortgagee.

Syamalaryudu v. *Subbarayudu*, 21 M. 143; *Chama Swami* v. *Padala Anandu*, 31 M. 439; 3 M. L. T. 395; 18 M. L. J. 306; *Sundar Singh* v. *Chandrika Singh*, 36 C. 193; 5 C. L. J. 611; 1 Ind. Cas. 913; *Brocklosby* v. *Temperance Permanent Building Society*, (1895) A. C. 173; 64 L.J.Ch. 433; 11 R. 159; 22 L. T. 477; 43 W. R. 606; 59 J. P. 676; *Thurstan* v. *Nottingham Permanent Benefit Building Society*, (1902) 1 Ch. 1; 71 L. J. Ch. 82; 50 W.R. 179; 86 L.T. 35; 18 T.L.R. 135, referred to.

First appeal from the decision of the Second Additional Judge of Meerut, dated the 27th September 1909.

The Hon'ble Mr. *Sunder Lal*, for the Appellants.

Dr. *Satish Chandra Banerji* (with him Mr. *Nihal Chand*), for the Respondent.

JUDGMENT.

CHAMIER, J.—These appeals arise out of a suit brought by Mubarak Husain the respondent in First Appeal No. 11 for enforcement of a mortgage alleged to have been made by one Amir Abbas in favour of Ram Prasad whom Mubarak Husain now claims to represent. The rights of Amir Abbas in the property were put up for sale in execution of a money-decree and were purchased by Fakhr-ud-din on December 20th, 1902. The latter entered into possession and while in possession redeemed the mortgage held by Ram Prasad. Meanwhile, Amir Abbas by private treaty sold all his interest in the property to two persons Tulsi Ram and Ram Gopal who applied to the Collector to set

aside the auction-sale. The Collector did so, but on appeal the Commissioner reversed his order and confirmed the sale. Tulsi Ram and Ram Gopal then brought a suit in the Civil Court to have the sale set aside. The Subordinate Judge dismissed the suit on April 19th, 1905, but his decision was reversed by the District Judge who set aside the sale on September 22nd, 1905. A further appeal to the High Court was dismissed. It was after the dismissal of the suit by the Subordinate Judge and before that decision was reversed by the District Judge that Fakhr-ud-din redeemed Ram Prasad's mortgage. The plaintiff in the present suit is one of the heirs of Fakhr-ud-din. The other heirs have been impleaded as defendants. The plaintiff's case is that Fakhr-ud-din having paid off Ram Prasad's mortgage at a time when he was in possession of the mortgaged property and believed himself to be entitled to the property, he stood in the shoes of Ram Prasad and was entitled to sue upon that mortgage. The defence of Tulsi Ram and the heirs of Ram Gopal was and is that Amir Abbas was a minor at the date of the alleged mortgage of which they say they have no knowledge, that the full consideration stated in the deed did not pass to the mortgagor, and that the plaintiff cannot sue upon the mortgage. The Court below found that Amir Abbas was of full age at the date of the mortgage and that the deed was duly executed by him but that only Rs. 75 passed to him on consideration. The Court held also that Fakhur-ud-din, by paying off the mortgage in the circumstances stated above, had acquired the rights of the mortgagee and consequently his heirs representing him were entitled to bring the present suit. Both sides have appealed on the questions of fact, I have no hesitation in confirming the decisions of the Court below. There can be no doubt whatever that Amir Abbas executed the mortgage-deed in suit. There is a conflict of evidence as to his age on the date of the mortgage but I have no dobut that the evidence adduced by the plaintiff is true. It is supported by an application dated June 20th, 1894, made by Amir Abbas in which he stated that he had come of age and prayed that his guardian might be removed. The Judge to whom it was made observed that he looked about 18 or 19; according to this Amir Abbas must have been born about 1875 or 1876. He came of age in 1896 or 1897, and was in all probability more than 21 years of age at the date of the mortgage. The evidence adduced to prove the passing of the consideration stated on the deed is extremely feeble. It was intended to prove that the consideration was made up of a sum of Rs. 75 paid in cash at the execution of the deed, Rs. 74 paid a few days before the execution, Rs. 120 paid to a relation of the mortgagee on account of a pair of bullocks purchased by Amir Abbas, Rs. 76 paid to the mortgagee's son-in-law on account of a bond and some cloth and Rs. 30 on account of a tonga purchased from the mortgagee. Amir Abbas denies having received any of these sums except the sum of Rs. 75 paid at the execution of the deed. I think with the Court below that his evidence is true and I do not believe that the other items had any real existence.

There remains the question whether Fakhr-ud-din by paying off the mortgage when he was in possession of the property was subrogated to the rights of the mortgagee. Counsel for the plaintiff relies upon the decisions of *Syamalarayudu* v. *Subbarayudu* (1); *Chama Swami* v. *Padala Anandu* (2) *Sunder Singh* v. *Chandrika Singh* (3); *Brocklesby* v. *Temperance Permanent Building Society* (4); *Thurstan* v. *Nottinghan Permanent Benefit Building Society* (5) affirmed by the House of Lords in *Nottinghan Permanent Benefit Building Society* v. *Thurstan* (6) and the very recent case of *Batlu* v. *Rice* (7). Pandit Sundar Lal on behalf of the defendants Tulsi Ram and the heirs of Ram Gopal sought to distinguish these cases (except the third) from the case before us on the ground that in all of them (except the third) the person who paid off the mortgage had at the time an interest both in fact and in law, in a part at all events, of the property affected by the mortgage whereas in the present case though Fakhr-ud-din was in possession he had no interest in any part of the property and the

(1) 21 M 143.

(2) 31 M. 432; 3 M. L. T. 395; 18 M. L. J. 506.

(3) 36 C. 193; 5 C. L. J. 61'; 1 Ind. Cas 913.

(4) (1895) A. C. 173; 64 L. J Ch. 433; 11 R. 159; 72 L. T. 477; 43 W. R. 606; 59 J. P. 676.

(5) (1902) 1 Ch. 1; 71 L. J. Ch. 83; 50 W. R. 179; 86 L. T 35; 18 T. L. R. 135.

(6) (1903) A C. 6; 72 L. J. Ch. 134; 67 J. P. 129; 51 W. R. 273; 87 L. T. 529; 19 T. L. R. 54.

(7) (1910) 2 Ch. 277.

learned Pandit urged that according to the law as stated in third case Fakhr-ud-din was not subrogated to the rights of the mortgagee. It may, no doubt, be said of some of the cases cited that the person found to be entitled to be subrogated to the rights of another had both in law and in fact an interest in part of the property in question at the time when he paid or advanced the money but this cannot be said of the Building Society in the fifth case or of the plaintiff in the last case and there is no substance in the ground of distinction suggested by Pandit Sundar Lal for in none of the cases was the right of subrogation limited to that part of the property in which the person claiming the right was ultimately found to have an interest both in fact and in law. In the present case Fakhr-ud-din was supported by the decision of a competent Court in his belief that his purchase at auction would hold good. In that belief he paid off Ram Prasad's mortgage. He was in possession of the property and he paid off the mortgage to protect the interest which he believed himself to possess in the property. His right to be subrogated to the position of Ram Prasad as against the subsequent purchasers of the property seems to me to be very clear. This case is in many respects a much stronger case than any of those mentioned above.

I would dismiss both appeals with costs.

KARAMAT HUSAIN, J.—I agree.

BY THE COURT.—The order of the Court is that both appeals are dismissed with costs including in this Court fees on the higher scale.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 900 OF 1910.

May 19, 1911.

Present:—Mr. Richards, K. C., Chief Justice, and Mr. Justice Tudball.

Musammat DHIAN KUAR—PLAINTIFF—APPELLANT

versus

DIWAN SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Pre-emption—Wajib-ul-arz, *evidentiary value of*—*Custom or contract.*

There is no class of evidence that is more likely to vary in value according to circumstances than that of the *wajib-ul-arz.*

In a suit for pre-emption based on custom the plaintiff produced only a *wajib-ul-arz* which was not a clear record of custom, but on the contrary appeared on the face of it to be a record of a number of arrangements between the co-sharers adopted for the first time at the Settlement at which it was prepared:

Held, that it was not sufficient to establish the custom of pre-emption which the plaintiff wanted to set up.

Thakur Anant Singh v. *Thakur Durga Singh*, 37 I. A. 191; 14 C. W. N. 770; 7 A. L. J. 764; 12 C. L. J. 36; 13 O. C. 163; 32 A. 363; 6 Ind. Cas. 721; *Tofaluddi Peada* v. *Mohara Ali Shah*, 26 C. 78; *Muhammad Imam Ali Khan* v. *Hussain Khan*, 25 I. A. 161; 26 C. 81; *Parbati Kunwar* v. *Chandrapal Kunwar*, 36 I. A. 124; 31 A. 457; 12 O. C. 304; 19 M. L. J. 605; 10 C. L. J. 216; 6 A. L. J. 767; 13 C. W. N. 1073; 11 Bom. L. R. 890; 5 M. L. T. 427; 4 Ind. Cas. 25, referred to.

Second appeal from the decision of the Additional Subordinate Judge of Saharanpur, dated the 10th May 1910.

Mr. *Sarat Chandra Choudhri*, for the Appellant.

Mr. *Nihal Chand*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for pre-emption. The Court of first instance decreed the claim. The lower Appellate Court reversed the decree and dismissed the plaintiff's suit. The only evidence adduced by the plaintiff in support of his case was the *wajib-ul-arz* of 1867. The *wajib-ul-arz* is of a somewhat unusual nature. On the face of it, if we were to construe the document according to the ordinary rules of construction of written documents, it would be the record not of a custom but of a contract. There are a number of other matters dealt with in the *wajib-ul-arz* which it is extremely improbable were established customs or usages at the time the *wajib-ul-arz* was prepared. The entries in the *wajib-ul-arz* are in all probability "entries recorded to connote the views of individuals as to the practice that they would wish to see prevailing rather than the ascertained fact of a well-established custom." See the remarks of Lord Collins in the cases of *Thakur Anant Singh* v. *Thakur Durga Singh* (1). We think that the real question in the present case, is whether or not the evidence adduced by the plaintiff was sufficient to establish a usage or custom of pre-emption prevailing in the village. There is no evidence of a single instance in which the custom was enforced or exercised. The plaint referred to the earlier *wajib-ul-araiz* but the plaintiff did not file them. We think that the fair inference to be drawn is that these earlier documents would not support the plaintiff's case. It may be that there are no entries as

(1) 37 I. A. 191; 14 C. W. N. 770; 7 A. L. J. 764; 21 C. L. J. 36; 13 O. C. 163; 32 A, 363; 6 Ind. Cas. 712.

to pre-emption at all or that the entries are inconsistent with the entry in the *wajib-ul-arz* of 1867. In short, as we have said above, the sole evidence adduced by the plaintiff was the *wajib-ul-arz* of 1867. Their Lordships of the Privy Council in dealing with the question of the weight to be attached to the *wajib-ul-arz* as establishing usages have said:—

"Another piece of evidence on this part of the case is the *wajib-ul-arz* of the village Deokalia which is part of the Bhatwamau estate. This class of document is always admissible in evidence being an official village record. Its weight may be very slight or may be considerable according to circumstances." See *Tafaluddi Peada* v. *Mohar Ali Shah* (2). Again, in the case of *Thakur Anant Singh* v. *Thakur Durga Singh* (1), to which we have already referred, Lord Collins at page 197 said,— "it has been pointed out more than once at this Board that there is no class of evidence that is more likely to vary in value according to circumstances than that of the *wajib-ul-ariz*." His Lordship then quotes the case of *Muhammad Imam Ali Khan* v. *Husain Khan* (3) and another case of *Parbati Kunwar* v. *Chandrap l Kunwar* (4).

Having regard to the circumstances of the present case and bearing in mind that the *wajib-ul-arz* which has been produced is certainly not a clear record of a custom but on the contrary appears on the face of it to be a record of a number of arrangements between the co-sharers, adopted for the first time at the Settlement of 1867 and binding only during the period of that particular Settlement. We think that this *wajib-ul-arz* was not sufficient to establish the usage claimed by plaintiff and that he has failed to discharge the onus which lay upon him of proving by satisfactory evidence the existence of the usage of pre-emption. We dismiss the appeal with costs.

Appeal dismissed.

(2) 26 C. 78 at P. 92.
(3) 25 I. A. 161; 26 C. 81.
(4) 36 I. A. 124; 31 A. 457; 12 O. C. 304; 19 M. L. J. 605; 10 C. L. J. 216; 6 A. L. J. 767, 13 C. W. N. 1073, 11 Bom. L. R. 890; 5 M. L. T. 427; 4 Ind. Cas. 25.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1143 OF 1910.

May 3, 1911.

Present:—Mr. Justice Karamat Husain and Mr. Justice Chamier.

HASWA—PLAINTIFF—APPELLANT

versus

MAHBUB AND ANOTHER—DEFENDANTS—RESPONDENTS.

Arbitration—Application not signed by all parties interested in the suit at the time of reference, whether invalid and award illegal—Civil Procedure Code (Act V of 1908), Sch. II, s. 1.

If all the parties interested at the time when a reference is made to arbitration have not joined the reference, the reference is invalid and the award which follows such reference is also invalid.

Pitam Mal v. *Sadiq Ali*, 24 A. 229; *Kadhu Singh* v. *Baljit Singh*, 29 A. 423; 4 A. L. J. 847; A. W. N. (1907), 147; *Ishar Das* v. *Keshab Deo*, 32 A. 657; 7 A. L. J. 807; 7 Ind. Cas. 68, referred to.

Second appeal from the decision of the District Judge of Agra, dated the 23rd August 1910.

Messrs. *Gokul Prashad* and *Haribans Sahai*, for the Appellant.

Messrs. *Muhammad Ishaq* and *Benode Behari*, for the Respondents.

JUDGMENT.—This was a suit by the appellant against the respondents Mahbub and Badal for recovery of Rs. 1,331-15-9. The appellant and the respondent Mahbub referred the matter in dispute in the case to the arbitration of three persons. The respondent Badal did not join in the reference. An award was made in due course by two of the arbitrators and a decree dismissing the suit was passed in accordance therewith. The appellant appealed and the respondents took a preliminary objection that no appeal lay, inasmuch as the decree was in accordance with the award. To that the appellant replied that there was no award because all the parties to the suit had not joined in the reference. The lower Appellate Court held that there had been a valid reference and dismissed the appeal.

In second appeal it is again urged that there was no award at all inasmuch as all the parties to the suit did not join in the reference. Several cases have been cited. The first is that of *Pitam Mal* v. *Sadiq Ali* (1), in which it was held that the words "all the parties to a suit" in section 506 of the Code of Civil Procedure of 1882 must be read with the succeeding words "any matter

(1) 24 A. 229.

in difference between them in the suit" and did not necessarily include parties who never put in any appearance and between whom and others there was no matter in dispute. The second case was that of *Kadhu Singh* v. *Baljit Singh* (2), in which it is held that a reference made by some only of the parties to a suit was invalid. The Court referred to the case of *Pitam Mal* v. *Sadiq Ali* (1) and pointed out that what had been held in that case was that all the parties interested in a dispute should join in a reference. The third case mentioned was *Ishar Dass* v. *Keshab Deo* (3), in which it was pointed out that there has been a significant alteration in the wording of paragraph 1 of the Second Schedule to the present Code of Civil Procedure which corresponds with section 506 of the Code of Civil Procedure of 1882, paragraph 1 of the Second Schedule providing that, "When in any suit *all the parties interested* agree that any matter in difference between them shall be referred to arbitration, that may, at any time before judgment is pronounced, apply to the Court for an order of reference." In that case a reference to arbitration and an award were upheld on the ground that all the parties interested had joined in the reference. In arriving at that conclusion the learned Judges said that one Bhagwan Singh had never put in an appearance or contested the suit, and in the events which happened appeared to have nothing whatever to do with its result inasmuch as by the award he had been exempted from the plaintiff's claim. That is exactly what has happened in the present case and it is contended that the reference was a good reference although Badal did not join in it, because by the award he has been exempted from the appellant's claim. We do not think that the learned Judges who decided the case of *Ishar Dass* v. *Keshab Deo* (3) intended to lay down that the question whether a person who was interested within the meaning of section 1 of the Second Schedule of the Code of Civil Procedure of 1908 depends upon whether the award is against him or in his favour. It seems quite clear that the question whether a party is interested or not depends upon his position at the time when the reference was made and this view is supported by the recent decision in *Ajudhia* v. *Adhin*. [First Appeal from Order No. 54 of 1910 decided on the 6th of February 1911]. In that case four out of nine defendants joined with the plaintiff in referring the matter in dispute to arbitration. The other defendants were absent and had not defended the suit, but they were not merely *pro forma* defendants and Knox and Banerjee, JJ., held that as all the parties had not joined in the reference, the reference was invalid and the award which followed thereon was not a valid award. In the present case it is quite clear that the respondent Badal was interested in the dispute at the time when the reference was made. The Code does not contemplate a reference to arbitration between the plaintiff and one defendant and a trial between the plaintiff and another defendant. As the respondent Badal was not a party to the reference, the reference was invalid and it must be held that the award which followed was invalid. We, therefore, allow the appeal, set aside the decisions of the Courts below and remand the case, through the lower Appellate Court, to the Court of first instance for trial on the merits. Costs, which will in this Court include fees on the higher scale, will be costs in the cause.

Appeal allowed.

(2) 29 A. 423; 4 A. L. J. 347; A. W. N. (1907) 147.
(3) 32 A. 657; 7 A. L. J. 807; 7 Ind. Cas. 68.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 687 OF 1908.
February 15, 1911.
Present:—Mr. Justice Mookerjee and Mr. Justice Teunon.
Maharaja BIJOY CHAND MAHTAP BAHADUR—PLAINTIFF—APPELLANT
versus
PARBATI CHARAN MUKHERJI AND OTHERS—DEFENDANTS—RESPONDENTS.

Landlord and tenant—Decree for rent—Sale of tenure—Suit for rent for intermediate period—Personal liability of tenant—Estate in the hands of executor—Executor's personal liability—Personal liability of beneficiaries.

A rent-decree was obtained for the period ending with May 1310. In execution the tenure was sold and the sale confirmed in *Baisak* 1312. The landlord now sues to recover the rent which accrued due between *Falgoon* 1310 and before the confirmation of the sale in *Baisak* 1312. The tenure was during the period vested in certain executors:

Held, that as the property has been sold, the landlord can obtain only a personal decree against the tenants, and as the property was vested in the

executors, they are personally liable and not the beneficiaries who would ultimately be entitled to the property if anything remained to be distributed.

Appeal from the decree of the District Judge of Hooghly, dated December 12th, 1907, modifying that of the Sub-Judge of Hooghly, dated September 26th, 1907.

Babus *Basanta Kumar Bose* and *Shorashi Charan Mitra*, for the Appellant.

Babus *Brojo Lal Chakravarti*, *Joy Gopal Ghosha* and *Hari Bhushan Mukherjee*, for the Respondents.

JUDGMENT.—This is an appeal on behalf of the plaintiff in a suit for rent of a *patni taluk* for the period from *Falgun* 1310 to *Chaitra* 1311. It appears that a decree for rent was obtained in respect of the said property for the period ending with *Magh* 1310. In execution of that decree the property was sold on the 10th April 1905 and the sale was confirmed on the 12th May following. The *zemindar* now sues to recover rent which accrued due between *Falgun* 1310 and before the confirmation of the sale in *Jysak* 1312. It is obvious that as the property has been sold he can obtain only a personal decree against the tenants; one of these tenants, by name Chander Kant Mukerjee, died in 1897. He had made testamentary disposition of his property by which he had appointed his son and one of his grandsons as executors to hold possession of his estate till the termination of the minority of his youngest grandson. These executors are the sixth and seventh defendants in the present suit. The grandsons are the defendants Nos. 8 to 11 and the defendant No. 12 is their mother. The plaintiff sought to make all these persons jointly responsible for the rent and the Court of first instance made a decree in his favour. Two separate appeals were then preferred, one on behalf of the 6th defendant and the other on behalf of defendants Nos. 8 to 12. The learned District Judge has allowed both these appeals and maintained the decree only as against the other defendants.

The landlord has now appealed to this Court, and on his behalf it has been contended that all the defendants are liable for the rent claimed. The appeal has been contested by the executor defendant as also by the grandsons and the mother. It has been argued on behalf of the former that, as during the period for which rent is claimed, the estate was in the hands of a Receiver appointed on the original side of this Court in the course of a partition suit, the only person who can rightly be made liable for the rent was the Receiver-defendant. This objection is manifestly groundless. The Receiver, in fact, was not a necessary party to this litigation at all [*Jatindra Nath* v. *Sarfaraj* (1)]. The plaintiff does not seek to sell any property in the hands of the Receiver. The defaulting tenure, as we have already explained, has been previously sold and it has been stated to us that the joint estate which was in the hands of the Receiver has also gradually disappeard in the course of the partition-suit. The plaintiff, therefore, seeks a personal decree against the tenants and the question which requires consideration is, who were the tenants in possession or entitled to possession of the property during the period for which rent is claimed. Now, in so far as the executor-defendant is concerned, it is clear that he was the person in whom the property was vested during this period. He was to continue to act as executor till the minority of the youngest grandson of Chandra Kant Mukerjee. That period had not come to an end even at the time of the institution of this suit. It cannot be disputed, therefore, that the sixth defendant was entitled to possession and was liable for rent. The mere circumstance that a Receiver had been appointed could not affect his liability. because the Receiver held possession only on behalf and for the benefit of persons found in the end to be entitled to the property [*Jagat Tarini* v. *Naba Gopal* (2)]. There is no room for controversy that the executor is personally liable. It was faintly suggested on behalf of the respondent, that a decree should be made against him in his character as executor. That would, in our opinion, be clearly erroneous. It is pointed out in Williams on Executors (9th Edition, Volume II, p. 1634) that in an action for rent accrued after the death of the lessee, if the executor enters upon the demised premises the lessor has his election either to sue him as executor or to charge him personally as assignee in respect of the participation of the profits. In sup-

(1) 14 C. W. N. 653; 6 Ind. Cas. 214.
(2) 5 C. L. J.270; 34 C. 305.

port of this view the learned author refers to the cases of *Boulton* v. *Canon* (3) and *Jevan* v. *Harridge* (4). The principle upon which the executor may be made personally liable for rent which has accrued due after the death of the lessee is explained in the same work (page 1637) namely, that if the rent be of less value than the land as the law *prima facie* supposes, so much of the profits as suffices to make up the rent is appropriated to the lessor and cannot be applied to anything else. The learned author in support of this view refers to the case of *Buckley* v. *Park* (5). It is clear, therefore, that the 6th defendant is personally liable for the rent claimed. It follows also that the grandsons defendants and their mother cannot be held liable for the rent. The estate during the period for which rent is claimed was vested in the executors and, therefore, the beneficiaries who would ultimately be entitled to the property, if anything remained to be distributed, could not be made personally liable for the rent.

The result is that this appeal is allowed in part and the decree of the learned Judge, in so far as it dismisses the suit as against the sixth defendant, is reversed. But the decree, in so far as it dismisses the claim against the defendants Nos. 8 to 12, must be affirmed. The appeal is not pressed against the fifth defendant. The effect of our decision will be that there will be a joint decree against all the defendants except Nos. 5 and 8 to 12. The plaintiff will have his costs of this appeal as also his costs in the lower Appellate Court from the sixth defendant, but he must pay the costs of defendants Nos. 8 to 12 in this Court.

Appeal allowed in part.

(3) 11 Free. 237; 1 Saunders 1 Note (1).
(4) 1 Sid. 308; 2 Keb. 116.
(5) 1 Salk. 317.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL No. 1438 OF 1907.
March 9, 1911.
Present:—Mr. Justice Mookerjee, and
Mr. Justice Caspersz.
ARAB ALI—DEFENDANT—APPELLANT
versus
RACHIMADDI—PLAINTIFF—RESPONDENT.

Bengal Tenancy Act (*VIII of* 1885), *s.* 85, *cl.* (3)—*Under*-raiyat *allowed to hold over—Ejectment, forcible, if legal.*

The provision in sub-section 3 of section 85 of the Bengal Tenancy Act, that the sub-lease shall not be valid for more than nine years from the commencement of the Act, applies only as between the under-*raiyat* and the landlord of the *raiyat*; it does not apply as between the tenant and the sub-tenant.

If the provisions of section 85, sub-section (3), are not enforced immediately upon the termination of 9 years after the commencement of the Bengal Tenancy Act, and if the under-*raiyat* is allowed to hold over and continue in occupation of the land of the tenancy, his tenancy must be terminated in accordance with the provisions of the law, and till such steps have been taken, he cannot be forcibly ejected from the land.

The *raiyat* of a holding executed a sub-lease in favour of certain persons on May 30th, 1879. These latter again executed a sub-lease in favour of the plaintiff on February 20th, 1885. The interest of the *raiyat* was subsequently acquired by the defendant, under deeds of conveyance in 1883 and 1897, who forcibly ejected the plaintiff:

Held, that the defendant, being the representative-in-interest of the *raiyat*, is not entitled as between himself and the plaintiff to take up the position that the lease of May 30th, 1879, was inoperative, and that the plaintiff must succeed.

Appeal from the decree of the Sub-Judge of Barisal, dated April 6th, 1907, reversing that of the Munsif of Bhola, dated March 19th, 1906.

Babu *Prokash Chandra Mazumdar*, for the Appellant.

Maulvi Nur-ud-din Ahmed and Babu *Biraj Mohan Majumdar*, for the Respondent.

JUDGMENT.—This is an appeal on behalf of the defendants in an action in ejectment. The land in dispute admittedly belonged at one time to a person named Kalim, whose status was apparently that of a *raiyat*. After his death his representatives-in-interest executed a sub-lease in favour of certain persons on the 30th May 1879. These latter again executed a sub-lease in favour of the plaintiffs or their predecessors on the 20th February 1885. The interest vested in the representatives of Kalim was subsequently acquired by the contesting defendants, now appellants before this Court, under two deeds of conveyance executed on the 3rd April 1883 and the 14th March 1897. The case for the plaintiffs is that they were in occupation of the disputed land till the 21st August 1905 when the contesting defendants forcibly ejected them. They, therefore, seek for declaration of their title and for recovery of possession of the land in dispute. The Court of first instance dismissed the suit on the ground that the plaintiffs had not

acquired a valid title under the lease of the 20th February 1885. Upon appeal, the Subordinate Judge has reversed that decision and made a decree in favour of the plaintiffs.

The defendants have now appealed to this Court and on their behalf the decision of the Subordinate Judge has been assailed, substantially on the ground that in view of the provisions of sub-section (3) of section 85 of the Bengal Tenancy Act the plaintiffs are not entitled to any relief as against the contesting defendants.

The learned Vakil for the appellants has argued that, although the lease of the 30th May 1879 in favour of the under-*raiyats* and the sub-lease by them in favour of the plaintiffs on the 20th February 1885 were for indefinite terms, by the operation of sub-section (3) of section 85, they are invalid as against the contesting defendants. In support of this view reliance has been placed upon the cases of *Ramgati Mandul* v. *Shyama Charan Dutt* (1) and *Basaratullah Mundle* v. *Kasirunnessa Bibi* (2). In our opinion, the contention of the appellants is not well founded and must be overruled. The difficulty of the appellants is tow-fold. In the first place, the appellants are the representatives-in-interest of the *raiyats* who granted the lease of the 30th May 1879. Consequently, they are not entitled as between themselves and the under-*raiyats* to take up the position that the grant was inoperative. This view is supported by the decisions of this Court in the cases of *Gopal Mandal* v. *Eshan Chandra Banerjee* (3); *Madan Chandra Kapali* v. *Jaki Krikar* (4). *Tamijuddi* v. *Aggar Howladar* (5) and *Bepin Behari Hati* v. *Amritalal Bhattacharjee* (6). In the case last mentioned, it was pointed out by Sir Francis Maclean, C. J., that the words in sub-section 3 of section 85 of the Bengal Tenancy Act, namely, that the sub-lease shall not be valid for more than nine years from the commencement of the Act, apply only as between the under-*raiyat* and the landlord of the *raiyat*; they do not apply as between the tenant and the sub-tenant. It has been suggested, however, that a contrary view is supported by the case of *Basara'ullah Mullah* v. *Khasirunnessa Bibi* (2). But that decision is clearly distinguishable, because it turned upon the construction of sub-section (2) of section 85 of the Bengal Tenancy Act, *Manik Borai* v. *Bani Charan Mondal* (7). It is not necessary now to examine whether the distinction drawn therein between sub-section (2) and sub-section (3), which latter alone is applicable to the present case, is well-founded. But, even if the appellants can get over this difficulty and even if it be assumed that it is open to them to contest the validity of the lease granted by their predecessors on the 30th May 1879, it is obvious in the second place, that they have no defence to the claim of the plaintiffs. Sub-section 3 of section 85 provides that where a *raiyat* has, without the sanction of his landlord, granted a sub-lease by an instrument registered before the commencement of the Bengal Tenancy Act, the sub-lease shall not be valid for more than nine years from the commencement of the Act. Let us assume, therefore, that the sub-lease of the 30th May 1879 was not valid, even as against the grantors or their representatives, for more than nine years from the commencement of the Bengal Tenancy Act, that is, for more than nine years from the 1st November 1885. In this view, it may be conceded that steps might have been taken for recovery of possession from the plaintiffs on the 1st November 1894. But apparently no such steps were taken. The plaintiffs have continued in occupation from the 1st November 1894 to the 21st August 1905. Their case is that they have continued in occupation upon payment of rent to their landlords and these landlords again have been in possession by payment of rent to the grantor of the lease of the 30th May 1879 or their representative-in-interest. Consequently, the question arises, whether if the provisions of section 85 sub-section (3) are not applied immediately upon the termination of nine years after the commencement of the Bengal Tenancy Act, and if the under-*rayiat* is allowed to hold over and continues in occupation of the land of the tenancy, he can subsequently be treated as trespasser and forcibly ejected from the land. In our opinion, only one answer is possible. If the under-*raiyat* has been allowed to hold over and to continue in occupation as tenant, his tenancy must be terminated in accordance

(1) 6 C. W. N. 919.
(2) 11 C. W. N. 190.
(3) 29 C. 148.
(4) 6 C. W. N. 377.
(5) 36 C. 256; 1 Ind. Cas. 942; 13 C. W. N. 183.
(6) 9 C. L. J. 76; 3 Ind. Cas. 685.
(7) 10 Ind. Cas. 469.

with the provisions of the law, and till such steps have been taken, he cannot be forcibly ejected from the land. Reliance, however, has been placed upon the decision of this Court in the case of *Ramgati Mandul* v. *Shama Charan Dutt* (1) in which a distinction was apparently drawn between the case of a person who sues as plaintiff in his capacity as an under-*raiyat*, and another who is sued as a defendant in the same capacity. It is not necessary for our present purpose to examine whether this distinction is well-founded on principle. But the case mentioned is clearly distinguishable on two grounds, *first*, that it was a case under sub-section (2) of section 85, and, *secondly*, that in that case there was nothing to show that the under-*raiyat* had been treated as a tenant even after the expiry of the term of his lease. In the case before us, it is manifest that the contesting defendants were not entitled to take the law into their own hands, and to eject the plaintiffs before their tenancy had been lawfully terminated. We must not be taken, however, to decide that the tenancy of the plaintiffs, on the strength of which they now succeed, is at all liable to be terminated at the present time.

The result is that the decree made by the Subordinate Judge must be affirmed and this appeal dismissed with costs.

Appeal dismissed.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 68 OF 1909.
May 3, 1911.
Present:—Mr. Justice Karamat Husain and Mr. Justice Chamier.
CHAUDHRY BALDEO SINGH AND OTHERS—PLAINTIFFS—APPELLANTS
versus
JUGAL KISHORE AND OHTERS—DEFENDANTS—RESPONDENTS.

Riparian owners—Flow of water through natural channel obstructed—Obstruction caused by silting up of a river—Riparian owner, whether bound to clean the natural channel—Damages—Contributory negligence.

An owner of land through which a river or other natural channel flows is not bound to clean it out from time to time so that the amount of water that can pass down it may not be diminished, though he is bound within certain limits as between himself and other riparian owners not to do anything which shall obstruct the flow of water or materially interfere with their rights. If from natural causes a river or channel passing through *A.*'s land silts up with the result that more water is thrown into another river or channel running through *B.*'s land and *B.* blocks up the river or channel on his land so as to throw the water back on to and flood. *A.*'s land, *A.* cannot be held to have contributed to the result. The inundation of *A.*'s land must be regarded as being due to *B.*'s action alone and *B.* is *prima facie* responsible for the consequences, though he may show that he had acquired a right to block up the channel partly.

Second appeal from the decision of the District Judge of Mirzapur, dated the 2nd June 1908.

Mr. *M. L. Agarwala* (with him Mr. *Kalindi Prcshad*), for the Appellants.

Mr. *Gulam Mujtaba* (with him Mr. *Gokal Purshad*), for the Respondents.

JUDGMENT.

CHAMIER, J.—This was a suit by the appellants to have a *bandh* removed which had been built by the respondents; for a perpetual injunction restraining the respondents from building a *bandh* at place in question, and for damages.

South of the villages of the parties is some high ground the drainage from which passes first by several natural channels through four of the appellants' villages. From a point north of the appellants' village Sarkohia the drainage passes on in one natural channel to the appellant's village Dohri. Further north again this channel branches out into two channels one running east to the place where the *bandh* in question has been erected at a point marked T in the map and the other running north and ultimately falling into the Garhai Nadi the latter channel for a part of its course is known as the Deosya channel or drain and it seems that an arm runs out of it east-ward and joins the other channel somewhere near the point T which is in the respondents' village. The appellants say that the respondents in *Kartik* 1312 *Fasli* built a new *bandh* at T which so blocked the natural drainage as to cause the appellants' village Tohri to be inundated. The respondents' case was that the *bandh* in question is an old *bandh*; that the drainage passes away from the appellants' villages through the Deosya channel; that the appellants have blocked up this channel thereby interfering with the natural drainage, and that the respondents have caused no damage to the appellants.

The findings of the first Court are clear enough. It finds that the *bandh* in question

is an old one and caused no damage to the appellants' land, that the appellants blocked up the Deosya drain and have themselves to thank for the inundation of their fields.

On appeal the District Judge said,—"If any inundation of the Dohri lands did take place it must have been due as much to the blocking up of the Deosya drain either by silting up or artificial means as to the existence of the *bandh* at T. I am of opinion, therefore, that it is not satisfactorily proved that the inundation of the plaintiffs' lands was caused solely by the *bandh* at T and, therefore, the defendants are not responsible for any loss which may have been suffered by the plaintiffs apart from the fact (*sic*) whether the *bandh* in dispute was old or new." Later on he says:

"I am, therefore, of opinion that the *bandh* in dispute is not proved to be an entirely new construction and supposing it to be new it is not proved that the inundation of the plaintiffs' lands was due entirely to the existence of the *bandh* in dispute." The words "either by silting up" in the first finding rob it of any value that it might otherwise have possessed. We asked Counsel for the respondents whether he could produce any authority for the proposition that the appellants are bound to keep the Deosya channel clear. He was unable to do so. What is called the Deosya channel is a natural not an artificial channel and I know of no authority for the proposition that the owner of land through which a river or other natural channel flows is bound to clean it out from time to time so that the amount of water that can pass down it may not be diminished. Such an owner is bound within certain limits as between himself and other riparian owners not to do anything which shall obstruct the flow of the water or materially interfere with their rights. If from natural causes a river or channel passing through *A*'s land silts up with the result that more water is thrown into another river or channel running through *B*'s land and *B* blocks up the river or channel on his land so as to throw the water back on to and flood *A*'s land, *A* cannot be held to have contributed to this result if all that can be said of him is that has not kept the river or channel on his land clear. *A* is not responsible for the silting up of the channel on his land. If after the river or channel flowing through *A*'s land has silted up, *B* blocks up the river or channel flowing through his land with the result that *A*'s land is inundated, the result must be regarded as being due to *B*'s action alone and *B* is *prima facie* liable for the consequences though he may show that he has acquired a right to block up the channel partly. In my opinion, therefore, the first finding of the District Judge does not enable us to dispose of this appeal. There should also be a fresh finding on the question whether the *bandh* is new or old. I would remit the case to the lower Appellate Court for fresh findings upon the second and third issues framed by the first Court.

KARAMAT HUSAIN, J.—I agree.

BY THE COURT.—Order of the Court is that the case be remitted to the lower Appellate Court for fresh findings upon the second and third issues framed by the first Court. Ten days will be allowed for objections on return of the findings.

The lower Appellate Court will take such additional evidence as the parties may adduce.

Case remanded.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 930 OF 1910.
May 18, 1911.
Present:—Mr. Justice Karamat Husain
AND Mr. Justice Chamier.
Musammat KISHORI DUBAIN—PLAINTIFF APPELLANT
versus
Musammat MUNDRA DUBAIN AND OTHERS —DEFENDANTS—RESPONDENTS.

Hindu Law—Will—Gift—Construction—Bequest to favour of two brothers living jointly, whether creates joint or separate interest—Joint tenancy unknown to Hindu Law.

A gift and a Will were made in favour of two brothers living jointly as members of an undivided Hindu family. There was nothing either in the Will or in the deed of gift which gave any indication as to whether the testator or the donor intended that the two brothers should hold as undivided co-parceners or as tenants-in-common with separate interests. Moreover, both at the execution of the Will and of the deed of gift the father of the donees was also living with them jointly: *Held*, that both the Will and the deed of gift conveyed separate interests to the donees.

The principle of joint tenancy is unknown to Hindu

KISHORI DUBAIN *v.* MUNDRA DUBAIN.

Law except in the case of co-parcenary between the members of an undivided family.

Jageshur Narain v. *Ram Chandra*, 23 C. 670; 23 I. A. 37; *Venkatayyamma Garu* v. *Venkataramanayyamma Garu* 25 M. 678; 4 Bom. L. R. 657; *Kurupai Nachiar* v. *Sankaranarayanan*, 27 M. 300; *Vydinada* v. *Nagammal*, 11 M. 258; *Mankama Kunwar* v. *Balkishen Das* 28 A. 38; A. W. N. (1905) 170; *Gopi* v. *Jaldhara*, 33 A. 41; 7 A. L. J. 941; 7 Ind. Cas. 697; *Bai Devali* v. *Patel Bechardas*, 26 B. 445, referred to.

Second appeal from the decision of the District Judge of Gorakhpur, dated the 29th August, 1910.

The Hon'ble Mr. *Sunder Lal* (with him Dr. *Satish Chandra Banerji* and Mr. *Govind Prashad*), for the Appellant.

The Hon'ble Mr. *Moti Lal* and Mr. *Surendro Nath Sen*, for the Respondents.

JUDGMENT.

CHAMIER, J.—The following pedigree explains the position of the parties to this appeal and other persons to whom reference will be made.

RAM CHARAN.

Kali Prasad.	Lachmi Prasad	Deokinandan, married *Musammat* Sonkali.
Jaintri Prasad, married *Musammat* Mundra, (Respondent.)	Sarup Narain	
	Triloki Narain, married *Musammat* Kishori, (Appellant).	

After the death of Deokinandan a suit occurred many years ago. Ram Charan his sons Kali Prasad and Lachmi Prasad and his grandsons Jaintri Prasad and Sarup Narain constituted a joint family. In 1874 Kali Prasad brought suits against Ram Charan, Lachmi Prasad and Sonkali for partition and possession of his share in the family property and obtained decrees which established his right to possession of a one-third share. In August 1876 Kali Prasad made a Will whereby he left his shares in the villages Katiahi, Bisauli, Kanora and Budhiax to his nephews Jaintri Prasad and Sarup Narain. In January 1878 Ram Charan executed a deed of gift whereby he transferred to the same two persons his ancestral and acquired shares in the four villages mentioned above and other property. All the males in the family have died. The dates on which they died are not material. It is only necessary to state that Jaintri Prasad predeceased his brother Sarup Narain and on Jaintri's death mutation of names in respect of the shares standing in his name was made in favour of the respondent *Musammat* Mundra. On the death of Sarup Narain mutation of names in respect of the property standing in his name was made in favour of his son Triloki Narain and on the latter's death in favour of the appellant *Musammat* Kishori. It may be mentioned here that *Musammat* Sonkali was at one time recorded with Jaintri and Sarup as one of the proprietors of shares in two villages called Misraulia and Gular Bahar a fact which seem to have puzzled the lower Appellate Court. The explanation is to be found in the deed of gift executed by Ram Charan whereby he gave his shares in certain jungle land to *Musammat* Sonkali for life and thereafter to his two grandsons. That land, as the lower Appellate Court has shown, is now known as Misraulia and Gular Bahar with the exception of these two villages the whole of the property in the six villages with which we are concerned in the present case was for many years recorded in the names of Jaintri Prasad and Sarup Narain.

The respondent *Musammat* Mundra having made a loan of her recorded shares in two of the villages in favour of the respondent Mahant Beni Bibikanandgir and having in other ways shown that she intended to claim a widow's estate in the property recorded in her name, the appellant brought the suit out of which this appeal has arisen claiming a declaration that she is the owner and in possession of the property recorded in *Musammat* Mundra's name and that the lease is invalid. The appellant's case is that the brothers Jaintri and Sarup held all the property recorded in their names as members of a joint family; that on the death of Jaintri the whole passed to Sarup, on the latter's death to Triloki Narain, and on his death to the appellant who has been in undisputed possession for many years. The respondents' case is that the decree of 1874 operated to sever the interests of Kali Prasad, Ram Charan and Lachmi Prasad; that each took a one-third share, Lachmi Prasad taking one-third for himself and his two sons; that Jaintri Prasad and Sarup Narain each took separate interests under the Will of their uncle Kali Prasad and under the deed of gift executed by their grandfather with

the result that the interest of Jaintri which is the property now in dispute passed on his death to his widow *Musammat* Mundra.

The first question is as to the effect of the decree of 1874. There is no doubt that the decree operated to sever the share of Kali Prasad from the shares of the rest of the family. The appellant referred to the decisions in *Durga Dei* v. *Bal Makund* (1) and *Balkishen Das* v. *Ram Narain Sahu* (2) and contended that as shares were not actually allotted by the decree to Ram Charan and Lachmi Prasad these two should be held to have remained joint in estate. The respondent referred to the case of *Ram Parshad Singh* v. *Lakhpati Koer* (3), and contended that Ram Charan and Lachmi Prasad should be regarded as having held separately after the decree because, in order to determine the share of Kali Prasad it was necessary to determine the shares of Ram Charan and Lachmi Prasad and evidence shows that they held their shares separately after the decree. They might, no doubt, have elected to remain in union but the evidence shows that they did not—Ram Charan, as already stated, transferred his share to his grandsons and there is other evidence to support the view of the lower Appellate Court that Ram Charan held a separate share after the decree of 1874.

The second and most important question in this case is, whether Jaintri Prasad and Sarup Narain took separate interests under the Will and deed of gift as contended by the respondents or took the property as undivided co-parceners as contended by the appellant. The latter does not suggest that the two brothers took the property as joint tenants in the sense of the English law. Her learned Advocate relied principally upon the decision of their Lordships of the Privy Council in *Venkatayyamma Garu* v. *Venkatarumanayyamma* (4). That case does not appear to me to have any real bearing on the question which we have to decide. There the question was; whether the sons of a daughter who were members of a joint family with their father and had succeeded to their maternal grandfather's estate on the death of their mother took the property as undivided co-parceners (*i. e.*, jointly) or as tenants-in-common. It has been pointed out by the Madras High Court [see *Karuppai Nachiar* v. *Sonkaranarayanan* (5)] that that decision cannot be regarded as laying down a rule that all property coming to two or more persons who happen to be members of a joint family is taken by them jointly, *i.e.*, with the rights of co-parceners in a joint family. Moreover, we have to deal here not with succession or an intestacy to which alone the ruling of the Privy Council can be applied but with a case of property passing under a Will and a deed of gift—the nature of the interests taken by the two brothers defendants upon the language of the Will and deed of gift, and if the language is ambiguous, upon any presumption or rule of construction that may be applicable to such documents. There is nothing either in the Will or the deed of gift which gives any indication as to whether the testator or donor intended that the two brothers should hold as undivided co-parceners or as tenants-in-common with separate interests. There are cases, *e.g.*, *Vydinada* v. *Nagammal* (6) and *Mankamma Koer* v. *Balkishen Das* (7), in which it has been held, in accordance with the rule of English law, that a gift or bequest to two persons without more creates a joint tenancy but their Lordships of the Privy Council have disapproved of the application of this rule and Will of a Hindu and have observed that the principle of joint tenancy is unknown to Hindu Law except in the case of co-parcenary between the members of an undivided family [*Jogeshur Narain* v. *Ram Chandra* (8)].

Regard may be had to surrounding circumstances in order to ascertain the meaning of the testator in the one case and of the donor in the other. The learned Advocate for the appellant has relied upon the fact that the brothers were, at the time of the gift and Will, members of a joint family and has pointed out that this circumstance was relied upon by this Court in the case of *Mankamna Koer* v. *Balkishen Das* (7) as a reason for holding that a joint tenancy had been created by a deed of gift. The respondents' learned Vakil contended

(1) 29 A. 93; 3 A. L. J. 683; A. W. N. (1900) 287.
(2) 30 C. 738.
(3) 30 C 231; 5 Bom. L. R. 103; 7 C. W. N. 162.
(4) 25 M. 678; 4 Bom. L. R. 657.
(5) 27 M. 300.
(6) 11 M. 258.
(7) 28 A. 38; A. W. N. (1905) 70.
(8) 23 C. 670; 23 I. A. 370.

that the authority of the last mentioned case was much weakened by the erroneous application of a rule of English conveyancing to the construction of a deed of gift executed by a Hindu and has referred to the later case of *Gopi* v. *Jaldhara* (9), in which, following a decision of the Privy Council, one of the same Judges declined to apply that rule and the construction of a Will executed by a Hindu. The learned Vakil referred also to the case of *Bai Dewali* v, *Patel Bechardas* (10). There property had been given to two brothers who were members of a joint Hindu family. One died leaving a widow and it was held that she was entitled to half the property as heir of her husband. The facts of the present case are very much the same. It was suggested that as this Court, in the case of *Mankamna Koer* v. *Balkishen Das* (7), relied upon the fact that the donees were living as undivided co-parceners as a reason for holding that the donor intended that they should hold the property passing to them under the deed of gift in the same manner, we should give the same weight to a similar circumstance in the present case. That would not be a proper way of using a reported decision. One document cannot be construed by reference to decisions on other documents executed in different circumstances and containing different language. We must determine for ourselves what weight should be attached to the fact that the two brothers Jaintri Parsad and Sarup Narain were living in union when the Will and deed of gift were executed in their favour. It was suggested that a passage in the judgment of the Privy Council in *Jogeshur Narain* v. *Ram Chandra* (8) to the effect that the principle of joint tenancy is unknown to the Hindu Law except in the sense of co-parcenary between the members of an undivided family recognises the possibility of property being given or devised to two or more Hindus to be held by them in co-parcenary under the Hindu Law. But the context shows that nothing of the kind was intended or contemplated. Their Lordships were considering only the incidents of the right of survivorship between joint tenants under the English Law. There seems to be a difficulty in treating a gift or devise of property to two members of a joint family as a gift or devise to them of property to be held as undivided co-parcenars for, as pointed out in the case of *Bai Dewali* v. *Patel Bechardas* (10), such a devise or gift would create interests in favour of the issue of the donees who might be unborn at the time of the gift or the death of the testator. I see no reason whatever for supposing that either Ram Charan or Kali Prasad intended that any children that might be born to either of the brothers should on their birth acquire an interest in the property. It must be remembered that the two brothers were at the time joint with their father Lachmi Prasad and others and the fact that the gift and devise were made to them only suggests that there was no intention to benefit any other members of the joint family whether then is existence or to be born hereafter. It must also be remembered that Ram Charan had already given some property to Lachmi Prasad to be held by him separately. In all the circumstances, I am unable to come to the conclusion either Kali Prasad or Ram Charan intended that the two brothers should hold the property given to them as undivided co-parceners. The fact that the two brothers were joint is not, in my opinion, a sufficient reason in the present case for holding that the donor and testator intended that they should hold the property as undivided co-parceners. The lower Appellate Court held that the brothers took in severalty and I am not satisfied that that decision is erroneous.

The question of limitation is disposed of by the finding of the lower Appellate Court that though there is no good evidence of possession on the part of *Musammat* Mundra there is no good evidence that her relatives even held adversely to her.

I would dismiss the appeal with costs.

KARAMAT HUSAIN, J.—I agree.

BY THE COURT.—The appeal is dismissed with costs including in this Court-fees on the higher scale.

Appeal dismissed.

(9) 33 A. 41; 7 A. L. J. 941; 7 Ind. Cas. 697.
(10) 26 B. 445.

AMRITA LAL *v.* SHYAMA CHARAN.

CALCUTTA HIGH COURT.
CIVIL RULES NOS. 4612 AND 4771 OF 1910.
March 9, 1911.
Present:—Mr. Justice Mookerjee and
Mr. Justice Caspersz.
AMRITA LAL ROY—PLAINTIFF—PETITIONER
versus
SHYAMA CHARAN SIKDAR—DEFENDANT—OPPOSITE PARTY.

Right of suit—Plaintiff's decree against defendant's landlord—Attachment of rent due to landlord—Suit by plaintiff for rent due to landlord—Whether suit is for rent—Attachment of debt—Right to sue debtor—Small Cause Court jurisdiction.

The plaintiff alleges that in execution of a decree held by him against the landlord of the defendant, he attached the rent which had already accrued due, and he seeks to recover in this suit the money payable by the defendant to his landlord, the plaintiff's judgment-debtor:

Held, that the suit was not one for rent, but for money due to the plaintiff, and the Small Cause Court had jurisdiction to try the suit.

Obiter dictum.—Mere attachment of a debt does not prevent the judgment-debtor from suing his debtor, though he is not entitled to receive payment form his debtor unless the claim in respect of which the debt is attached has been satisfied.

Shib Singh v. *Sita Ram*, 13 A. 76 and *Beti Maharani* v. *The Collector of Etawah*, 17 A. 198; 22 I. A. 94, referred to.

Rule against the order of the Small Cause Court Judge of Faridpur, dated June 6th, 1910.

Babu *Satish Chandra Bhattacharjee*, for the Petitioner.

JUDGMENT.—We are invited in this rule to set aside an order by which the Court below has dismissed a suit for recovery of money without trial on the merits. The petitioner instituted the suit originally in the Court of the Munsif of Faridpur. On the 10th August 1909, the Munsif held that the money sought to be recovered could be claimed only as a debt and not as rent, and that consequently the Court had no jurisdiction to try the suit. He, therefore, returned the plaint for presentation to the proper Court. The plaintiff then presented the plaint in the Small Cause Court. The Judge has dismissed the suit on the ground that the procedure laid down in rules 46 and 79 of Order XXI of the Code of 1908 had not been observed. This judgment is not intelligible.

The plaintiff alleges that in execution of a decree held by him against the landlord of the defendants he attached the rent which had already accrued due and he seeks to recover in the present suit the money payable by the defendants to their landlord, his judgment-debtor. It is clear that the suit is not one for rent, because it has not been brought by a person who stands in the relation of a landlord to the defendants as their tenants. If the plaintiff is really entitled to recover this sum from the defendant he can claim it only as money due to him. But, upon the face of the plaint, it is not explicitly stated whether the plaintiff has completed his title on the basis of the attachment mentioned. Before he can succeed on the merits, he must prove that he has a complete title. It is well-established that mere attachment of a debt does not prevent the judgment-debtor from suing his debtor for it and from taking any other steps necessary for the money thereof though he is not entitled to receive payment from his debtor unless the claim in respect of which the debt is attached has been satisfied, *Shib Singh* v. *Sita Ram* (1), *Beti Maharani* v. *The Collector of Etawah* (2). It is not necessary, however, to decide at the present stage whether the plaintiff has an enforceable title as against the defendants. If he has such a title, it is plain that the sum sought to be recovered by him is a money-debt and is not in the nature of rent.

The result is that this rule must be made absolute and the order of the Court below discharged. The case will be remitted to the Small Cause Court Judge in order that he may re-try it on the merits. As the rule has not been opposed there will be no order for costs.

This order will govern Rule No 4771 of 1910 which will also be made absolute. The case will be remanded to the Small Cause Court Judge as above, and there will be no order for costs.

Rules made absolute.

(1) 13 A. 76.
(2) 17 A. 198; 22 I. A. 94.

CALCUTTA HIGH COURT.
CIVIL RULE NO. 4289 OF 1910.
January 16, 1911.
Present:—Mr. Justice Chitty and
Mr Justice Coxe.
J. J. MIRANDA—DEFENDANT—PETITIONER
versus
MOHENDRA KUMAR ROY—PLAINTIFF—RESPONDENT.

Co-operative Credit Societies Act (X of 1904), s. 6 (2) —Suit by Society—In whose name suit to be brought.

The Chairman of a Co-operative Credit Society has no right to institute a suit, against a member of the Society under the Co-operative Credit Societies Act, in his own name. The suit should be one by the Society itself under section 6, clause (2), of the Act.

A suit in the name of the Chairman must fail.

Rule against judgment and decree of the Small Cause Court Judge of Chittagong, dated August 2nd, 1910.

Babus *Dhirendra Lal Kastagir* and *Probodh Kumar Das*, for the Petitioner.

JUDGMENT.—This is a rule issued at the instance of the defendant J. J. Miranda in a Small Cause Court suit calling upon the plaintiff, Mohendra Kumar Roy, to show cause why the decree in favour of the plaintiff should not be set aside.

It appears that the defendant was a member of a Society styled the Non-Gazetted Officers Urban Co-operative Credit Society in Chittagong, constituted under the Co-operative Credit Societies Act (X of 1904). The plaintiff is said to be the Chairman of the Society and brings this suit presumably on behalf of the Society.

Two objections are raised on behalf of the defendant. *Firstly*, that the plaintiff Mohendra Kumar Roy had no power to institute this suit which ought to have been filed in the name of the Society; and *secondly*, that the learned Subordinate Judge, exercising Small Cause Court powers, was in error in disallowing the defendant's claim for a set-off.

No cause has been shown against the rule, and we, therefore, have not had an advantage of hearing arguments on behalf of the Society. But we think that it is clear from the provisions of the Act that the Chairman had no right to institute the suit in his own name, and that the suit should have been one by the Society itself, under the provision of section 6 (2) of the Act. That section provides that if the Society is registered "the Society shall become and be a

body corporate by the name under which it is registered, with perpetual succession and a common seal, and with power to hold property, moveable or immoveable, to enter into contracts, to institute and defend civil suits and to do all things necessary for the purposes of its constitution." Had the suit been filed in the name of the Society, no doubt the plaint might have been signed and verified on its behalf by the Secretary or any other Officer of the Corporation in accordance with Order XXIX, rule 1, of the Civil Procedure Code. This not having been done, we consider that this defect is fatal to the suit which must necessarily fail on that account.

As to the second contention it is unnecessary for us to go into that now: but we may notice that the learned Subordinate Judge has found as a fact that the membership of the defendant in the Society has not yet ceased. If this was so, it is obvious that he cannot claim to set off the amount of his share as a member, certainly not without going into the question of accounts between himself as such member and the Society. It would have to be ascertained whether he was liable in any amount as a member of the Society.

The rule is made absolute. But there being no appearance on the other side, we make no order as to costs.

Rule made absolute.

CALCUTTA HIGH COURT.
SECOND CIVIL APPEAL NO. 642 OF 1909.
April, 20, 1911.
Present:—Mr. Justice Mookerjee and
Mr. Justice Teunon.
GULAB RAI—PLAINTIFF—APPELLANT
versus
RAM RAJ TEWARI—DEFENDANT—RESPONDENT.

Mortgage—Payment to first mortgagee by second mortgagee for releasing property from second mortgage —Sale of the property—Failure of consideration for the payment—Contribution suit.

The plaintiff, the second mortgagee, purchased the mortgaged property in execution of his mortgage decree. Subsequently, the defendant, the first mortgagee, obtained a decree on his mortgage and attempted to sell the property. Then the second mortgagee, the plaintiff, paid to the defendant, the first mortgagee, Rs. 215 for the express purpose that the property purchased by the second mortgagee should be released from all liability under the defendant's

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decree. The defendant was unable to release the property by reason of objections taken by persons interested in the equity of redemption. The property was, therefore, sold and purchased by a stranger. The defendant applied the sale proceeds towards the satisfaction of his decree. The plaintiff brought this suit for recovery of the amount Rs. 215:

Held, that there was no answer to the claim of the plaintiff who should not be driven to a contribution suit to enable him to realise a proportionate amount from persons who had been benefited by the payment he made.

Appeal from the decree of the Sub-Judge of Chapra, dated February 20th, 1909, reversing that of the Munsif of Chapra, dated June 15th, 1908.

Moulvi *Muhammad Mustaja Khan*, for the Appellant.

Babu *Naresh Chandra Sinha*, for the Respondent.

JUDGMENT.--This is an appeal on behalf of the plaintiff in an action for recovery of money, upon an alleged failure of consideration. The circumstances under which the payment was made by the plaintiff to the defendant are not disputed. The second defendant, as the head of a joint *Mitakshara* family, executed a mortgage of these properties in favour of the first defendant. He subsequently executed a second mortgage in respect of one of these properties to the plaintiff. The plaintiff, as second mortgagee, sued to enforce his security, got a decree, and at the sale held in execution thereof, purchased the mortgaged premises himself. Subsequently, the first mortgagee, in execution of the decree obtained by him on the basis of his own mortgage, attempted to proceed against this very property. At this stage, the plaintiff, second mortgagee, entered into an agreement with the first mortgagee to pay the latter Rs. 215, on condition that the property purchased by him was released from all liability under the decree obtained upon the first mortgage. The first mortgagee accepted the money, but was unable to release the property by reason of objections taken by the persons interested in the equity of redemption. He subsequently proceeded to execute his decree against the property held by the plaintiff, though he had received Rs. 215 with a view to release it. In execution, the property was sold and was purchased by a stranger. The first defendant applied the sale proceeds of this property towards the satisfaction of his decree. The plaintiff then commenced this action to recover Rs. 215 on the ground of failure of consideration. The Court of first instance made a decree in his favour. The Subordinate Judge has, on appeal, reversed that decree. In our opinion, there is no answer to the claim of the plaintiff.

It is not disputed that money was paid by the plaintiff to the first defendant for the express purpose that the property held by him might be released from the claim under the first mortgage. No doubt, it was not competent to the first mortgagee to grant a valid release without the assent of the other parties interested in the mortgaged premises and without the leave of the Court [*Mir Eusuff* v. *Panchanan* (1)]. But if he wished to retain the sum received by him from the plaintiff, it was his duty to secure the assent of the persons interested, and the approval of the Court. If he failed, though it may be through no fault of his own, to grant a valid lease it undoubtedly became his duty to return to the plaintiff the sum of Rs. 215. The plaintiff was under no personal obligation to pay any portion of the judgment debt, though it might become incumbent upon him to satisfy the decree if he desired to save his property. It was, therefore, manifestly unjust for the first defendant, to accept and retain his money, and at the same time to sell up his property. Under such circumstances, if we permitted the first defendant to appropriate to his own use, the money paid by the plaintiff, we would have to sanction his unjust enrichment at the expense of the latter. We cannot consequently accept as reasonable the suggestion that the plaintiff should be driven to a contribution suit, to enable him to realise a proportionate amount from persons who have been benefited by the payment he made.

The result is that this appeal is allowed, the decree of the Subordinate Judge set aside and that of the Court of first instance restored. This order will carry costs in all the Courts.

We may add that the plaintiff is plainly at liberty to bring a suit for contribution against persons who may have been unduly benefited by the sale of his property. That, however, is a question foreign to the present litigation and cannot be now determined,

(1) 11 C. L. J. 639; 6 Ind. Cas. 842.

It follows, as a matter of course, that the decree-holder will be at liberty to proceed with execution of his decree for recovery of any balance that may still be due thereunder, on the assumption that Rs. 215 which he is now obliged to return to the plaintiff, has not been applied to the satisfaction of the decree.

Appeal allowed.

ALLAHABAD HIGH COURT.
FIRST CIVIL APPEAL NO. 8 OF 1910.
May 9, 1911.
Present:—Mr. Justice Karamat Hussain and Mr. Justice Chamier.
KHUNNI LAL - DEFENDANT—APPELLANT
versus
KALIMUDDIN AND OTHERS—PLAINTIFFS—DEFENDANTS—RESPONDENTS.

Contract - Interest - Enhanced rate of interest to be paid from the date of execution of bond under certain circumstances—Penalty—Penal enhanced rate not to be disallowed entirely—Reasonable compensation to be allowed—Contract Act (IX of 1872), s. 74.

A mortgage-deed provided that interest was to be paid at the rate of 11 annas per cent. per month, but if the interest for any year were not paid the interest on the entire amount due should be paid at the rate of 13 annas 4 pies per cent. per mensem instead of 11 annas from the date of the execution of the mortgage-deed :

Held, that the agreement to pay enhanced rate of interest was penal, but that the enhanced interest would not to be disallowed altogether,—a reasonable portion of it might be allowed by way of compensation.

Sunder Koer v. *Rai Sham Krishen*, 34 C. 150; 4 A. L. J. 109; 11 C. W. N. 249; 5 C. L. J. 106; 17 M. L. J. 43; 9 Bom. L. R. 304; 2 M. L. T. 75, referred to.

First appeal from the decision of the Additional Subordinate Judge of Bareilly dated the 20th September 1909.

Dr. *Tej Bahadur Sapru*, for the Appellant.

The Hon'ble Mr. *Sunder Lal* and Dr. *Satish Chandra Banerji*, for the Respondents.

JUDGMENT.—One Sheoraj Singh and his brother Bahadur Singh executed a mortgage-deed in lieu of Rs. 7,000 in favour of Kanhai Lal on 17th September 1903. Interest was to be paid at the rate of 11 annas per cent. per month. But there was a stipulation to the effect that if the interest for any year were not paid, interest on the entire amount due should be paid at the rate of 13 annas 4 pies per cent. per mensem instead of 11 annas from the date of the execution of the mortgage-deed. The plaintiff on the 13th of July 1908 purchased a portion of the property mortgaged, and after offering a sum of Rs. 9,587-3-6, which was not accepted by the defendant, instituted a suit for redemption of the mortgage alleging that only Rs. 6,225 have been paid to the mortgagors. The defence was that the entire sum of Rs. 7,000 had been received by the mortgagors, and that the mortgagee was entitled to that sum with interest and compound interest at the rate of 13 annas 4 pies per cent. per mensem according to the terms of the deed. The Court below finding that the entire sum of Rs. 7,000 had been received by the mortgagors, and that the condition as to the payment of compound interest at the rate of 13 annas 4 pies per cent. per mensem was penal, gave the plaintiff a decree for redemption on payment of the principal sum of Rs. 7,000 and interest calculated at the rate of 11 annas per cent. per mensem amounting to Rs. 4,590-8-6. Regarding the costs of the plaintiff that Court said that as the plaintiff had not offered the full amount due to defendant No. 1, under the mortgage bond of 17th September 1903 he was not entitled to any costs. The Court also ordered the contesting defendants to bear their own costs. The defendant Khunilal has preferred an appeal to this Court, and three pleas are taken. The first in the memorandum of appeal is that the stipulation at the enhanced rate of interest is not penal. The second is that the contractual rate of interest should have been allowed during the time allowed in the decree for the payment of the mortgage money. The third is that the appellant is entitled to his costs in the lower Court. The defendant-appellant, in our opinion, is entitled to his costs inasmuch as the sum offered by the plaintiff was not the full sum to which the mortgagee was entitled. There is no doubt that the enhanced rate of interest is penal. But, according to the ruling of their Lordships of the Privy Council in *Sunder Koer* v. *Rai Sham Krishen* (1), the enhanced interest is not to be disallowed altogether, but a reasonable portion of it may be allowed. Had we been trying the case ourselves as a Court of first instance, we might have allowed a portion of the enhanced interest by way of compensation. But sitting here

(1) 34 C. 150; 4 A. L. J. 109; 11 C. W. N. 249; 5 C. L. J. 106; 17 M. L. J. 43; 9 Bom. L. R. 304; 2 M. L. T. 75.

as an Appellate Court we are not disposed to interfere with the discretion which has been exercised by the Court below. The result is that we allow the appeal so far as the costs of the defendant-appellant are concerned. In other respects we dismiss it. Parties will pay and receive proportionate costs in this Court which will include fees on the higher scale. We also dismiss the objections with costs because we are not satisfied that the decision of the Court below that the entire amount of mortgage-money was paid wrong.

Appeal allowed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 218 OF 1910.

May 8, 1911.

Present:—Mr. Richards, K. C., Chief Justice, and Mr. Justice Banerji.

JAI GOPAL NARAIN SINGH AND OTHERS —DEFENDANTS—APPELLANTS

versus

UMADAT AND OTHERS—PLAINTIFFS—RESPONDENTS.

Occupancy-holding—Mortgage—Fraudulent relinquishment while question of mortgage sub judice *—Void —Suit for declaration in Civil Court—Maintainable—N W.-P. Rent Act (XII of 1881).*

An occupancy-tenant can validly mortgage his occupancy-tenancy with possession under the Rent Act XII of 1881, and any fraudulent and collusive relinquishment by the occupancy-tenant would be void against the mortgagee. The mortgagee is entitled to sue for a declaration in the Civil Court that the relinquishment was not operative as against him.

Second appeal from the decision of the District Judge of Allahabad, dated the 22nd December 1909.

JUDGMENT.—The facts out of which this appeal arises are fully set forth in the referring order of our brother Tudball. It has been consistently held by this Court that under Act XII of 1881 an occupancy-tenant could confer on a person who lent him money at least a right which would entitle the mortgagee to remain in possession of the holding so long as the tenancy lasts. It follows that any fraudulent and collusive relinquishment by the occupancy-tenant to the *zemindar*, the latter being a party to the fraud and collusion will be void against the mortgagee. We understand the Court below to find that the occupancy-tenant relinquished the occupancy-tenancy to the

zemindars, defendants in the suit, in consideration of certain promises, the defendants knowing well that the plaintiffs were mortgagees, in other words, to find that there was fraudulent collusion between the defendants and the occupancy-tenant. Our learned brother was evidently of opinion that the plaintiff was entitled to the declaration he sought but for one reason, namely, that he considers that having regard to the proceedings which had taken place in the Revenue Court the declaration would be perfectly useless. It is true that the *zemindar* brought a suit for ejectment after the relinquishment in the Revenue Court and obtained a decree which was affirmed by the Commissionerand which has been actually executed. At the same time, we are told that the defendants in the revenue suit have applied to the Board of Revenue in revision and that the Board of Revenue had postponed their final decision until after the decision of the present suit. We take it from this that it will be within the power of the Board of Revenue to set aside the decree for possession in the Revenue Court and to restore the plaintiffs in this suit to possession if they consider that plaintiffs are legally entitled to be restored. The matter in the Revenue Court is, therefore, still *sab judice* and there has been no final decree determining the occupancy-tenancy. We agree with the Court below, as did our learned brother, that the plaintiffs are entitled to the declaration which they seek.

We, therefore, dismiss the appeal with costs including in this Court-fees on the higher scale.

Appeal dismissed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 780 OF 1908.

April 7, 1911.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Wallis.

KAMALATH AMMAL—APPELLANT

versus

KRISHNA PILLAY AND OTHERS—RESPONDENTS.

Limitation Act (XV of 1877), Sch. II, art. 124—Suit for possession of office and lands appertaining thereto —Adverse possession by defendant in respect of lands—Whether gives right to office—Vesting of beneficial enjoyment of lands in plaintiff's family—Limitation.

KAMALATH AMMAL *v.* KRISHNA PILLAY.

The acquisition by a person of a prescriptive title to lands attached to an office does not give him a right to that office unless he was in adverse possession of the office also for the statutory period.

The mere receipt of the emoluments of an office without performance of its duties will not enable the recipient to claim possession of the office, if its duties are performed by another in his own behalf and not as the deputy of the person enjoying the emoluments.

Where plaintiff, the widow of an *archaka*, sued 1st defendant, alienee from her husband, for possession of the office of *archaka* and of the lands attached thereto, and it was found that 1st defendant was in adverse possession only of the lands, the beneficial enjoyment whereof vested in the plaintiff's family:

Held, (1) that plaintiff was entitled to the office as the adverse possession by defendant of the lands did not give him a right to the office;

(2) that the plaintiff's claim to the lands was not barred and she had a right to recover the property from the time her right to beneficial enjoyment accrued.

Mahomed v. *Ganapati*, 13 M. 277; and *Gnanasambanda Pandara Sanadhi* v. *Velu Pandaram*, 23 M. 271, referred to.

Abhiram Goswami v. *Shyam Charan Nandi*, 36 C. 1003, 10 C. L. J. 284; 6 A. L. J. 857; 11 Bom. L. R. 234, explained.

Second appeal against the decree of the District Court of Tanjore in Appeal Suit No. 146 of 1907, presented against the decree of the District Munsif of Shiyali in Original Suit No. 58 of 1906.

Mr. *T. R. Venkatarama Sastri*, for the Appellant.

Messrs. *T. R. Ramachandra Aiyar* and *G. S. Ramachandra Aiyar*, for the Respondents.

JUDGMENT.—The suit is by the widow of an *archaka* to recover the office and the lands which appertained to the office from defendants Nos. 1 and 2. The office and the lands were alienated by the plaintiff's husband under Exhibit I in 1893 to the first defendant. It is found by the District Judge on appeal that the lands have been in the first defendant's possession for more than 12 years. As regards the office he says possession passed at the same time. He does not, however, find who held possession of the office since 1897. The Munsif held that since 1897 the second defendant performed the duties of the office. Mr. Ramachandra Aiyer argues, applying Article 124, Schedule II, Indian Limitation Act, that as the first defendant enjoyed the emoluments he must be deemed to have held the office as well. This we are unable to agree to. Article 124 deals with a suit for possession of a hereditary office. That means the suit is against the holder of the office. The third column says that the time runs from the date when the defendant takes possession adversely. An explanation is attached to the clause in the third column that the office is possessed when the emoluments are received in cases where the emoluments are attached. The explanation is not attached to the words in the first column, nor does it say that mere receipt of the emolument without reference to any performance of the duties will enable the recipient to claim possession of the office if the duties are being performed by another. To hold otherwise, would mean when two different persons perform the duties of the office and enjoy the emoluments of the office for the statutory period that the latter acquires the right to the office, a conclusion which appears to us, to be manifestly absurd; nor can the conclusion be avoided when the emoluments are taken by several persons in severalty without any of them doing the duties, that they have all acquired a right to the office. We must then overrule the contention that the first defendant by possession of the lands alone has acquired a right to the office.

The next question is, whether the second defendant's possession since 1897 was as the deputy of the first. In that case the plaintiff's right to the office would be barred and as a consequence thereof his right to the lands as well. As regards the lands, the claim would not be barred if the plaintiff's family was entitled to the beneficial enjoyment thereof. See *Mahomed* v. *Ganapati* (1). This view has not been overruled by the Privy Council in *Gnanasambandapandara Sannadhi* v. *Velupandaram* (2) which was the case of a trust. We are unable to hold that *Abhiram Goswami* v. *Shyam Charan Nandi* (3) which was the case of lease under which rent was being paid affects the principle to be applied to the present case. But Mr. Ramachandra Iyer says that lands belonged to the temple and were only burdened with a charge for beneficial enjoyment in favour of the plaintiff's family This does not appear to us to affect the right of the plaintiff to recover the property

(1) 13 M. 277.
(2) 23 M. 271.
(3) 4 Ind. Cas. 449, 36 C. 1003; 10 C. L. J. 284; 6 A. L. J. 857; 11 Bom. L. R. 234.

from the time her right to beneficial enjoyment accrues. But before we dispose of the case, it is necessary to have a finding on the question as to who had possession of the office since 1907 and in case it was the second defendant, whether he was in possession on behalf of the first.

The finding should be returned within a fortnight after the recess on the evidence on record and seven days will be allowed for filing objections.

In compliance with the order contained in the above judgment the District Judge of Tanjore submitted the finding that the 2nd defendant did not hold the office as 1st defendant's deputy.

The second appeal coming on for final hearing after the return of the said finding the Court delivered the following

JUDGMENT.—We accept the finding and, reversing the decree of the District Judge, we restore that of the District Munsif with costs in this and in the lower Appellate Court.

Appeal allowed.

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 861 OF 1909.

April 12, 1911.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Sundara Aiyar.

MUTHURAKU THEVAN AND OTHERS—APPELLANTS

versus

ROBERT GORDON ORR AND OTHERS—RESPONDENTS.

Landlord and tenant—Encroachment by tenant on landlord's lands not included in the lease Prescription—Landlord's knowledge of encroachment, whether necessary.

The true presumption as to encroachments made by a tenant, during his tenancy, upon the adjoining lands of his landlord is that the lands so encroached upon are added to the tenure and form part thereof for the benefit of the tenant so long as the original holding continues and afterwards for the benefit of his landlord, unless it clearly appears by some act done at the time that the tenant made the encroachment for his own benefit.

In such a case the tenant-trespasser is not bound to prove that his trespass was known to the landlord.

Gooroodas Roy v. *Issur Chunder Bose*, 22 W. R. 246, *Ishan Chandra Mitter* v. *Raja Ramranjan Chakarbutty*, 2 C. L. J. 125 and *Moidin Saiba* v. *Nagappa*, 7 B. 96, approved.

Mali Ahmad Chowdry v. *Tota Meah Chowdry*, 31 C. 397, explained.

Krishna Govind Jamadar v. *Banka Behari Shah*, 13 C. W. N. 693; 4 Ind. Cas. 526; *Prohlad Teor* v. *Kedar Nath Bose*, 25 C. 302, distinguished.

Second appeal from the decree of the Additional Subordinate Judge's Court of Madura, in A. S. No 446 of 1908, presented against the decree of the District Munsif of Shivaganga in O. S. No. 223 of 1907.

Mr. *K. Srinivasa Aiyangar*, for the Appellants.

Mr. *T. Rangachariar*, for 6th Respondents.

JUDGMENT.—The Courts below were wrong in holding that the defendants were not entitled to adduce evidence on the second issue. If the defendants held the excess lands for more than the statutory period they will be entitled to claim the same rights in them as in the lands admittedly held under the *cowle*. We must ask the present District Judge to return a finding on the second issue after taking the evidence that the parties may adduce.

The finding should be submitted within six weeks from this date and seven days will be allowed for filing objections.

In compliance with the order contained in the above judgment the District Judge of Madura submitted a finding to the effect, that the defendants did not acquire a prescriptive right in respect of the excess land claimed.

The second issue is whether the defendants have acquired any prescriptive right in respect of excess lands claimed.

This second appeal coming on for final hearing the Court delivered the following

JUDGMENT.

The District Judge has found that the defendants have acquired a prescriptive right of tenancy to the excess lands claimed by the plaintiffs. We accept the finding. Mr. Rangachariar contends that, as the Judge has not found that the plaintiffs or their predecessors-in-interest were aware more than 12 years before this suit of the encroachment made by their tenants, the defendants cannot be taken to have acquired a prescriptive right. His argument is that a tenant who encroaches upon his lessor's land adjoining the land leased to him must prove that he set up, to the knowledge of his lessor, more than 12 years prior to the suit in ejectment, a right to hold the land encroached on as

a tenant. We are unable to uphold this argument. Unquestionably, the ordinary rule of law is that possession held by a person in his own right is adverse to the true owner, whether the owner is aware of such possession being taken or not and if the adverse possession be continued for the statutory period it will confer a prescriptive title on the trespasser. This rule is qualified by the principle that if the trespasser, while in possession, claims a right less than the absolute ownership in the land he will acquire by prescirption only the inferior title set up by him. The title acquired will be determined by the *animus persidendi* of the trespasser. It is also well-established that, when possession is proved by a person, it will be presumed to be held in his own right. This presumption, no doubt, is not applicable in cases where a special relationship exists between the parties such as tenants-in-common or members of an undivided family. The Court will in such cases presume that possession is on behalf of all the co-owners or the members of the family and it will lie on the possessor to prove that he held exclusive possession to the knowledge of those whose rights he seeks to affect by his possession. What then is the proper presumption where a tenant takes possession of lands not included in his holding, taking advantage of his character as tenant? We are clearly of opinion that the view enunciated by Markby, J., in *Gooroodas Roy* v. *Issun Chunder Dose* (1) is correct. That learned Judge obseves,—

"We think the true presumption as to encroachments made by a tenant during his tenancy upon the adjoining lands of his landlord is that the lands so encroached upon are added to the tenure and form part thereof for the benefit of the tenant so long as the original holding continues, and afterwards for the benefit of his landlord unless it clearly appeared by some act done at the time that the tenant made the encroachment for his own benefit."

This is also the view enunciated in the later case in *Ishan Chandra Mitter* v. *Raja Ramranjan Chakarbutty* (2). See also *Moidin Saiba* v. *Nagappa* (3). Our attention has been drawn to some cases in which it has been stated that the tenant is bound to prove that he set up a right of tenancy over the encroached lands to the knowledge of his landlord, *Wali Ahmad Chowdhry* v. *Tota Meah Chowdhry* (4), *Krishna Govinda Jamadar* v. *Banka Behari Shah* (5). See also *Prohlad Teor* v. *Kedar Nath Bose* (6) where Maclean, C. J., was of opinion that the rule laid down by Markby, J., was stated in too broad terms. In *Wali Ahmad Chowdhry* v. *Tota Meah Chowdhry* (4) the encroachment was on waste land and the acts of enjoyment might be held not to amount to effective possession. These decisions might be perfectly right on the particular facts on which they were passed but if they intend to lay down that a tenant trespasser is, as a matter of law, bound to prove that his trespass was known to his landlord we must say that we prefer the rule laid down by Markby, J. We can see no basis for a presumption that a tenant, when he encroaches on his landlord's land, intends to hole possession purely for the benefit of the landlord. We are, therefore, of opinion that, on the finding arrived at by the District Judge, the plaintiffs must fail. We may add that it is almost impossible to believe that, during the period of about 30 years that the defendants were cultivating the lands prior to 1904, their landlords were ignorant of the fact. The result of the finding is that the decrees of the lower Courts must be reversed and the suit dismissed with costs throughout.

Appeal allowed.

(1) 22 W. R. 246.
(2) 2 C. L. J. 125.
(3) 7 B. 96.
(4) 31 C. 397.
(5) 13 C. W. N. 698; 4 Ind. Cas. 526.
(6) 25 C. 302.

EMPEROR *v.* ADAM KHAN.

(s. c. 9 M. L. T. 458.)

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 439 OF 1910.

February 22, 1911.

Present:—Mr. Justice Wallis.

EMPEROR—COMPLAINANT

versus

ADAM KHAN—OPPOSITE PARTY.

Madras Local Boards Act (Mad. Act III of 1890), s. 162 (c)—Branch of tree in public road felled with Chairman's permission—Conversion of branches to personal use—Conviction under the section—Legality.

Section 162 (*c*) of the Local Boards Act does not provide for wrongful conversion of trees: where, therefore, a person cut down, with the permission of the Chairman, the branch of a tree, and converted it to his own use, it was held that he could not be convicted under this section.

Petition, under sections 436 and 432 of the Criminal Procedure Code, praying the High Court to revise the judgment and order of the Sub-Divisional Magistrate of Anantapur, in Appeal No. 19 of 1910, presented against the order and judgment of the Sub-Magistrate of Penukonda in C. C. No. 473 of 1909.

FACTS.—The appellant petitioned the Chairman of the Penukonda Union to have a dried branch of a Margosa tree in front of his house felled as it was overhanging his house and threatened danger to the inmates (Exhibit I). He was given an order by the Chairman that he might, at his expense, get the tree cut in the presence of the Sanitary Maistry. The appellant, however, having removed the felled branch into his house, the Chairman by a notice informed him that the branch would be sold in public auction on the 21st August and required the branches and all fellings to be kept outside his house by the preceding day. The appellant inquired under what law and on what grounds the Chairman proposed to sell the branch felled at his cost. The Chairman replied that the tree belonged not to the appellant but to the Union Panchayat he saw no reasons not to hold the sale of the branch.

ORDER.—The accused cut down a branch of a tree in a public road by permission of the Chairman of the Union, and appears afterwards to have wrongfully converted the branch to his own use and refused to return it. The Local Boards Act does not contain any provision as to trees wrongfully converted, and the conviction under section 162 (*c*) of the Local Boards Act cannot be upheld. The conviction and sentence of the lower Court are set aside and the fine, if paid, be refunded.

Conviction set aside.

A. B. *v.* EMPEROR.

(s. c. 7 N. L. R. 53.)

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION NO. 317-B OF 1910.

February 31, 1911

Present:—Mr. Stanyon, A. J. C.

A. B.—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Berar Municipal Law of 1886, s. 146 (1)—Penal Code (Act XLV of 1860), s. 168—"Pecuniary interest," meaning of—Vice-Chairman of Municipal Board issuing contracts—Private loan to contractor to carry on works—Recovery out of realization from cheques issued by Vice-Chairman.

A member of a Municipal Board in Berar who lends money to a contractor, upon the personal credit of such contractor, for the purpose of a contract with the Municipal Board violates section 146 (1) of the Berar Municipal Act and is liable to punishment under section 168 of the Penal Code.

In a Municipal contract, in the name of *B.* which is entirely worked with the money of *A.*, *B.* is merely the *benamidar* of *A.*

A, the Vice-Chairman of a Municipal Board, had authority to enter into contracts for the Municipality, to pass contractor's bills and to issue cheques in payment thereof. *A.* gave two contracts for the construction of Municipal drains to *B.*, *B.* had no capital to carry out these works so *A.*, who carried on a money lending business on his own behalf, advanced the money and re-paid himself out of the realizations of Municipal cheques issued by himself:

Held, that *A.* had a pecuniary interest in the contracts within the meaning of section 146 (1) of the Berar Municipal Act and was guilty of an offence under section 168 of the Penal Code as applied to Berar.

Todd v. *Robinson*, (1885) 54 L. J. Q. B. 47; 14 Q. B. D. 739; 52 L. T. 120; 49 J. P. 278; *Nicholson* v. *Fields*, (1862) 31 L. J. Ex 233; 7 H. & N. 810; 10 W. R. 304; *Lewis* v. *Carr*, (1877) 46 L. J. Ex, 314; 1 Ex. D. 484; 36 L. T. 44; 24 W. R. 940; *Nell* v. *Longbottom*, (1894) 63 L. J. Q. B. 400; 1 Q. B. 767; 10 R 193; 70 L. T. 493; and *City of London Electric Lighting Co.* v. *London Corporation*, (1903) A. C. 434; 72 L. J. Ch. 737; 89 L. T. 310; 52 W. R. 158; 67 J. P. 437; 2 L. G. R. 93, relied upon.

Le Feuvre v. *Lankester*, (1854) 23 L. J. Q. B. 254; 3 El. & Bl. 530; 2 C. L. R. 1423; 18 Jur. 894; 2 W. R. 307, distinguished.

Criminal revision, against the order of the Sessions Judge, East Berar, Amraoti; dated the 16th August 1910, confirming

the conviction and sentence passed by the Assistant Commissioner and Magistrate, 1st Class, Amraoti, dated the 10th June 1910.

Mr. *F. W. Dillon*, for the Applicant.

Sir *B. K. Bose*, for the Crown.

JUDGMENT.—This case raises a somewhat difficult question of law, and it is, therefore, expedient to make a short statement of the facts material thereto. The applicant, *A.*, *B.*, became a member of the Municipal Committee of the town of Amraoti, in Berar, on the 1st April 1908. On the 2nd June 1908, he became Vice-Chairman of that Committee, a position of great trust and responsibility. As Vice-Chairman he was the working member of the Committee in its dealings with contractors, who carried on Municipal work. He made the contracts, and passed contractors' bills, and issued Municipal Cheques in payment thereof. Incidentally, he was also subject to the Berar Municipal Law, section 146 (1), whereof runs as follows:—

> "If any member, officer, or servant of a Committee is, otherwise than with the permission in writing of the Commissioner, directly or indirectly interested in any contract made with the Committee, he shall be deemed to have committed an offence under section 168 of the Indian Penal Code."

By profession the applicant is a Pleader, practising as such at the Amraoti Bar, and he also has, and himself carries on, a money-lending business.

On the 16th November 1908, two contracts were given by the Municipal Committee, acting through the applicant, to one Lahanu, for the construction of certain drains, the amount payable for the completed drains being Rs. 352 in one case and Rs. 456 in the other. The contractor is said to have been in want of capital to carry out these works, and it is an admitted fact that the applicant advanced him Rs. 150 on the first contract, and Rs. 200 on the second. These advances were not made by applicant in his official capacity from Municipal Funds, but constituted, on the faces of them, private loans from applicant's money-lending business. According to Lahanu (W.P. No. 4) the money was lent without any agreement for the payment of interest. In due course Lahanu presented two bills for payment on account of the above contracts, and these bills having been passed by the applicant as Vice-Chairman, he issued Municipal Cheques signed by himself in payment thereof on two different dates. The cheques were, however, not given to Lahanu, but kept under control of the applicant as below. The first cheque was endorsed to one Pandharinath, clerk to Mr. Kale, a Pleader, who is a trustee of the estate of *A.B.*'s father-in-law, Jog. Pandharinath cashed the cheque and brought the money to *A. B.*, who first deducted his own claim, and passed on the balance to the contractor Lahanu. The second cheque was endorsed to *A. B.*'s office peon, Naru, who, as was done in the other case, cashed it and carried and delivered the money to *A. B.* who then paid Lahanu, a balance after deducting his own claim.

Upon these facts applicant was convicted by the Sub-Divisional Magistrate of Amraoti of two offences punishable under section 168 of the Indian Penal Code as applied to Berar, (namely that, being a public servant he had unlawfully engaged in trade), and sentenced to pay a fine of Rs. 51 or undergo simple imprisonment for one month in respect of each of the two offences. The applicant appealed against these convictions and sentences to the Court of Session for East Berar, but the appeal was dismissed. He has, therefore, applied for revision to this Court.

On behalf of the applicant it was urged that his election as member and Vice-Chairman of the Amraoti Municipality did not disentitle him to carry on his business as a banker and money-lender. Lahanu was introduced to him by one Pimple, another Pleader, and the money was recovered, with the contractor's consent, in ordinary course of applicant's business as a banker and money-lender. Except the recovery of money lent, *A. B*, had no interest whatever. Under section 146 (1), Berar Municipal Law, the word "interest" meant 'pecuniary interest' in the contract. If Lahanu's contracts had gone to the wall, *A. B.* would still have been entitled to recover his advances. In other words, the argument advanced was that, by finding capital for Lahanu's business, applicant did not become interested in that business within the meaning of the above section of the Berar Municipal Law. It was

further urged that in this matter Berar Law is identical with English Law, and the following cases were cited by the learned Counsel for the applicant, as leading to a correct decision in the present case, *viz.*, *Todd* v. *Robinson* (1) and *Le Feuvre* v. *Lankester* (2). The latter case was said to be on all fours with the present case.

On behalf of the Crown the convictions were supported by the learned Government Advocate upon the ground that the English cases above cited affirmed principles which were in accord with the view taken by the Court below, while further authorities cited were, *Nicholson* v. *Fields* (3) *Lewis* v. *Carr* (4) *Nell* v. *Longbottom* (5) and *City of London Electric Lighting Co.* v. *London Corporation* (6).

It was said that the above cases would show that the Courts are jealous and stringent in imposing restrictions upon the carrying on of trade by public servants, and that they will go as far as possible in construing the words "directly or indirectly interested" to protect, in the remotest degree, the common public interest against the fraudulent use of advantages created by the official position of a public servant. It was conceded on all hands that there are no Indian rulings yet published on the subject in any of the known reports. I, therefore, proceed to make a short examination of the English cases citd, section 168 of the Indian Penal Code as applied to Berar and section 146 (1) of the Berar Municipal Law, being equally derived from the Law of England.

Section 193 of the Public Health Act, 1875 (38 and 39 Vic. c. 55), provides as follows:

> "Officers or servants appointed or employed under this Act by the local authority shall not in anywise be concerned or interested in any bargain or contract made with such authority for any of the purposes of this Act."

In *Todd* v. *Robinson* (1) it was held that a clerk to a District Board under the above statute, who is a share-holder in a Gas Company which supplies gas in the district at so much a lamp paid by the Local Board pursuant to a resolution of the Board is an officer "interested in" a contract made with the Board for the purposes of the Act, is liable to penalties under section 193 of the Act. This ruling certainly does not support the case for the applicant, unless it was meant to suggest that if the defendant in the English case had been the banker of, and not a share-holder in, the Gas Company, he would not have been held liable. No doubt, the three Judges who concurred in the rule laid down regretted being obliged to do so and regarded with approval a modification of the law which subsequently took place. But that was because they considered the particular case before them a technical breach of a rule; and so it undoubtedly was, seeing that neither as share holder of the Gas Company, nor as a clerk of the District Board, had defendant the least control over the contract between the Company and the Board. His interest was as indirect as it could be. Yet he was held liable. Had he been a Director of the Company or a Managing Vice Chairman of the Board, the English Court would have expressed no regret for having to inflict penalties upon him. The case is one instance of how far the English Law carries even indirect responsibility.

The next case, *Le Feuvre* v. *Lankester* (2), was relied on as the sheet-anchor of applicant's case. I have read that case carefully and I am of opinion that no analogy can be drawn from it. It was a decision upon the peculiar facts, that, a member of a firm of iron-founders, which firm, in the ordinary course of its business, had furnished lamp-posts, railings and the like at its current trade prices to a Municipal contractor, was not, *ipso facto*, disqualified under the provisions of a Local Act from being an Alderman of the Board. The contractor had no previous dealings with the defendants and it was held that the simple fact of the sale of goods did not create any interest in the contract. It is, how-

(1) (1885) 54 L. J. Q. B. 47; 14 Q. B. D. 739; 52 L. T. 120, 49 J. P. 278.

(2) (1858) 23 L. J. Q. B. 254; 3 El. & Bl. 530; 2 C. L. R. 1426; 18 Jur. 894; 2 W. R. 307.

(3) (1862) 31 L. J. Ex. 233; 7 H & N. 810; 10 W. R. 304.

(4) (1877) 46 L. J. Ex. 314; 1 Ex. D. 484; 36 L. T. 44; 24 W. R. 940.

(5) (1894) 63 L. J. Q. B. 490; 1 Q. B. 767; 10 R. 193; 70 L. T. 499.

(6) (1903) A. C. 434; 72 L. J. Ch. 737; 89 L. T. 310; 52 W. R. 158; 67 J. P. 437; 2 L. G. R. 93

ever, not easy to reconcile this *dictum* with the ruling in *Todd* v. *Robinson* (1) and other cases to be presently cited, and I am in respectful doubt of the soundness of the view taken by Coleridge, J., and the learned Judges who concurred with him in the case under consideration. It was pointed in the course of the arguments that defendant, as a member of the Board, might be called upon to decide whether the iron-work supplied to the Municipal contractor by his firm was well made and satisfied a warranty that it should be of a merchantable quality and urged that defendant, as an Alderman; would be clearly interested to decide this matter in the affirmative. The forcible contention was dealt with in the judgment by Coleridge, J., in the following words:—

> "It was, however, said, that it was within the mischief of the clause, because, supposing there had been a question afterwards as to the quality of the goods, the defendant himself, in the capacity of one of the Town Council, might have to determine on the matter, and that he might thus have an indirect interest. Now, whether that might fairly bring the case within the mischief it is not necessary to decide, unless it is also fairly brought within the meaning of the words. All that can be said, is that the Legislature has not provided for such a case, and we must not strain a penal clause from any consideration of consequences."

To my mind this does not answer the question. If the ironwork was condemned by the Council the contractor could have proceeded against the defendant's firm in damages, and, therefore, defendant had a clear pecuniary interest at stake depending upon his own vote and influence as a Town Councillor. Whatever may have been the language of the particular clause before the English Court, the above would be, in my opinion, a case of at least indirect interest under section 146 (1) of the Berar Municipal Law. The tendency of the later decisions has been to draw closer and closer the restrictions upon public servants in their private dealings with the Corportions to which they belong.

In *Nicholson* v. *Fields* (3) it was held that a member of a Board who had signed invoices for lime supplied for the works of the Board was a person interested, and though the *dictum* in *Le Feuvre* v. *Lankester* (2) was not expressly dissented from it was left in the category of a decision on the facts of a particular case, and the learned Judges concurrently found that a penal statute must be reasonably construed, like a remedial or any other enactment, so as to give effect to the intention of the Legislature. In the case under consideration Pollock, C. B. gave that intention in these words:—

> "It is clear it was intended that all and every description of jobbing by the corporation should be put an end to as far as mere legislation could do it, and that persons who were parties to any contract should be prevented from being capable of exercising the office of Commissioners, in other words, from dealing with themselves."

I am unable to see any less intention in the language of section 146 (1) of the Berar Municipal Law. The case of *Lewis* v. *Carr* (4) does not carry us much further, the Court holding penal that liability for acting as a member of a Corporation only remains so long as interest in the contract with the Corporation survives—a *dictum* which no one will dispute. If applicant in the case before me had lent money to a Municipal contractor and recovered the same *before* he acted as Vice-Chairman of the Municipal Board, the law would have attached no penalty to his procedure. But that is not the fact here, In *Nell* v. *Longbottom* (5), a vote by a candidate for his own election as Mayor was held invalid because the office carried a salary of £30 a year under a vote of the Town Council to which the candidate belonged. He was said, therefore, to have a "pecuniary interest" in the matter. Another vote by another Councillor, who was also at the time a Chemist to the Board, was avoided upon the same ground. The latest case is a decision of the House of Lords in *City of London Electric Lighting Co* v. *London Corporation* (6). The question before their Lordships was whether three contracts between the parties were invalid by reason of section 42 of the City of London Sewers Act,

1848, which provides, "that no person being a Commissioner, or a member of the Court of Aldermen, or of the Common Council of the City, shall be directly or indirectly interested or concerned in any contract which shall be made or entered into by or on behalf of the Commissioners for the execution of any works by this Act directed or authorized to be done or executed, or for furnishing materials or labour, or for any other matter or thing whatsoever, upon pain that every such contract shall be null and void, and that the person who being a Commissioner, or a member of the said Court of Aldermen or of the Common Council, shall be so interested or concerned therein, shall, for every such offence, forfeit and pay the sum of £100 to any person who shall sue for the same, to be recovered in any of the superior Courts by action of debt or on the case."

In the cases of two of the contract it was found that on the dates therof, some of the Commissioners, Aldermen, and Common Council men, were share-holders in the Electric Company: for that reason, the contracts were held to be void. In respect of the third contract it was found that at the time of making it no Commissioner, Aldeman, or Common Councilman, was a share-holder in the Company; and the contract was held valid and not affected by the fact that some Commissioners, Aldermen and Common Councilmen afterwards became share-holders in the Company. Halsbury, L. C., remarked:—

> "I have striven to escape the stringency of the language, since I think that no one will doubt that the contracts were fairly and properly made with a due regard to the public interest; but I cannot escape from the language of the statute, * * * I am unable to interpose any qualification."

Davey, L. J., in the same case said:—

> "I fully appreciate the stringency and drastic character of the enactment in section 42 of the Act of 1848. It applies to any Common Councillor, whether he is a Commissioner or not, and the remotest interest in the contract will not only expose the interested person to a penalty of £100, but will also avoid the contract. But the stringency of the section is not a reason for a Court of law to decline to give effect to it or to construe it otherwise than according to the plain meaning of the words."

There can be no doubt that, in the circumstances of this country, and in the best interests of the community, the Legislature cannot go too far in safeguarding an exotic like Local Self-Government, still little more than a mere seedling, against the diseases to which a long experience of it, as an indigene, has shown it to be peculiarly liable: and I have no doubt that all such provisions as section 146 (1) of the Berar Municipal Law, (which are to be found, as far as I can see, in every Municipal enactment enforced and applied by the Government of India), are designed to put a check on every kind of jobbery, and every fraudulent or improper use of office, by Municipal members and servants. Only a Board which, individually as well as collectively, is above all suspicion of fraud and jobbery, can hope to obtain and retain that degree of public confidence, without which it cannot be a fit manager of public business and proper trustee of public funds. It is notorious to all who have any experience of municipal business, as carried on at the present day in, at least the Central Provinces and Berar, that executive responsibility is almost entirely vested in the President or Vice-President and the Secretary of each Committee. How much of this power goes to each of these officers is a question which depends upon the circumstances of each particular case. In some cases the President holds sway: in others the leading authority is the Secretary, in regard to works to be carried out by the Board, the usual course is for the Board to sanction the work and the estimated outlay, and to leave everything else in the hands of its office-beares. In the present case, as we have seen, the executive authority was the applicant as Vice-Chairman, the Chairman being presumably a busy gazetted officer of Government, with little time to attend to the internal details of Municipal administration. The public interest required that the contracts in this case should be given to some person, wholly unconnected otherwise with the Board, who was fully capable of performing them: and that the applicant,

as the representative of one party to such contracts, should remain a vigilant and, if not hostile, at least disinterested critic of the manner in which each contract was performed by the contractor. That position of disinterestedness was lost the moment the applicant lent money to the contractor, because the contractor was admittedly insolvent, and the applicant's recovery of his money depended upon the due performance of the contracts and the resulting payments by the Board for the same. It is not going too far to say that the loans were made upon the security of the payments to be made by the Board, because the making of those payments lay in the hands of the applicant. The conduct of the applicant in connection with the payments makes this sufficiently clear. It is manifest that applicant would not have lent the impecunious contractor Rs. 350 upon his personal credit. Nor is it probable that he would have lent the money had the passing of the works and payment for the same been beyond his control. Even the usual banker of the contractor had refused to capitalise him for these particular contracts. Therefore, the applicant was pecuniarily interested in the success of the contractor's work, and in full and early payment for the same. It is difficult to conceive a more glaring violation of section 145 (1) of the Berar Municipal Law than is here disclosed, even if fraud was entirely absent.

It is manifest that the circumstances are such as would have lent colour to a contention that applicant was either the true but undisclosed contractor, or at any rate, a concealed partner of the person with whom the contracts purport to have been made. It is a well-established practice, in connection with *benami* transactions in India, to presume that property purchased with the money of *A.* in the name of *B.* is purchased for the benefit of *A.* and it does not seem easy to avoid the presumption that, in a Municipal contract, in the name of *B.* which is entirely worked with the money of *A.* *B.* is merely the *benamidar* of *A.* It is not at all clear what the conditions of the advance were, and what was the precise sum over and above his outlay, which applicant paid himself; and the whole transaction is obviously well within the mischief against which section 146 (1) of the Berar Municipal Law is directed.

Upon the best consideration that I have been able to give to the subject, I hold that any member of a Municipal Board in Berar who lends money to a contractor with his Board upon the personal credit of such contractor, for the purpose of such money being applied in carrying out the Municipal contracts, violates section 146 (1) of the Berar Municipal Law, and becomes liable to punishment under section 168 of the Indian Penal Code as applied to Berar. *A fortiori* the applicant as Vice-Chairman, authorised to enter into and to pay for Municipal contracts, was rightly convicted.

* * * *

The application for revision is dismissed.

Application dismissed.

(s. c. 15 C. W. N. 593.)

CALCUTTA HIGH COURT.

ORDINARY ORIGINAL CRIMINAL JURISDICTION.

(THE HOWRAH GANG CASE.)

SPECIAL TRIBUNAL.

April 19, 1911.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, Mr. Justice Brett and Mr. Justice D. Chatterjee.

EMPEROR—COMPLAINANT

versus

NONI GOPAL GUPTA ANOTHERS—ACCUSED.

Penal Code (Act XLV of 1860), s. 121 A—Conspiracy to wage war against the King—Dacoities committed as part of conspiracy—Conviction, acquittal and discharge, effect of—Evidence of approver—Corroboration—Rule not technical—'Conspiracy,' meaning of—Necessary elements—Charge of one conspiracy—If accused may be found guilty of another—Evidence Act (I of 1872), s. 30—Confession of co-accused—Retracted confession—Photograph of under-trial prisoner—Practice condemned—Association in play or pastimes—Gymnastic exercise—Lathi play—Exercise performed publicly—Sinister motive not to be ascribed—Criminal Law Amendment Act (XIV of 1908), object of.

The principal charge against several persons was, under section 12 A of the Indian Penal Code, of conspiracy to wage war against His Majesty the King-Emperor. As a part of the conspiracy, it was alleged by the prosecution, that many crimes, *e. g.*, dacoities were committed and that these formed the subject of judicial investigation which resulted in some of the accused being convicted, and others being acquitted or discharged:

Held, that, where there was an acquittal, it was conclusive, for a judgment of not guilty fully establishes the innocence of an accused.

The convictions also were similarly conclusive.

As to those who were discharged, no steps were taken to have the order of discharge set aside, nor was any further evidence adduced, but on the contrary

some evidence which was adduced before the Magistrate and which was favourable to the accused, was not even adduced: *Held*, that the guilt of these accused had not been proved, nor had any connection been established between the dacoity and the alleged conspiracy.

The rule that the testimony of an approver must be corroborated not only as to the crime, but also as to the identity of each accused person and that the corroboration must ordinarily proceed from an untainted source, is not a technical rule, but is one founded on long judicial experience.

A charge of conspiracy to wage war against His Majesty the King-Emperor under section 121A of the Penal Code may, to the lay mind, imply a political situation of the gravest character and it is partly for this reason that the Legislature has prescribed that a charge of this description should not be entertained except upon complaint made by order of Government. The provisions of the law, however, are comprehensive and no very formidable elements, either in men or means, are required to satisfy its definition of a conspiracy to wage war. No act or illegal omission is necessary; the agreement of two or more will suffice, so that the determination by a Court that a conspiracy to wage war has been established would not imply the existence of a serious menace to the constitution or the stability of constituted authority in India.

When several persons are charged with the same conspiracy, it is a legal impossibility to find some guilty of one conspiracy and some of another. Any accused not shown to be a member of a particular conspiracy is entitled to demand an acquittal, however bad his record may be and however much he may be suspected of this or that offence.

The true effect of section 30 of the Evidence Act is that the Court can only treat a confession as lending assurance to other evidence against a co-accused. A conviction on the confession of a co-accused alone would be bad in law. Further, that only can be taken into consideration which is a confession, in the true sense of the term, of the offence for which the persons are then being jointly tried. It would be most unsafe to place any reliance on the confession of a co-accused, which was subsequently retracted.

There is no warrant or justification for the practice of taking photographs of under trial prisoners.

To attach a sinister significance to the mere association in play or pastime such as music, gymnastic exercise and *lathi* play of those who live in the same village or attend the same school, is dangerous, especially when there is a complete absence of secrecy and rather a courting of publicity in the preformance of these exercises

The application of the Procedure of Act XIV of 1908, which was intended "to provide for the more speedy trial of certain offences," to a case of this kind which resulted in the detention in custody of the accused for many months without any access to legal advice, could hardly have been contemplated at the passing of the Act.

In this case the accused persons were committed by the Magistrate of Howrah on July 20th, 1910, to take their trial under sections 121A, 122 and 123 of the Penal Code before a Special Tribunal of the High Court constituted under the Criminal Law Amendment Act XIV of 1908. The charge under section 123 was dropped.

Messrs. *P. L. Roy*, *L. P. E. Pugh*, *E. Keays*, *J. Chatterjee* and *C. Bagram*, instructed by Mr. *Hume*, Public Prosecutor; for the Crown.

Messrs. *J. N. Roy* and *B. C. Chatterjee* instructed by Messrs. *Manual* and *Agarwalla*, Solicitors, for Noni Gopal Sen-Gupta, Bistupada Chatterjee, Norendra Nath Bose, Nibaran Chandra Majumdar, Suresh Chandra Majumdar, Jotindra Nath Mukherjee, Pobitra Dutt, Sarat Chandra Mitter; Suresh Chandra Mitter, Satish Chandra Mitter, Siboo Hazra and Haripada Adhikari.

Mr. *S. P. Sen-Gupta*, instructed by Messrs. *Ghosh* and *Kar* and Mr. *P. N. Banerjee*, Solicitors, for Narendra Nath Bhattacharjee and Annada Prasanna Roy.

Mr. *E. P. Ghose* and Mr. *N. C. Sen*, instructed by Messrs. *Ghosh* and *Kar*, Solicitors, for Bemola Charan Deb.

Mr. *J. K. Surita*, instructed by Mr. *H. C. Ghose*, Solicitor for Kalipada Chakravarti and Pulin Behari Sarkar.

Mr. *J. C. Bagchi*, instructed by Mr. *M. N. Chatterjee*, Solicitor, for Harendra Chandra Banerjee.

Mr. *P. C. Sen*, instructed by Messrs. *Alum* and *Mitter*, Solicitors, for Bhutan Mukherjee and Charu Chandra Ghose.

Mr. *J. N. Sinha* instructed by Mr. *H. C. Ghose*, Solicitor, for Chuni Lal Nundi, Bhusan Chandra Mitter, Ramapada Mukherjee and Atul Pal.

Mr. *S. K. Sen*, instructed by Messrs. *Manual* and *Agarwalla*, Solicitors, for Jogesh Mitter, Gonesh Das, Sailen Das, Rajani Bhattacharjee, Indu Kiran Bhattacharjee, Tincowri Das, Monmatha Biswas, Srish Chandra Sarkar, Narendra Nath Chatterjee, Bidhu Bhushan Biswas, Bejoy Chakravarti Dasarathi Chatterjee, Soilen Chatterjee and Bhupendra Rai Chaudhury.

Mr. *B. C. Chatterjee*, by the permission of the Court, addressed on behalf of Kartik Dutt, Taranath Roy Chowdhury, Monmatha Chowdhury, Susil Kumar Biswas, Atul Mukherjee and Upendra Nath Dey who were undefended.

JUDGMENT.—Forty six accused have been committed to this Court for trial under section 6 (*b*) of Act XIV of 1908, and the charges against them are under sections

121-A, 122 and 123 of the Indian Penal Code.

Of these the principal charge is that under section 121-A, of conspiracy to wage war against His Majesty the King-Emperor, and deprive the King-Emperor of the sovereignty of British India, and to overawe by means of criminal force, or show of criminal force, the Government of India, as by law established, the charges under the other sections are subsidiary, and have not been discussed before us. The period of the conspiracy, as charged is between the Christian years 1905 and 1910 both inclusive, and the accused are charged with having conspired at Sibpur in the District of Howrah, and at other places in British India.

Of the 46 accused so charged, Bhuban Mukherjee is alleged to be of unsound mind, and consequently incapable of making his defence, and an application has been made to us, under section 465 of the Criminal Procedure Code. As against him we have directed an adjournment of the trial subject to any objection that may be taken on his behalf.

The accused, Satish Chander Mitter and Haripado Adkary, have been discharged for want of jurisdiction, by reason of the failure of the prosecution to observe the provisions of section 196 of the Criminal Procedure Code. The accused, Bimola Deb, has been acquitted at the instance of the prosecution, on the ground that there was no case against him.

The case against Kiran Rai has been dropped, not for lack of evidence, but because his mental condition appeard to be such that the prosecution against him could not properly be continued; and, in adopting this course, Mr. P. L. Roy was influenced, and properly influenced, by the fact that this accused had already been sentenced to eight years' rigorous imprisonment for the Haludbari Dacoity, which is alleged to be a part of this conspiracy.

Counsel for the Crown also determined not to proceed with the prosecution against Jotindra Nath Mukerjee and Nibaran Mazumdar *alias* Karuda, as the relevant evidence he was able to adduce against them was not sufficient to support a conviction.

The case for the prosecution is that the accused were members of a vast conspiracy, organized and working in secrecy, and aiming at the overthrow of the British Government; hat, though the period of the conspiracy mentioned in the charge was between 1905 and 1910 both inclusive, the movement commenced earlier; that the principal centres of the conspiracy were Calcutta, Sibpur, Kidderpore, Nattore, Hughly, Bankura, Midnapur and Jessore; that the scheme of the conspiracy required the collection of men, arms and money, and that an actual start in this direction was made; that men were recruited and arms and ammunition collected, that to obtain funds dacoities were committed, and *swadeshi* shops were started. As a part of the conspiracy, it is said, many crimes were committed, for the prosecution would ascribe to the conspiracy a number of dacoities attempted or committed, the murder of two police officers, and one informer, the endeavour made to seduce troops from their allegiance, and other minor offences. Many of these offences have actually been the subject of judicial investigation and adjudication, and several of the accused have already been covicted, acquitted or discharged, in respect of them. Where there has been an acquittal, there has, of course, been no further discussion, for the acquittal is conclusive, and indeed it would be a very dangerous principle to adopt to regard a judgment of not guilty as not fully establishing the innocence of the person to whom it realates, *Rex* v. *Plummer* (1).

In other cases we have been compelled, by the course the prosecution have seen fit to adopt to hear the evidence again, in proof of these same offences against the same accused. In other instances completed offences, as for instance, the Netra Dacoity, have not been made the subject of a separate trial, as they could and should have been, but they have been thrown into this case, and we have had to investigate them in this trial. It may be that this course was inspired by the idea that, though the evidence at the disposal of the prosecution was insufficient to secure a conviction for the crimes committed, it might serve to secure a conviction for a conspiracy, the proof of which really rested on the establishment of those crimes; there can hardly have been the hope that the Court would be willing to suppose much had been proved, merely because much had been said. Of this however, I am clear, that the course adopted is not to be commended, and, though

(1) (1902) 2 K. B 339; 71 L J. K. B. 805; 66 J. P. 647; 86 L. T. 836; 18 L. T. R. 659; 51 W. R. 137; 20 Cox. C. C. 243.

it may be lawful, it unquestionably is not expedient. The result has been this trial, and with every effort to curtail its length, it has lasted, and necessarily lasted, for months, so that from the arrest of most of the accused a year and more has passed. The seriousness of this is the greater when it is borne in mind that, during the whole of the time, almost all the accused have been in custody, and that until the close of the magisterial inquiry, they were unrepresented by any legal advisers as a result of the application to this case of the special procedure provided by Act XIV of 1908, an Act" to provide for the more speedy trial of certain offences." I doubt whether when that Act was passed it could have been contemplated that a procedure was being sanctioned that would render it possible for accused persons to be incarcerated for months without any access to legal advice.

To establish their case the prosecution called, in the course of the magisterial inquiry, close on 450 witnesses, all of whom and more have been called or tendered in this Court, while the printed exhibits alone cover upwards of 1,100 foolscap pages. The evidence adduced in support of the prosecution's case is in part oral, in part documentary and in part real. The principal and most important oral evidence is that of the approvers, Lolit Mohan Chakrabarti and Jotindra Nath Hazra, but admittedly their testimony before it can be acted on must be corroborated in material particulars. The nature and extent of this corroboration is well-settled; there must be corroboration not only as to the crime, but also as to the identity of each one of the accused; and ordinarily it must proceed from an untainted source. This is no technical rule, but one founded on long judicial experience, and this case affords a striking illustration of its wisdom, as will be made clear when I come to a discussion of the approvers' evidence.

The documentary evidence consists of books, newspapers, accounts, diaries and letters found for the most part at searches made in the course of this case, or of cognate or relevant cases. We also have before us arms and ammunition that the prosecution seek to connect with one or other of the accused. And finally we have the confessions, of which use is sought to be made under section 30 of the Evidence Act against co-accused.

First, then it has to be seen whether the conspiracy alleged by the prosecution has been proved. Was there a conspiracy "to wage war against His Majesty the King-Emperor and to deprive the King Emperor of the sovereignty of British India and to overawe by means of criminal force or show of criminal force the Government of India by law established? A charge so phrased might, and probably would, to the lay mind, imply a political situation of the gravest character, and it is, no doubt, partly for this reason that the Legislature has prescribed that a charge of this description shall not be entertained except upon complaint made by order of, or under authority from, the Governor-General in Council, the Local Government, or some officer empowered by the Governor General-in-Council in this behalf.

The proceedings in this case have been initiated by complaint made by order of the Local Government: with the policy of that order this Court has no concern. I have hesitated much as to whether it could, with any show of reason, be said that the evidence has disclosed a conspiracy for so serious an end as waging war against His Majesty, and I have hesitated the more when I have borne in mind the class of men arraigned before us as accused, and the arms that have been disclosed, consisting as they do, for the most part, of a few revolvers, some muzzle-loading guns, some antiquated and broken pistols and a handful of arrow heads. Even Lolit, when he says that the object was "to make the country independent," adds "there was no immediate hurry." Jotin Hazra seems to have regarded the movement as a means of liveliood, and in proclaiming his repentance he declared that he recognized that all this dacoity business was bad and that he had been worse off since the dacoities than before. Before us he expressed the view that "these dacoities constituted a secret society." Panna Lal, who also professes to have been a member of the conspiracy, declared in his confession to Mr. Patterson, "all who entered the gang perpetrated swindles in the name of Swadeshi." Here he improved his story. Still the provisions of the law are comprehensive and it does not require very formidable elements either in men or means to satisfy its definition of a conspiracy to wage war. For

the conspiracy with which we are concerned no act or illegal omission is necessary; the agreement of two or more will suffice, so that the determination of the Court that a conspiracy to wage war has been established does not imply, as its terms might suggest, the existence of a serious menace to the constitution or the stability of constituted authority in India. And I think it right to say this in explanation of my conclusion that a conspiracy to wage war has been proved.

So much is made of the evidence of the approvers and so closely and intimately is the success of the prosecution identified with it, that it will be convenient to discuss its value at the outset.

Of the two principal approvers Lolit is the more important and I will deal with him first. His previous record has nothing to commend it: though he is poor and his family poor, he has frankly admitted that he "has never tried to earn an honest penny." He was arrested in Darjeeling on the 27th of October 1909, and, instead of being sent at once to Diamond Harbour, he was kept at Darjeeling "for local inquiry" and did not reach Diamond Harbour until the 2nd November. Then he had interviews with Inspector Shamsul Alum extending over several hours, and though it was understood before Lolit was willing to confess even he left Darjeeling, it was not until the 5th of November that he was taken to the Magistrate to have his confession recorded. No explanation of this delay is forthcoming, and it is a matter both for regret and for comment that the statement recorded by Inspector Shamsul Alum is not forthcoming. No such document could be found. This assurance we, of course, had to accept, but I feel that it might have materially assisted us, had it been possible for the prosecution to place before us either the original record. or a copy of Lolit's first statement to Inspector Shamsul Alum. How such an important document (if it ever existed), and all records of its contents have become lost to the Police, it is difficult to understand. That such a statement was recorded seems clear, and Counsel for the prosecution was asked by the Court to produce for our inspection some document from which we could learn what Lolit had said to the Inspector. Though it seemed to me improbable that the police authorities would not have somewhere in their possession either the original or a copy of this statement, Mr. P. L. Roy, after search had been made, informed the Court that he was instructed to say, no record of this statement could be found.

Lolit's confession to the Magistrate, Mr. C. C. Chatterjee, is a very remarkable statement, and it is the foundation on which practically the whole of this case is built.

For the prosecution it is said that this statement is not a full disclosure of all Lolit knew, and this has to be said, for it is silent as to the many matters to which Lolit has deposed before us. Lolit's successive statements to the recording Magistrate, to the varifying Magistrate, before Mr. Duval who conducted the inquiry, and finally before this Court, afford so much room for comment that it is difficult to decide where to begin. His evidence in-chief before this Court was conspicuous for the assurance with which it was given, and the intimate knowledge of the membership and doings of the conspiracy it professed. Offences and outrages that had baffled the detective powers of the Police were explained and claimed by him as the work of the conspiracy, and he has painted himself before us as having a considerable hand in the commission or abetment of dacoities, murder and theft. His knowledge of the *personnel* of the conspiracy appeared to be extraordinary; before the inquiring Megistrate he gave the names of over 170 persons, indicating in most instances their residences, and yet he has told us he was not an important member of the conspiracy, and to the verifying Magistrate he stated in explanation of his inability to give a particular name and address, "the rule of our *Samity* is not to ask the name and residence of any member. On this account I do not know the names and residences of many persons." Nor can the achievement of re-counting this list of names and residences be explained by a good memory for facts within his experience, for when confronted in his cross-examination with one of his many inconsistencies all he could say was "it is impossible for me to narrate these facts correctly each time." Under the stress of cross-examination the assurance vanished, though he displayed considerable resource as he was dislodged from one after the

other of his former statements. It would take too much time to do more than mention a few of the inidcations of untrustworthiness his evidence affords. First, there is his denial of the brick burning letter*, which it is difficult to regard as anything but deliberate falsehood. He may have felt he was safe in this denial, for the falsehood was one that could not have been discovered, but for chance that brought this letter into the possession of the defence, a contingency Lolit could not have foreseen. His ingenious explanation of the letter, when he had to admit its authorship, did not impress me. Then there is the change of his story as to the receipt of Rs. 10 by money-order from Jotin Mukherjee, from which it became necessary to resile when it was discovered that Jotin was at that time at Darjeeling. Next, we have him deposing before the Magistrate that he had passed the Entrance Examination from Diamond Harbour School in 1905, while here he denied that he had made any such statement, and declared that he left when he was promoted to the second class. At one time he says it was his father that paid for his outfit at Darjeeling, at another time that it was Noni Gopal, and when he was confronted with the variation in his story he promptly said both were true.

Then, the story of his connection with Benares is remarkable for its changes. At one time he deposes that he went with Horen and Behari Lal, at another that he preceded them; in his examination-in-chief it seemed as though he went there only once, but in cross-examination, he escapes from the difficulty this involves, by saying there was more than one visit. At one time he says he, Horen and Behari Lal lived in Umbica's house at Benares for a fortnight, at another he says he thinks he never made any such statement: at one time he declares that he returned from Benares in $1\frac{1}{2}$ or 2 months, at another after working there for 5 months. His story as to his being sent to Dacca for the *Barrah loot* is almost as full of contradictions: at one time it is Pabitra and Noni who sent him on this mission, at another Bimola takes Noni's place: at one time he declares that it was while he was living in Indra Nandi's house that he was so sent, although it appears that the dacoity had not then been committed, at another that it was when he returned from Benares in the autumn of 1908, though the dacoity had then been committed not less than four months before: at one time he was given cartridges and a revolver on this occasion, at another no mention is made of this. Then, as to the date of his first coming to Calcutta: before us he declared it was in October 1905, that he first stayed at 46, Machua Bazar Street, that he then moved to the premises of the Calcutta High School, No. 66, Nebutolla Lane; that in Assin or Kartic he was initiated; that he then went to the *Yugantar* and *Chatra Bhandar* mess No. 15-1 or 15-2, Bhowani Churn Dutt's Street; that on the very day of his initiation he was entrusted with a revolver to make over to Sakharam Ganesh Deoskar; that on the following day in accordance with instructions, he watched 7, Alipur Lane, and followed a man on a bicycle supposed to be carrying money, and that, after staying two or four days at the *Yugantar* and *Chatra Bhandar* mess, he was sent by Indra Nath Nandi, to Cheddapathar. Before the verifying Magistrate, however, he places his visit to Cheddapathar in 1907. It is true that the date in the Magistrate's record appears to have been altered to 1907, but if this alteration was subsequently made, one thing at any rate is clear, the alteration could not have been made by the defence, for the document was in possession of the Police and it was only after repeated efforts that Counsel for the defence saw it in the course of the trial in this Court, But, more than this, if the alteration was subsequently made, it was one

*This letter, dated the 13th February 1910, marked as Exhibit H in the case is in Bengalee, and the following translation is taken from C. W. N.—*Ed.*

"Father, I am in great anxiety, not having had any news for many days. Do not be anxious about me. I have now been out of home three years, I may be away for say two months more. There is no cause for anxiety concerning the case. You have got bricks ready, please begin building the house. I shall, be assured, certainly go and help you two or three months hence. Please give my younger brothers good education—have no anxiety. Send one or two Bengali books for me and reply to this letter. If you do not begin (building) the house, then prepare bricks again, I shall on my return commence building the house. Do not be anxious on my account. Pray God, that I may soon be able to return home—have no fear no one will kill me. Government has kept me very well guarded and will do so. Let mother cry no more for me tell her I shall soon return. Tell the same to my brothers also—let them attend to their studies."

necessitated by Lolit's statement at the time, for immediately afterwards he says, in the same statement, that after being two months at Cheddapathar, he returned to Calcutta, and he goes on to describe a long conversation he had as to the Changripota dacoity, and the disposal of the proceeds. And seeing that this dacoity was not committed until December 1907, it is at once patent that if 1907 is a later alteration, it was one necessitated by Lolit's own story. But if October 1907 be taken as the date of his arrival, then all the events prior to that to which he deposes,—and they are both many and important,—must have been outside his experience. If, on the other hand, he came in 1906, then the conversation as to the Changripota dacoity on his return, must be a fabrication, and it is difficult to repel the suggestion, very pertinently made that it was a fabrication in which he was instructed for the purpose of bringing in this dacoity as the work of the conspiracy.

Then there is Lolit's story as to the assistance he gave in securing the murder of Nanda Lal. If Lolit was in Benares in August, then his version as to how he came to know Nanda Lal by sight is false, and with that the whole of his story goes by the board. There are other serious difficulties in the way of accepting his evidence on this point, with which I will deal later, and I will now merely allude to the fact that, though he professes to have watched Nanda Lal's house under instructions from Noni, the house he pointed out to the verifying Magistrate as Nanda Lal's was No. 25, whereas in fact Nanda Lal lived in No. 100-2. Then we have Lolit placing the Musapur dacoity in April, and so placing it, not as an isolated event, but for the purpose of accounting for the abandonment of the second Netra attempt, and yet we know that this dacoity was committed on the 27th February. Then we find that, while he claims an intimate knowledge of those who took part in the Netra dacoity, he points out as parties to it two persons who admittedly had nothing to do with it.

I have mentioned here only a few of the many indications which go to show how untrustworthy Lolit is, apart altogether from the discredit that attaches to him as an accomplice or as the worthless character he obviously is. When I come to deal with the details of the case it will be necessary for me to refer to many other such instances, and indeed a close examination of his evidence goes to show that almost all his statements, when capable of being checked, can be shown to be incorrect. There can be no question that Lolit has overdone his part, whatever the reason may be; and if it be said that had he been fabricating a false story he would not have fallen into this error, then I would answer in the words of Lord Brougham:—"This is a very tender argument before a Court, and too doubtful to justify the Court in placing any considerable reliance on it; for we do find, happily for the ends of justice, that men do fall into these inconsistencies, and by means thereof, the fraudulent character of the evidence becomes apparent."

Jotin Hazra, the other approver, it is also urged on behalf of the defence, is, apart from his being an accomplice, an untrustworthy witness. There is certainly little in his general character to commend him, for he seems to have been a ne'er-do-weel, and admits to having been a *ganja* smoker. He is a man of indifferent education, and I was not favourably impressed by him in the witness-box. He first meet with Jotin in connection with the Morehal dacoity; he was arrested on the 5th February, on the 6th February he confessed, on the 29th of March he retracted; he was tried at the Sessions, and in the end he was acquitted on the 1st April 1909. Proceedings were then taken against him under section 110 of the Criminal Procedure Code for bad livelihood on the 29th June 1909, and he was ordered to find sureties on the 17th August. He was not finally released till the 11th February 1910, as he could not find sureties before. Prior to the 17th August, however, he had been temporarily released on bail in July, but instead of going to his own house, he went to Kali Babu, a Police Inspector at Uluberia and told him he would like to confess. But for a reason which has not been explained, the Inspector instead of taking Jotin Hazra to a Magistrate to have his confession recorded, took him to Inspector Shamsul Alum, and left Jotin with him. Jotin says he told all, and Shamsul wrote it down, but we have not been placed in possession of what was so recorded. On the 15th of February 1910, he was arrested in this case, and he made a

statement to Mr. Forrest on the 17th, two days later.

The defence have drawn attention to the fact that, in reference to the confession in the Morehal case, which was subsequently retracted by him, it was Jotin's contention that he had been tutored to make that confession by Behari Lal, and it is urged that it is significant that he should have made his statement to Mr. Forrest immediately after this same Behari Lal became his surety. Jotin's movements while in custody certainly are deserving of attention. I will start with his being brought to the Presidency Jail where at the time none of the accused were in custody. He was, however, removed from here to the Alipur Central Jail, where the accused then were. This was a few days before he was required to identify them in the Magistrate's Court, and not only was he removed to the Jail where the accused were, but he seems to have eaten and bathed with them. Almost immediately after he had identified the accused, with whom he was concerned, in the Magistrate's Court, he was removed to another Jail. In considering the significance of these moves, it has to be borne in mind that, up to this time, there had been no identification by Jotin. For the defence it is asked, and I think reasonably asked, what is the explanation of all this None has been vouchsafed, or attempted, and it is difficult to treat the matteras an undesigned coincidence.

This will be a convenient place at which to deal with the confessions.

Reliance has been principally placed on those of the accused Soilen Das and Susil Biswas, and these the pnosecution would use not only against the persons making them, but also against the rest of the accused. The warrant for this is to be found in section 30 of the Evidence Act, which provides that, when more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such person, is proved, the Court may take into consideration such confession as against such other person, as well as against the person who makes such confession. The language of the section is guarded, and the history of this Act leaves me in no doubt that this section was designedly framed in these terms. While admissions, a word which embraces confessions, are by section 21 *relevant*, and may be proved as against the person making them, all that section 30 provides is that the Court *may* take them into consideration, as against other persons. This distinction of language is significant, and it appears to me that its true effect is, that the Court can only treat a confession as lending assurance to other evidence against a co-accused. Thus to illustrate my meaning, in the view I take, a conviction on the confession of a co-accused alone would be bad in law. This reading of the section appears to me to gain confirmation from the language of section 5.

Further, I think, that only can be taken into consideration which is a confession, in the true sense of the term, of the offence for which the persons are then being jointly tried. But, in addition to this, the confessions with which I am now dealing, have been retracted, so that, to place any reliance on them against the co-accused would be most unsafe, *Yasin* v. *King-Emperor* (2). Counsel for the defence, however, has gone further and maintained before us that there are points on which the confessions are absolutely false, and that these are points on which honest mistake was not possible.

First, I will examine Susil's confession. He was arrested on the 7th November 1909 at Beilashishi for the Haludbari dacoity, and he confessed on the following 14th of December. He speaks to the presence of Lolit Mohan at Beilashishi 8 or 9 days before the commission of the Haludbari dacoity, which was on the 28th of October 1909, and to his taking two swords away with him. He further speaks to having been initiated by Lolit 4 months before his confession. But Lolit's deposition is that he was not near Beilashishi at either of these dates, and according to his story he was not in Beilashishi after May. Further than that, Lolit in the witness-box never alluded to this alleged initiation, though he was questioned in his examination-in-chief as to initiations performed by him, and mentioned some, particularly those in which he had taken part. So much for Susil's confession.

I now come to Soilen's confessions. To begin with, it is pointed out, that while Soilen in his first confession made on the 29th of October, the day after his arrest

(2) 28 C. 689 at p. 690.

gave the name of Ganesh Chandra Das alone, saying that he did not know the names of all the rest, in his second confession he names all the Calcutta men and Bidhu. This, it is urged, shows an improvement designed to meet the exigencies of the case. Whether this be so or not is not directly material for the purposes of this case. But what has been most vigorously attacked is the third confession made on the 9th and 10th of March after Soilen had been in custody for over four months. In this he purports to give a detailed list of conspirators, even naming 80 men who had not been mentioned by Lolit; he makes repeated reference to Noni Gopal, he gives an account of the Netra dacoity; he implicates some of the accused in the Morehal dacoity, and he deals with a number of other matters. Not only has this confession, as well as the two which preceded it, been retracted by Soilen, but a careful consideration of its contents, and a comparison of them with other materials in the case lead me to regard this statement as eminently untrustworthy, and I am unable to place any reliance on it against Soilen's co-accused. Without attempting a critical examination of the whole of this confession, it will suffice to refer to two matters. Towards the end of this confession, he throws in the remark that, "Noni Babu never keeps any incriminating thing in his house." Now this he says on the 10th of March 1910, while Noni's house had been searched on a previous date, the 20th of January, and nothing incriminating had been found. Then, again, Soilen almost immediately after this tells us, in the same confession, about the recovery by Noni of cartridges that had been thrown into the tank. It is conceded for the prosecution that this has reference to an incident of which witnesses named Sarna Bewa and Jamini speak. And yet, if Jamini is right in placing the occurrence in Aughran, *i. e.*, November-December, it is difficult to see how Soilen who was then in custody, could have known of it. This, however, is a matter which I will discuss at greater length when I come to deal with the case against Nani.

For the prosecution it has been suggested that the verification proceedings in this case add a value to the approver's evidence and the confessions, and may be regarded as corroboration. With this I am unable to agree; on the contrary I feel that there proceedings are open to much of the criticism to which they have been subjected. I refrain from noticing in detail this criticism, as in the view I take, it is not necessary for the decision of the case, nor do I propose to discuss at length the comments that have been made on the methods of identification, though I regret that no satisfactory explanation has been given either of Jotin's being moved to and from the Alipur Central Jail where the accused were lodged, a matter to which I have already alluded, or of the under-trial prisoners having been photographed in Jail by the Police, a procedure for which no warrant or justification has been furnished us by Counsel for the prosecution. Action of this class, if left unexplained, even after challenge in the clearest terms from the defence, is certainly calculated to occasion some degree of anxiety as to the methods employed in this case.

Considerable reliance is placed by Counsel for the prosecution on a series of dacoities committed or attempted, and alleged to be a part of the scheme on which the conspirators embarked. The earliest, according to the prosecution, was a dacoity at the Changripota Railway Station, committed on the 6th December 1907, and followed by dacoities at Sibpur on the 3rd April 1908, at Barrah on the 2nd of June 1908, and at Bighati on the 16th September 1908. Then, it is said there was an attempted dacoity at Protapchuck on 14th October 1908. On the 29th of November 1908, a dacoity is said to have taken place at Raita, and on the 2nd of December at Morehal. In 1909 dacoities are said to have been committed on the 27th of February at Musapur, on the 23rd of April at Netra, on the 27th of July at Maharajpur, and on the 28th of October at Haludbari.

The incident which has been described as the Changripotta dacoity occurred on the 6th of December 1907; whether or not it was a real dacoity is not clear, but of this I am convinced, that the evidence does not establish the guilt of the accused, Narendra Nath Bhuttacharjee and Bhusan Chandra Mitter. Shortly after the occurrence, a magisterial inquiry was held, with the result that the accused then before the Court were then discharged. This, no doubt, is not binding on this Court, for the discharge was not equivalent to an acquittal. Still the dis-

charge meant that the Magistrate, after taking the evidence, found that there were not sufficient grounds for committing the accused for trial, and he recorded his reasons for that conclusion. No steps were taken at the time to have this order of discharge set aside, and now, more than three years after the event, we are asked to hold that the complicity of the two accused now before the Court has been established. It is not suggested that further evidence has been adduced; on the contrary, some evidence which was adduced before the Magistrate, and which appears to have been favourable to the accused, has not been placed before us. The evidence actually placed before us is open to considerable comment, and this, together with the circumstances to which I have alluded, in my opinion, clearly requires that we should hold the guilt of Noren Bhuttacharjee and Bhusan Mitter not proved, and the connection of this dacoity with the alleged conspiracy not established.

The Sibpur dacoity was on the 3rd of April 1908, and, though Lolit refers to it, his evidence in this connection can command no confidence, and Mr. P. L. Roy wisely refrained from placing any reliance on it.

Norendra Nath Chatterji, it is true, was arrested on the 4th or 5th of April 1908, but no charge sheet was submitted and he was discharged. Apart from this, there is no evidence that any of the accused took part in the dacoity, or that it was the work of those engaged in the alleged conspiracy.

The Barrah dacoity was on the 2nd of June 1908, and of the accused before the Court, Kartick Dutt was put on his trial for this offence, but was acquitted. There is no credible evidence to connect any other of the accused or the conspiracy with this dacoity. It is true that Lolit tells a tale in connection with the loot of this dacoity that implicates Pabitra Charan Dutt and Bimola Deb, but Counsel for the Crown informed the Court that he did not rely on this, and, in my opinion, he had very good reason for taking this course.

The Bighati dacoity was on the 16th September 1908, and Kartick Dutt's participation in it is placed beyond question by his conviction. Apart from this, there is no evidence of direct participation in the affair by any other of the accused. Lolit's attempt to connect certain of the accused with it by means of conversation he over-heard, obviously fails. How far this dacoity can be treated as the work of the conspiracy under investigation will be considered when I come to deal with the case of Kartick Dutt.

The attempted dacoity at Protapchuck is not brought home by reliable evidence, either to any of the accused or to the conspiracy. Though there is reason to think that the Raita dacoity (November 29th, 1908) was committed by what has been termed respectable men, there is nothing which suggests that any of the accused took part in it, beyond the retracted confession of Susil Biswas, who names Monmatha, Bamapodo and Bhupen. But this obviously cannot take the place of legal proof.

The Morehal dacoity was on the 2nd December 1908, and, as I have already said, Monmatha Nath Rai Chowdhry has been convicted as one of the offenders. It is said by the prosecution that Dasarathi Chatterji, Sibu Hazra and Atul Pal were also of the party, and the approver Jotin, no doubt, names them. Not only, however, is his evidence wholly uncorroborated, but it is at least doubtful whether Jotin was at the occurrence. He tells a story of bursting open a safe with gun-powder which cannot have escaped the notice of others, and yet is mentioned by no one; his name does not appear in Monmatha's confession; and though put on his trial he was acquitted at the Sessions. In the circumstances, it cannot be fairly said that this dacoity is brought home to any one except Monmatha Nath Rai Chowdhry, though it may be that some of the dacoits were *bhadralogs*.

The Musapur dacoity was on the 27th of February 1909. There is, however, nothing to connect any of the accused with the occurrence. Lolit seeks to connect it with the conspiracy, but his evidence is unreliable. As I have already pointed ont he places the dacoity in April, though it occurred in February.

The Netra dacoity was on the 23rd of April 1908, and it owes its importance in this case to the fact that it was in connection with this affair that the approver Lolit Mohun Chakravarty was arrested, and it is on his successive statements that the whole fabric of this case practically rests. He ultimately seeks to implicate no fewer than fifteen of

the accused in this dacoity either as actors or instigators. The fact of the dacoity is beyond dispute, and if Lolit is to be believed, it was preceded by two abortive attempts. These need not be discussed at any length, nor is it necessary to do more than point out that his evidence as to the second of them is open to considerable doubt for, while he would place it within the month of April, he states that the attempt failed because the Musapur dacoity interfered, but in fact it appears that the Musapur dacoity was in February.

The first information of the Netra dacoity was lodged by Ram Taran Mitra, the owner of the looted house, within a few hours after the occurrence, and what appears there leaves little doubt that the dacoits cannot have been ordinary criminals, and it is peculiarly significant that the dacoits were at that early stage reported to have said, "the money and ornaments that we are taking are meant solely for driving the English root and branch from this country. We are in want of funds, and, therefore, we are obliged to collect money in this fashion. When the time comes we will return the money with interest." This points very clearly to the purpose and *personnel* of the party, and is in accord with the allegation that the dacoits were Hindus and the sons of *bhadralogs*. Though Lolit in his evidence deposes that the dacoits were 21 in all, yet, in the first information it is said there were only seven or eight youngmen.

It will be convenient here to recall Lolit's version of the whole affair. After detailing the instructions he received from Noni Gopal Sen Gupta, he states that he went by train to Dewla where he alighted at 5·40 or 6·40 P. M., with others, whom he conducted to a field. There five men of Joynagar and Mazilpur met them and about midnight, after the last train from Diamond Harbour had passed, the party proceeded to the scene of the dacoity, Ram Taran Mitter's house, led by Lolit, Arrived at the house of Kali, Chakravarti and Madaru scaled the wall, Lolit concealed himself in a drain, two men mounted guard and the house was looted. Then Lolit led them back again past the field, and, after they had gone 2 or 3 miles, the party sat under a tree and took count of the spoil of which a list was made. With certain trifling exceptions the arms and loot were made over to the men of Joynagar and Mazilpur. The rest went in batches of 3, 4 or 5 up to Sangrampur *Mat*, the men with Lolit being, to use his own words, "Soilen Das, Biftupodo Chatterjee, Atul Mukerjee and, I think, Upan De." This batch went to Magrahat Station and there they got into the third train from Diamond Harbour to Calcutta.

Such, in broad outline, is Lolit's story of the dacoity as presented to us in the course of his examination-in-chief. He then goes on to describe visits to Sarat Mitter and Noni Gopal, his expedition under Noni's instruction on the following day, which must have been Sunday, the 25th April, his arrival at Mazilpur, and his return in the early hours of Monday with the plunder, accompanied by Chuni Lal Nandi and Rajoni Bhattacharjee. Though there is reason to think that this dacoity was connected with some such conspiracy as is charged in this case, I will reserve for consideration, when I come to deal with their individual cases, whether the evidence establishes the guilt of Chuni Lal and Rajoni, but against the rest of the accused the imputation that they were in this dacoity fails.

The Maharajpur dacoity was on the 27th July 1909. The evidence discloses nothing that serves to connect the offence either with any of the accused or with the alleged conspiracy.

The Haludbari dacoity was on the 28th of October 1909, and the accused Soilen Das Susil Biswas, Atul Mukerjee, Kiran Rai, Gonesh Das, Salendra Chatterjee and Upendra Kristo Deb have on a previous trial been found guilty of this offence. The accused, Bidhu Bhusan Biswas and Monmotho Nath Biswas, who were tried with them, were acquitted. One of the principal overt acts alleged in the complaint initiating these proceedings is, "the seduction of and attempting to seduce certain men of the 10th Jats from their allegiance." This, according to the prosecution, was a distinct and complete offence in itself, and it is much to be regretted that it has not been brought to trial as such. However, this has not been done, and we have, therefore, been compelled to try in this case the charge of attempting to seduce the *sepoys* of the 10th Jats

from their allegiance and duty, and of conspiring in such attempt, so that, as far as the present accused are concerned, the judgment of the Court on that charge will be conclusive. The men of the 10th Jats involved in this offence are, according to the prosecution, Surjan Singh, Chunai Havildar, and possibly Ram Gopal; but it is Surjan Singh who figures most prominently in this connection, and the accused whom the prosecution would implicate in this affair are Noren Chatterji, Sarat Mitter, Bhutan Mukerji and Noni Gopal.

The specific acts alleged are (1) that Surjan Singh was initiated into the secret society at Bhutan's house at Sibpur, where he and Ram Gopal were taken by Noren Chatterjee, (2) that Surjan Singh was thrice given money, once by Noren Chatterji and twice by Lolit and (3) that these men of the 10th Jats visited Sarat, and were in constant touch with Noren Chatterji. I may say at once that against Noni there is absolutely no evidence; of the payments by Lolit there is not a word of corroboration, and in fact these payments are opposed to Surjan's testimony; for Noren's payment to Surjan we have to depend on the unsupported evidence of Surjan, who was, on his own showing, a party to this alleged criminal transaction. But there is a more serious difficulty in the prosecution's way. One of the witnesses on whom the prosecution principally rely for the story of the initiation, is Ram Gopal, for his evidence at any rate, it is claimed; cannot be depreciated as that of an accomplice. Ram Gopal was a soldier in the 10th Jats, and his evidence is that he left the regiment in November or December 1908. The exact date must be a matter of record, within easy reach of the prosecution, and no attempt has been made to question the correctness of this date, and so presumably the prosecution accept it as correct. Now, Ram Gopal speaks to the visit with Surjan to Sibpur, and places it 5 or 6 months before he left the regiment, and though it would be wrong to tie him down strictly to this computation of time, it is reasonable to suppose that, according to him, this visit occurred some considerable time before November or December 1908. Here, again, the prosecution could have fixed the date, as the execution is said to have been made while Surjan was in hospital with a dislocated knee. No steps, however, have been taken to show that Ram Gopal was in error, so that here, too, it is fair to assume that the prosecution accept as correct the time, approximately fixed by Ram Gopal. For what it may be worth, I may point out that it was said to be drizzling at the time of this visit to Sibpur, and this would agree with Ram Gopal's estimate of the time. At the same time, the evidence of these Jat witnesses is, that before and after the Sibpur incident, they used to go to Sarat's dispensary at 86-1, Diamond Harbour Road. This is clear from the evidence itself, and is confirmed by the fact that it was this house that Surjan Singh pointed out to the verifying Magistrate. The evidence, however, is clear that Sarat was not living in Diamond Harbour Road at the date of this alleged visit to Sibpur, whether it occurred 5 months or even less than 5 months before November-December 1908. This visit to Sarat's, it has to be borne in mind, is not an irrelevant incident; it is an essential and integral part of the story of the initiation, and the discrepancy, to which I have drawn attention, throws serious discredit on the whole story of the journey to Sibpur, which is in itself improbable. In expressing these definite and positive conclusions in regard to the Jat soldiers, it is right to state that, though they are the conclusions of the Court, they do not in all respects represent our unanimous opinion. But the divergence of view is not such as to qualify the unanimity of our opinion on the essential question whether the accused, alleged to be involved in this incident, are or not proved to be guilty of the offence of conspiracy with which they are charged. On that we are all agreed.

Then, it is claimed that the *Chatra Bhandar* affords strong evidence of the existence of the conspiracy, and is of value as incriminating several of the accused. It came into existence as far back as 1903 as a Students' Co-operative Stores Association, and it is conceded that, in its origin, it was a legitimate trading concern. In August 1906, it was converted into a limited company but whether it was before or after this that it was put to unlawful ends has not been formulated by the prosecution. The theory now advanced is, that the conspirators saw in its prosperity a useful instrument for forward-

ing their ends, and they accordingly captured the Association. The uses to which, according to this theory, the Association was put were, *first*, to earn money for the conspiracy, *secondly*, to afford a secure meeting place for the conspirators, and, *thirdly*, to be the bankers of the cause. But ingenious and attractive as this may be as a theory, it has no foundation in established fact; not one of these three suggestions is proved. But then it is said that a close connection existed between the *Chatra Bhandar* and the *Jugantar*, and that, from this the true character of the *Chatra Bhandar* is to be learnt. For this reliance is placed on the fact that the proof of the *Chatra Bhandar's* blue prospectus was printed at the Sumati Printing Works. But it would seem that these printing works belonged to Nikhileshwar Roy Moulick, who was a Director of the *Chatra Bhandar*, so that the fact on which so much reliance is placed, is capable of an explanation which is not only innocent but probable. And, in this connection, it has to be borne in mind that Nikhileshwar has been conclusively acquitted of participation in the conspiracy set up by the prosecution. It is true that on the *Chatra Bhandar* prospectus the *Jugantar* was advertised, but of this an explanation has been suggested, and, in any case, it cannot be overlooked that the *Chatra Bhandar* had 10 Directors, and that, of these, two have been acquitted of being concerned in the conspiracy, while, of the remainder, it is only against Pabitra that any suggestion of complicity has been made. Moreover, at this time, it has to be remembered, the *Jugantar* had been in existence some considerable time, its popularity was great, and no objection had been taken to its tone and its teaching by the authorities. Precisely the same considerations apply to the alleged connection with the *Mukti Kon Pathe*. Then, again, so far as the printing of *Chatra Bhandar* documents is concerned, it was in no sense limited to the Sadhana Press, but the accounts show that a large amount of printing work was done at other presses, even while the Sadhana Press was in existence.

Then, it is urged that the *Chatra Bhandar* is condemned by the books it sold. True it is that *Mukti Kon Pathe*, *Bartaman Rana Niti*, and *Jatiya Samasya* were sold there, but they were not proscribed books; they were sold elsewhere, and it is not suggested that they were only sold at establishments in league with the conspiracy. Nor were the *Chatra Bhandar's* sales of books restricted to these three publications: on the contrary, it is clearly shown that a large number of different publications was sold to which no exception could be taken. There has been some discussion before us as to whether the three offending publications to which I have referred, belonged to the *Chatra Bhandar*, or were merely sold by it in the ordinary course of business, and each side has referred us to the Association's books of account. But such of them as have been produced, throw no conclusive light on the point, and as possession of all was taken by the Police, the defence cannot be treated as responsible for the non-production of the rest, so all that can be said is that the prosecution have not proved that these publications belonged to the *Chatra Bhandar*. I do not overlook the expressions and sentiments contained in the blue prospectus to which our attention has been drawn, but giving to them all the force adverse to the Association to which they are fairly entitled, I find it impossibe to regard them as establishing the *Chatra Bhandar's* connection with the conspiracy into which we are inquiring in this case.

It is the case for the prosecution that the *Jugantar* was an integral part of the conspiracy. It was started in March 1906, and its origin and its purpose are matters of common knowledge. Its articles and its popularity have been brought to our notice, and the facts show that those who guided its policy managed to select writers possessed of a style so levelled to the popular taste that even street traffic was impeded in the rush of would-be purchasers. Inspector Purna Chunder Lahiri has told us that people were amazed at the inaction of the Government, and the audacity of the paper, and this I can well understand, for not withstanding its pernicious teachings no step was taken to check it until July 1907. All this may be conceded and regretted, but our concern is to see how far the connection of the *Jugantar* with the conspiracy we are investigating, and the accused we are trying, has been made good. Taranath's connection with the *Jugantar* is established but he holds an isolated position among these

accused, as does Kartic, who, alone of the rest, is said to have had relations with that paper. Apart from this, the accused are not shown to have been connected with the *Jugantar* in any sense that would justify us in holding that it was a limb of the conspiracy under trial. The mere discovery of copies of the paper at searches proves nothing, for admittedly it had an unusually wide circulation. True it is, that the *Jugantar* was a limb of the Muraripukur Garden conspiracy, but as I will show, that was distinct from the one into which we are inquiring. And this brings me to the prosecution's suggestion that the conspiracy with which we are concerned in this case is a part or branch of that which had its head quarters at Muraripukur Garden. This was not the case for the prosecution as formulated in the complaint of the 4th of March 1910 on which these present proceedings were initiated; there is no mention there of that conspiracy, and not even a reference, to any of the overt acts which were a part of that conspiracy. And yet this can hardly have been due to oversight, for that conspiracy and the outrages that belonged to it were a matter of public notoriety.

It was not until the 25th of May 1910, that a reference was made to the Muraripukur conspiracy, or to the accused Taranath and Kartic, who are said to have been intimately connected with it. Now, it is well-known that the Muraripukur conspiracy was the subject of long and careful Police investigation, and of subsequent judicial inquiry and trial, in the course of which a very large number of witnesses was examined and an immense volume of documentary evidence used. No pains were spared to secure an exhaustive inquiry, and yet it is not suggested before us that anything came to light that would establish the connection now sought; and it is remarkable that Counsel for the prosecution has been unable to suggest that in any of the mass of documents seized at the Muraripukur Garden, there is any trace of the connection now alleged. The suggestion made in Counsel's opening speech that this conspiracy was linked with the Muraripukur Garden conspiracy, through an alleged connection between Kartic Dutt and Hem Dass, has absolutely not a tittle of evidence in its support. And the proposal to connect this conspiracy with the Muraripukur, through Srish Sarkar and Satis Sarkar, and the expedition from Patna to Nepal, are far too fanciful and remote for serious acceptance.

Much evidence has been adduced to show association in music, gymnastic exercises and *lathi* play, and it is on this *lathi* play that the prosecution have principally relied. But when Counsel was asked to formulate the part played by these *lathi* exercises in the scheme of the conspiracy, he was unable to advance any suggestion from which much assistance could be derived. It may be that these exercises would conduce to the acquisition of strength, agility, hardihood and discipline, all no doubt qualities useful in war, but it was not and could not be reasonably argued that the contemplated war was to be waged with *lathis*, or that these exercises standing alone could be treated as evidence of a conspiracy to wage war. To attach sinister significance to the mere association in play or pastimes of those who live in the same village or attend the same school, would, I think, be dangerous, at any rate on the evidence that has been adduced before us. Evidently, it did not occur to those who joined in these exercises that they were doing that which would bring them into their present predicament, for there was a complete absence of secrecy, and rather a courting of publicity in the performance of these exercises. The defence are not without a theory as to the significance of this *lathi* play, but in the view I take, it is unnecessary to discuss it.

There is but one further point to which I would desire to allude before I proceed to deal with the individual cases. It is the charge of conspiracy that has been argued before us, and no other, and that charge is single and complete. At the same time, there are many accused before us and they are drawn from different parts of the country. These accused have been described by the prosecution, and conveniently described, as falling into groups. But it is not open to us to find more conspiracies than one, for there is the highest authority that it is a legal impossibility when several persons are charged with the same conspiracy that some should be found guilty of one conspiracy and some of another. This proposition was accepted by Counsel for the

prosecution as one by which the Court must be governed. It is thus only open to us to find one conspiracy, and for the prosecution to succeed against any one of the accused, they must establish by proper and sufficient proof that he is a member of that conspiracy.

Any accused not shown to be a member of that conspiracy is entitled to demand an acquittal at our hands, however bad his record may be and however much he may be suspected of this or that offence. Any other view would be intolerable.

The case against Noni Gopal Sen-Gupta rests principally on the testimony of the two approvers, Lolit and Jotin, and if they are to be credited, then this accused is one of the leaders of this conspiracy. But their evidence against him is of the most inconclusive character and relates for the most part to conversations with him, and instructions recieved from him, and coming as it does from these sources, it has to be scrutinized with care and accepted with caution. No witness corroborates either Lolit or Jotin as to a single detail to which they severally depose, in relation to Noni Gopal, though some have been called and have given evidence as to his taking part in gymnastics, wrestling and *lathi* play, and as to his association with Bhutan, Bhuban and Madaru a circumstance from which it is obvious that no adverse inference can reasonably be drawn seeing that they are near neighbours and known to each other.

The straits to which the prosecution have been reduced in the endeavour to adduce incriminating evidence against Noni, may be illustrated by the testimony as to the finding of cartridges in a tank in the neighbourhood of Noni's house, and in the immediate proximity of a public road.

One Sarna Bewa, a woman who describes herself as unemployed and doing no work, tells a story of how she found in the tank where the water was about one foot deep things which apparently were cartridges. She showed them, she says, to a goldsmith named Jamini who told her they were nothing, and that she had better throw them away. She spoke about this to no one but Jamini and following his evidence she threw them into a big drain. Jamini, too, is called and he says Sarna brought to him these things, but he, as puzzled as she, could not make out what they were, and so he advised her, with some inconsequence, to throw them away. It does not appear how Jamini's knowledge of his occurrence came to light, but somehow it did, if we are to believe the evidence and, what is more remarkable, Soilen professes to have known of it all according to his third and final confession, of which he delivered himself on the 10th of March 1910. It is worth quoting what he says about this: After relating that one Kishori had 5 revolvers and 200 cartridges kept with him by Noni and that Kishori in fear of a search had thrown them into the tank, he proceeds, "Kishori was sent for and when asked for the revolvers he said he had thrown them into the tank. The revolvers and cartridges were taken out, but 5 or 6 cartridges remained in the tank. Some fisherwomen while fishing got those cartridges, and took them to a goldsmith's shop. The goldsmith tested them and said they were not gold. He did not know they were revolver cartridges, so he returned them to the fisherwomen. Noni Babu heard of this and cleverly managed to get the cartridges back from the fisherwomen." And in this way Soilen turns to use against Noni the story of Sarna and Jamini! According to Soilen the discovery of cartridges must have followed the assault, and this is in harmony with Jamini's version of the affair. Jamini places the discovery in Aughran, and further fixes it by saying it was immediately after the Puja before last, that is the Puja of 1909 which ended on the 24th of October in that year. But in Aughran Soilen was in custody for the Haludbari dacoity, and from that day on, he has remained in custody. How then was he able to introduce into his confession events which happened (if at all) while he was in custody? When this difficulty was brought to the notice of Counsel for the prosecution he offered two explanations, *first*, that Soilen and Jamini were speaking to different incidents, and, *secondly*, that the mention of Aughran was a mistake. The first of these he felt compelled to abandon, and I need not deal with it, so that it is only the second that calls for notice. Now, while it was suggested that the mention of Aughran must be a mistake, it was conceded that the reference to the end of the Pujas must be accepted, and this, it was claimed, made

Soilen's story possible. The first day after the Pujas was the 25th of October. On the early morning of the 28th of October Soilen was arrested at Mirpur, and must have left Calcutta not later than the 27th. So it is on the 25th, 26th or a part of the 27th that Soilen, according to the prosecution, got this information which he imparts in his confession. And so, according to the prosecution, within this very limited time, Sarna went to Jamini, and taking his advice, threw the cartridges into the big drain, and Noni by some means, which have not been explained, learnt of the affair, and "cleverly managed to get the cartridges back from the fisher-women," and information of the occurrence reached Soilen. The imputed cleverness of Noni becomes all the more remarkable in view of the fact that neither Sarna nor Jamini knew they were cartridges, and that Sarna spoke to no one of what she had done, and that she threw them into the big drain. The prosecution theory is not without its difficulties. Soilen, however, furnishes a much simpler explanation: it is in effect that his confession was false.

Now, it has to be seen how far the case is advanced by documentary evidence against Noni Gopal. Much reliance is placed on three letters, Exhibits 26 (*a*), 26 (*b*) and 332. They were all three written by Noni while he was in jail, the first two on the 28th of March 1910, and the last on the 17th July 1910. The significance of the two letters of the 28th of March*, according to the prosecution, is that they show intimate acquaintance with those to whom they were addressed, and that Noni was even in jail regarded by them as their leader. Noni's previous acquaintance with Jogesh Mitter, to whom one of the letter was addressed, has never been disputed; they were near neighbours. His previous acquaintance with Sarat is denied, and it is urged there is nothing in the letter to him that negatives or even raises a doubt as to this.

*According to the evidence of the jailor and two European warders, Noni Gopal had been discovered writing without authority on two pieces of paper, and was departmentally punished for writing unauthorised letters from jail on private paper. They purported to be letters written one to Dr. Sarat Mitter and the other to Jogesh Mitter, who were both fellow-prisoners with Noni Gopal. There were suggestions in both that the addressee should complain of oppression in jail.—C. W. N.

I agree with this. It has to be borne in mind that Noni and Sarat were arrested as far back as the 20th of January 1910, and that these letters were written on the following 28th of March. During this time these two accused were kept in the same jail, and it is established that the accused while in jail met, and in particular they bathed and had their meals together. Indeed, the prosecution repudiates the idea that the accused were subjected to solitary confinement. Then, looking at the letters, it is at once obvious that they refer to events after and not before the arrest. Whether the ground of complaints they suggest of Police oppression in jail is true or not, is not relevant to this particular issue, and if it were, we have no materials on which to pronounce a definite opinion one way or the other. The suggestion that they point to the esteem in which Noni was held by his co-accused, possesses no importance, and the letter obviously cannot be read as proof of Noni's guilt of the conspiracy with which he is charged. The third letter*,

*This letter was sent out of jail by Noni Gopar through a jail-sweeper, who took it to Noni's fathe, who, apprehending it to be a trap to entangle him handed over the sweeper to the Police. The sweeper was prosecuted and punished and thus the letter got into the hands of the prosecution.—C. W. N.

The material portion of the letter was as follows:—

"Mother, do not think for me. Know it for certain that I shall not return. Mother, my sorrow is even more terrible than yours. You are going to lose one and I am going to lose all. Father is now old and I am going to bid adieu to the family for good. My heart breaks as I ponder day and night over the terrible state to which the family will be reduced after a few days. You should tell father and have these few things done in a day or two. Ask father to make a Will. Let him not do anything in my name, otherwise that will be lost. Prepare the Will in such a manner as will save all sides and, at the same time, not do anything in my name. Do it precisely in a day or two. Do not by any means fail to do it. There is no need of incurring any cost for me, because you will not be able to do anything in the case. An enormous cost is required which is beyond your means to meet. A case like this can be managed by 50 or 60 thousand rupees. Where can you get so much money? In the meantime ask father to come and see (me) once. Do one thing for me. Perhaps you remember what I wrote once in a letter. There is a *sadhu* (religious man) named Bama Kshepa (mad Bama) at Tarapur. Go where I went towards the end of *Kartik* last and seek his shelter. He will at first try to drive you away, but you must on no account leave him. If he does mercy, may be I shall get release. Or

Exhibit 332, is one written from jail by Noni to his mother on or about the 17th of July, and to appreciate the significance of this letter, and its true meaning, it is necessary to realise the predicament in which Noni then found himself. He had been arrested on the 20th January, just six months before, and during the whole of that period he had been in custody. The procedure of the Special Act had been put in force against him, so that he was unrepresented by Counsel or any legal adviser during the magisterial inquiry, and it has been asserted before us, and not contradicted, that, during that period, neither legal advisers nor friends had any access to him. He must have known that the inquiry was drawing to an end, and that, in its course, an immense number of witnesses had been examined, they numbered in all considerably over 400, and he probably anticipated, as the fact was, that the Magistrate was about to commit the case for trial. He was conscious that he had against him all the resources of the prosecution, and the position was not one calculated to inspire confidence.

What is the tone of his letter? "I am lost unless I can be defended, and defence is impossible owing to the enormous cost it will involve, a cost that is wholly beyond our resources, unless possibly you can secure divine intervention on my behalf." That I take to be the real meaning of what he writes to his mother, and I am not prepared to say that he was very wide of the mark. In a case so complicated it would have been next to impossible for any tribunal to have mastered unaided the mass of documents and accounts necessary for an adequate presentment of the defence, or to have possessed the knowledge requisite for the cross-examination of the witnesses and particularly of the approvers.

I cannot refrain here from digressing for one moment to express to Counsel who have undertaken the defence of the accused my appreciation of their assistance. Their mastery of the details of this case and the aid that they were thus enabled to give the Court call for the highest commendation, and I willingly give it, and in particular I would wish to acknowledge the admirable defence of Mr. J. N. Roy, who never, in length of cross-examination, or length of speech, exceeded what was right and useful.

But to return to this letter of the 21st of July, it must take its place, if anything, as a confession of guilt, but that effect cannot be attributed to its terms. In my opinion it falls absolutely and wholly short of that, and to treat it as a confession by Noni that he did enter into the conspiracy to wage war against the King is beyond my ability.

The case as to Noni does not rest there. While the prosecution will have it that he was the leader of the conspiracy, yet a search of his house has disclosed absolutely nothing incriminating. This is a circumstance of no small significance, but the prosecution suggest an escape from it is to be found in Soilen's confession where he naively remarks, "Noni Babu never keeps any incriminating things in his house," a piece of information that he conveniently supplies after Noni's house had been searched, with the fruitless result that I have indicated. It is difficult to preserve patience when one realizes all that this statement implies, made as it was over four months after Soilen had been in custody. It is on a par with his statement that he was re-initiated by Noni. Not only was nothing incriminating found on the search of Noni's premises, but no other search, not a single document, not even the *Chatra Bhandar* account, has brought to light or disclosed anything that incriminates Noni. In my opinion the case against Noni Gopal has failed.

Bhutan Mukerji, also known as Kristodhan, lived at Sibpur with his brother, the accused Bhuban, whose trial has been adjourned on the ground of his insanity. Both Lolit and Jotin speak to his membership of the conspiracy imputing to him active participation in its work, and implicating him in specific incidents, but their evidence is without any corroboration. Lolit's evidence is noteworthy for his substitution before us of Bhutan's name in place of that of Bhuban, who is no longer on his trial. But the evidence affecting Bhutan, which calls for serious consideration, is that which would make him an active worker in the attempt to seduce soldiers of the 10th Jats.

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there is in Calcutta another *sadhu*, whose name is Khanki Baba. Kulo (Asu) of the Banarji's and Jivan Ghosal brother of Noni Ghosal, know his address. . . . .

"Pay Rs. 3 to this man and then I shall get one and-a-half rupees. Burn this letter after reading it."

This falls under two heads; first there is the testimony of those Police officers who watched the lines of the 10th Jats and profess to have seen Bengali Babus speaking to the soldiers. They are Head Constables, Benoy Krishna Banerjee and Abbas Sobhan, but they neither of them are able to state with any degree of certainty that it was actually Bhutan that they saw. And, apart from that, their evidence, so far as it is aimed against Bhutan, is by no means convincing. Thus, while Binoy Kristo before the Magistrate declared that he tried to get the Bengalis' names but could not succeed, he at first swore to the exact opposite here, and persisted in it until he was confronted with his former statement, which he was ultimately constrained to admit was correct. And so Abbas Sobhan has asserted before us that he saw two Bengali youths come and speak to the Sepoys, and professed to recognize Bhutan as one of them, but before the Magistrate, while he said he saw Bengalis talking to the Sepoys, still when shown Bhutan and Bhuban, he admitted he could not recollect if he actually saw these men talking to the Sepoys. And then there is this further fact as to both these witnesses. Each has declared that he reported what he observed to his Superintendent. Not only, however, has the prosecution failed to produce these reports, though the Superintendent appeared as a witness before us not a question was put to him by Counsel for the prosecution on this matter, a failure and a reticence that has justly attracted comment. I do not suggest that Bengalis may not have been seen talking to the Jat soldiers, but the evidence fails to show that Bhutan was one of those Bengalis.

The other branch of the Jat case is that which would make Bhutan an active participant in the initiation of Surjan Singh at Sibpur. I have already shown the falsity of the story of their going to Sibpur and I need not again travel over the same ground. Some reliance was placed on the fact of Bhuban's house having been pointed out in the course of verification proceedings, and this has been much discussed before us. I have given the matter my most careful consideration, and I am not convinced that the alleged identificaton is of the smallest value. Moreover, the rival versions of Surjan and Ram Gopal are divergent on points where they could hardly have failed to be in agreement had these witnesses been narrating their actual experiences.

Apart, then, from the contention that Surjan and Ram Gopal on their own showing would be accomplices, my estimate of their evidence is that it is not trustworthy, their stories are discrepant and their narrative is on a vital point disproved. The only remaining evidence against Bhutan is that of association, but it comes to nothing. On the other hand, the search of his premises has revealed nothing incriminating, nor is there any document to which the prosecution can point as even suggestive of his membership of the conspiracy with which he is charged. Therefore, the case against Bhutan has failed.

The oral evidence against Bishtupada Chatterji proceeds wholly from tainted sources, for though Sital Chunder Ganguli names him, he was unable to identify him and imputes nothing incriminating to him. The search of his house disclosed nothing that would justify the conclusion that his guilt was established, and, therefere, the case against him fails.

Jogesh Mitter *alias* Madaru, accoding to Lolit was an active conspirator, and he ascribes to him a number of acts, including in particular participation in the Netra dacoity. But in no respect is there any corroboration of this evidence or of that given by Jotin, who also would implicate him in the conspiracy or of Soilen's 3rd confession in which he is named. Beyond this the oral evidence is limited to his taking part in wrestling and *lathi* play, and to his associating with others of the accused who happened to be his neighbours. Jogesh resided with his uncle whose house was accordingly searched, and this search of his residence resulted in the discovery of some *rakhi* songs and a book called "The Mysteries of Nihilism" apparently belonging to one S. N. Bose. How any of these documents can be brought home to Jogesh it is difficult to see, as they were not found in his room. In my opinion, the case against Jogesh fails.

Noren Chatterji, *alias* Bholanath, is the last of the Sibpur group. Lolit mentions him in connection with many incidents but without corroboration, and, indeed, as to the most important of these incidents, the payment to Surjan Singh of money obtained by Lolit

from Noren, his evidence is contradicted Jotin mentions him in connection with the Protapchuck attempt, but his testimony is without any support. It is the evidence against this accused from other sources that calls for more serious consideration, and in particular, that which relates to the soldiers of the 10th Jats.

Briefly, what is charged is that Noren got into touch with these soldiers, that he arranged for and assisted in the initiation of Surjan Singh into the conspiracy at Sibpur, and that he paid Surjan Singh money in return for his assent to join the conspiracy. I have already dealt with the story of Surjan's initiation and have shown its falsity, and I need not further discuss it, as I have already expressed the opinion that, not only is it impossible for initiation to have occurred in the manner described in the evidence, but that, in other respects, the testimony in its support is so untrustworthy as to be (in my opinion) incapable of acceptance.

The payment of money by Noren to Surjan rests in part on the evidence of Lolit and in part on that of Surjan. Lolit says he handed to Surjan on two occasions money, received for that purpose, from Noren Chatterji, but his evidence on this point is not merely uncorroborated; it is actually opposed to that of Surjan. Surjan makes a statement that he received Rs. 50 direct from Noren Chatterji, but not only is this without corroboration, but it rests on, and is indissolubly connected with, the story of the initiation which, in my opinion, must be rejected for reasons I have already indicated.

Evidence has been adduced to show that Noren Chatterji lived with Dr. Sarat, but this merely shows association between the two, and that is not disputed; on the contrary, the case for the defence is that the two were connected, for Noren married, according to the Arya Samaj rites, a relative of Sarat's and it was this that led to Noren's living with Sarat. Then the prosecution say that Noren went to the Punjab and lived at Lahore. This is admitted, but it is denied that Lolit could have had, as he pretends, any personal knowledge of this. Lolit's evidence is that Noren took this journey while he, Lolit, was still at Dr. Sarat's, but it is abundantly proved that Noren went to the Punjab in July 1909. At that time Lolit is proved to have been at Nattore. There is no evidence to show that Noren, while at Lahore, did anything that could be attributed to his alleged membership of the conspiracy. There is evidence of Noren's association with the Sibpur party, but that was at a time when he lived there, and there is no independent evidence of his having been seen in Sibpur after he went to live in Kiddarpur, that is to say, after 1907. Then, it is sought to use against Noren the fact that a proclamation was issued against him, for this, it is urged, shows that he was a fugitive from justice. What endeavours were made to arrest him does not appear beyond the fact that Monmotho Nath Ghose, a Sub-Inspector of the Criminal Investigation Department who says he knew Noren by name, and not by sight, searched for him in his house in Sibpur and in Calcutta in different parts of the town. The search in Sibpur in 1910 was not likely to be profitable seeing that there is no evidence that he was ever there subsequently to 1907 The details of the other searches have not been placed before us; but this we know that when he was seen by R. M. Ghosal, the officer who arrested him, he made no attempt at concealment or escape and apparently he had a place of residence in Calcutta, No. 19, Ananda Khan's Lane, which is never shown to have been searched. Have we then before us the materials that would entitle us to attribute to Noren a flight from justice that could fairly be regarded as indirect confessional evidence, pointing to his guilt of the conspiracy charged? I think not. To begin with, no circumstances are proved that would entitle us to hold that he wittingly endeavoured to evade arrest. And even if this were otherwise, I cannot forget the comment of a distinguished Judge on indications of this type, that is the evidence without them is sufficient, this species of evidence is unnecessary, and that if not then the inferences from them seem not of sufficient weight to give any conclusive effect to the other proofs.

The case against Noren Chatterji has failed.

I have now dealt with all the members of the Sibpur group, and I have come to the conclusion, for the reasons I have stated, that the case made against them has not been proved. And this being so it is unnecessary for me to discuss whether on other grounds

too the charge of conspiracy, so far as it relates to them, has not failed.

I now pass to the Kurchi group which is said to consist of Shibu Hazra, Atul Pal, Dasrathi Chatterji and Monmotho Rai Chowdhuri. The overt acts particularly attributed to them are the Morehal dacoity and the attempt at Protapchuck.

I will first take up the case of Atul Pal. The evidence against him is of the most meagre description. He is named by Jotin Hazra as a member of the conspiracy, and as having been present at the Morehal dacoity, but of this there is no corroboration. On the contrary, there is an indication that he was not present, for Monmotho Rai Chowdhuri, who was caught red-handed and confessed at once, never mentioned or referred to him in his confession. The evidence of association shows nothing more than companionship between him and his co-villagers. Therefore, the case against Atul Pal fails.

Monmotho Nath Rai Chowdhuri has been tried and convicted of participation in the Morehal dacoity. Of the justice of that conviction there can be no question: he was most happily caught on the spot and his confession is a complete admission of his guilt. For this he has already been sentenced to the substantial punishment of six years' rigorous imprisonment which he fully merited. But does this conviction establish his membership of the conspiracy charged in this case? This depends on whether the Morehal dacoity can be linked up with the conspiracy. The only direct evidence on this point is that of Jotin Hazra, and apart from the general untrustworthiness of this approver, it is doubtful whether he was present at this dacoity. It is true that after his arrest he confessed to this crime, but he afterwards withdrew this confession on the ground that it was wrongly extorted and in the end he was acquitted. In addition to this, Monmotho Nath Rai Chowdhuri does not mention him in his confession, though the evidence is that Jotin knew him two months before the dacoity. In the circumstances, it is impossible to accept Jotin's evidence on this matter with any degree of confidence. Monmotho's confession certainly does not point to a conspiracy to wage war, or to any purpose beyond a desire on the part of the dacoits to enrich themselves. And beyond this we have nothing but remarks attributed to Shibu by Fakir Pal, a witness who did not impress me favourably.

The connection of the Morehal dacoity with the alleged conspiracy is not established, and, therefore, Monmotho is not proved to be a member of the present conspiracy.

Dasarathi Chatterji is stated by the approver Jotin Hazra to have been a member of the secret society, and the prosecution have adduced evidence of his association with his co-villagers, members of the Kurchi group. The overt act in which he is alleged to have taken part is the Morehal dacoity. What precisely happened to Dasarathi in connection with the Morehal dacoity is not clear. Mr. Duval, the Committing Magistrate, says he was put on his trial and acquitted. If so, then there is an end of the case so far as he is concerned. No order of acquittal, however, has been place before us and if he was not acquitted, then he was either discharged or not put on his trial for he certainly was not convicted. The position then is that we are now asked, after this long lapse of time and notwithstanding the discharge (if there was a discharge), to hold him guilty of the offence on the strength of Jotin Hazra's evidence and retracted confession. In my opinion, it must be held that Dasarathi Chatterji's guilt of the conspiracy to wage war against the King is not proved.

Shibu Hazra is the last of the Kurchi group with whom I have to deal. According to the case for the prosecution, he is the local leader of this group, and as such a prominent member of the conspiracy. His position and attainments, however, hardly fit him for this position. Before us Lolit pointed out Shibu as a man he had seen once or twice at Noni Gopal's house, though he says he does not know in what connection he went there. Before Mr. Duval, however, when Shibu and another accused were shown him he said "I do not identify these two men shown me." It is true that after his deposition was completed, Lolit professed that he saw Shibu at Noni's house, but this addition to his deposition is most suspicious, and, in the absence of any explanation by the prosecution, I am unable to place any reliance on it.

The other evidence against Shibu is his alleged participation in the Morehal dacoity. I have, however, pointed out that this dacoity is not shown to have been the work of the

conspiracy with which we are concerned. Further than that, Shibu was arrested at the time for complicity in that dacoity, but was discharged, and the propriety of that discharge was not called in question. There undoubtedly standsagainst Shibu a conviction under the Arms Act, and though the correctness of that decision was questioned, I think it must be accepted as conclusive. The punishment imposed was merely a fine of Rs. 25 and in default one month's rigorous imprisonment. This might at first blush appear an inadequate punishment, but a view of the weapon showed it was well fitted to the requirements of the case. It certainly was not a weapon with which one would willingly wage war against any one, much less against the King's forces, and the mere possession of it is very far from furnishing the proof of which we are in quest. It is unnecessary to discuss the evidence of Nitai Chunder Dwari for it merely goes to prove the possession by Shibu of arms, and that I hold to be otherwise established. The result then is that the case against Shibu fails.

The accused belonging to the Kiddarpore group are Sarat Mitter and Suresh Mitter.—Charu Charan Ghose was also treated as belonging to this group throughout the trial.

Sarat Mitter or Dr. Sarat as he has been called, is a man of 46, with a family, who prior to his arrest, had carried on a dispensary and also a *mudi's* shop. Apart from the general evidence given by Lolit, the case against Sarat is that he supplied the poisoned pills of which we hear in connection with the dacoits, and that he was concerned with the attempt on the loyalty of the 10th Jats. The suggestion as to the poisoned pills is without anything to support it and must be rejected. His connection with the alleged attempt on the 10th Jats has not been established. That he was in any way involved in Surjan's initiation rests on the theory that he then lived at 86-1, Diamond Harbour Road, but this is clearly opposed to the fact, as I have already explained in some detail when discussing the story as to the 10th Jats. Moreover, apart from this, I think the attempt to prove Sarat guilty of attempting to seduce the Sepoys of the 10th Jats has failed.

What else is there against him after these allegations have failed? It never has been disputed that Lolit lived with him from the beginning of 1909 till April 1909, and it is said, and I think it is proved, that, while Lolit so lived with Sarat, he was in his employ at a small remuneration. For the defence, it is pointed out that there is nothing that tells against Sarat in this, for it would be quite natural, and in accordance with ordinary custom, that Lolit as a man with Mazilpur associations should go for employment to Sarat who had intimate connection with that village. Noren Chatterjee's connection, too, with Sarat, admits of reasonable and innocent explanation, for he was married to his relative, and was employed in the immediate neighbourhood. Moreover, Noren was not a guest of Sarat's; he paid for his ordinary expenses. The search of Sarat's premises revealed nothing incriminating. The case against Sarat Mitter fails.

The case against Suresh Mitter also fails. Lolit's evidence implicating him is unsupported, for I cannot regard Baru Kurmi's testimony as showing that Suresh ever went with Lolit to Borya in connection with the robbery of an idol. Baru Kurmi's story is not convicting but, even if it be accepted as true, it would go to show nothing against Suresh seeing that he lived and carried on business at Rajpore, a village on the way to Netra, and used from time to time to stay with his brother Sarat, and so naturally became acquainted with Lolit. Nothing incriminating is said to have been found in his house. The case against him fails.

Charu Chundra Ghose's physical infirmity was such that we were constrained to dispens with his attendance during the trial and we have to-day been told that he has succumbed to the serious illness from which he was suffering. In the circumstances, it has become unnecessary to discuss the evidece adduced against him, but I would wish to say that a very careful consideration of that evidence has led me to the clear conclusion that he was innocent of the charge brought against him.

The Changripota party consists of Bhuson Mitter *alias* Guley and Noren Bhattacharjee.

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Lolit mentions Bhuson in connection with four events, but as to none of them has he been corroborated, in fact while Lolit would place him among the Netra dacoits, Soilen Das does not name him. Bhusan seems to have been suspected in connection with the Changripota dacoity, but he has never been placed on his trial for this offence, though it was committed more than 3 years ago. I have already indicated the difficulty in the way of our re-trying that case after this long lapse of time, and in the absence of evidence which influenced the Court in discharging the accused then before it. The other evidence against him is that of Haran Chandra Chal who deposes that a party of young men, of whom the accused Bhuson and Noren Bhattacharjee were two, stamped the *bilati* cloth in Haran's shop. The charge against him is not made out.

Noren Bhattacharjee is the other member of the Changripota group. He, too, was suspected of being concerned in the Changripota dacoity but was discharged. He was party also to the cloth-stamping incident and, however, reprehensible it may have been, it cannot be seriously regarded as proof of the conspiracy charged in this case, and, indeed, it has not been so treated before us. Lolit, it is true, now speaks of Noren Bhattacharjee as a member of the conspiracy, but he so implicates him in general terms. Before us he has named him as one of those implicated in the Netra dacoity, and he says that it was at the Netra dacoity he first saw Noren Bhattacharjee; and came to know he was a member of the society. Lolit, however, made no mention of Noren in his confession, as a party to the Netra dacoity. He first introduces his name in this connection before the verifying Magistrate on the 13th of December. He, however, failed to identify him when he was taken to the Alipur Central Jail for that purpose, by Mr. Sati Prasad Ganguly, and he similarly failed before Mr. Duval on the 9th of April 1910. His evidence before the Committing Magistrate on the 11th of April, when Noren was shown to him was,—"Now, too, I am uncertain if this man was at the dacoity. A Norendra Nath Bhattacharjee of Changripota was, I heard, there." And so we find that Lolit's statement that Noren was at Netra comes to nothing, and as it is on Noren's alleged presence there that he professes to base his knowledge of his being a member of the conspiracy, this imputation, too, fails to the ground. I need only add that there is absolutely no corroboration of Lolit's evidence against Noren. Bhattacharjee's visit to Benares is not treated by the prosecution as evidence against him: apparently it merely had to do with a possible treaty for marriage. On the search of Noren's house nothing incriminating was found, but on the occasion of his arrest in connection with the Changripota dacoity, a copy of the *Bartaman Rananiti* was found on him, as also a manuscript headed "*The Mother's Call*". *The Bartaman Rananiti* was a very recent publication at that time and was, apparently, in great demand, so that mere possession of this book would obviously in no way establish membership of the conspiracy with which we are concerned. Nor would this membership be established by possession of the unpublished manuscript which is not shown or even suggested to be in Noren's handwriting. The result then is that, in my opinion, the case against Noren Bhattacharjee fails.

The Mazilpur group comes next, and it comprises four accused, Rajoni Bhattacharjee, Indu Kiron Bhattacharjee, Tincowri Das and Chuni Lal Nandi.

Against Indu Kiron there is no evidence worthy of consideration. Lolit declares that he was a conspirator, that he started on one of the abandoned excursions to Netra, and that he had to do with the Netra loot at Mazilpur. But there is not a syllable to be found in corroboration of any of these statements. It is said that he was member of the Mazilpur Young Men's Association, but it cannot be pretended that this was a limb of the conspiracy, while the fact that he bought such innocent materials as bed-sheeting, a towel and another article of a cognate character from the *Cha'ra Bhandar* on the 24th of January 1910, at a total cost of Rs. 2-7, can hardly be treated as evidence of guilt, though Counsel for the prosecution seriously brought these purchases to our notice as part of his case against Indu Kiron.

The case against Tincowri Das is also weak. Lolit would associate Tincowri with the preparations for the Netra dacoity and with the dacoity itself. He declares that while many of the party started by train from Baliaghata the five men from Joynagar and Mazilpur (of whom Tincowri was one) came walking all

the way, and that, after the dacoity was over and a list of the loot made, the stolen property and arms, except a few revolvers, were made over to the Joynagar men, and the Joynagar and Mazilpur men walked in the direction of Joynagar. He then goes on to describe how the rest of them made for the Railway, and states that they returned by train, some from Mograhat station and some from Sangrampore. He reached Sarat's house, he says, at 11 A. M., and this would be on the 24th of April. But Kusum Kummar Roy, Prosecution witness No. 33, deposes that he went to Sarat's house at 10 or 11 A. M. on that morning, and then found Tincowri there upstairs, and suffering from high fever. This not only agrees with what Amulya Cumar Rai, prosecution witness No. 34, was told on the 23rd, *i.e.*, that Tincowri had left the refreshment stall at the Zoological Gardens, where he was employed by Kusum, with fever, but it also shows that Tincowri could not have taken the part in the Netra dacoity ascribed to him by Lolit, or even have been there.

Counsel for the prosecution has seriously asked us to treat an act of kindliness performed by Tincowri as tending to prove his guilt, for he has argued that the assistance rendered by Tincowri in connection with the cremation of a deceased Brahmo's body is indicative of his being a member of this conspiracy. It would have been a misfortune if this argument had possessed the force claimed for it, for I can imagine nothing more deplorable than that young men should be driven into churlishness through the fear that their kindly deeds may rise up in judgment against them. The evidence of association led against Tincowri goes for nothing; as long as there is village life young men must have their neighbours as their companions in their sports and games. The documentary evidence connected with Tincowri furnishes no proof of his guilt, and in my opinion the case against him has completely failed.

Rajoni Bhattacharjee according to Lolit took part in the Netra dacoity and helped to bring back the loot from Mazilpur. It is argued for the prosecution that there is confirmation of his presence at the dacoity in the discovery of the pieces of paper, * Exhibit 15, coupled with the evidence of Fani Bhattacharjee and Fani Mukherjee, and of the story of the loot in the testimony of Jotindara Dutt and of Hem Chandra Mondal. The discovery of Exhibit 15 reflects credit on Mr. Warden's care and resource, and tends to induce a suspicion that Rajoni may have been present at the dacoity. By itself, however, it could not possibly form the basis of a judicial decision against Rajoni, so we have to see whether such a substratum of evidence has been laid as creates a substantial and independent *prima facie* case that Rajoni was present. We have nothing but Lolit's testimony and, apart from his general untrustworthiness, it has been very strongly contended before us that Lolit's version of the dacoity is such that he cannot have been present, or cannot have told the truth. It is difficult to reconcile some of his statements with his actual presence at the dacoity. Thus he declared in his confession, "All of us had had rubber masks on, and they covered their heads, faces half of our arms and the body down to the waist. None with such a mask on can be identified. It also changes the tone of the voice. They were taken off in the field where the list was made and Bhutan took them away with him. I have heard that they were burnt off." This is a definite and detailed statement of a remarkable fact, and if Lolit really was at the dacoity, he can hardly have been mistaken as to these masks. And yet there is not a word about them in the first information or in the evidence of the witnesses called in his case. In point of fact the first information is opposed to this story, for we get a description there of one dacoit as having a *pagri* of white cloth tied on his head, as being of black complexion, and aged 18 or 19, of another as having his head, beard and moustaches shaved, and being of black complexion, of another having his chin tied round, and of the remaining three or four as having *pagris* on their heads and their chins tied round.

*These pieces of paper are alleged to have been found in a field near the place of occurrence, and being put together, left blanks and only showed that it was a letter addressed to a person Raj..... K.....B., and this, it was alleged, showed that it must have been addressed to Rajoni, other evidence being adduced to show that the Mazilpur Students' and Young Men's Association had addressed a letter to Rajoni who was a member to attend one of their meetings. But the list of members of the Association showed that there were also other members to whom Raj.....K.....B., would apply —C. W. N.

Moreover Ram Taran in his first information said he would be able to recognize one of the dacoits. The evidence, too, negatives the wearing of these masks. I feel no doubt that the story told in the first information and the evidence is the true one, and if that be so how is it possible that Lolit can have been present, or at any rate can have told a true story as to the dacoity and those present at it? Then, again, he has throughout declared there were 21 dacoits, but while in his confession he mentions a man from an Ashu Babu's *akra*, in his statement to the verifying Magistrate Norendra Nath Bhattacharjee takes this man's place. Then, again, he identifies two outsiders, Nirad Krishna Chakrabarty and Noni Gopal Bhattacharjee, as having taken part in the Netra dacoity, but it is admitted they had nothing whatever to do with it. It would be easy to cite other instances which go to show how unreliable Lolit is in his statements as to the Netra dacoity, but it is unnecessary; those I have given suffice to show that the doubt cast by the defence on his presence is not without foundation, and it certainly would be most unsafe to rely on his evidence as giving to the discovery of Exhibit 15* the requisite support.

Then there is the story of the carriage of the loot from Mazilpur. This is not the only occasion on which Lolit professes to have been sent for loot, and notably he claims to have been sent for the Barrah loot, a story to which I have already referred as unworthy of acceptance. And so it is not unreasonable to look for confirmation of his mission in connection with the Netra loot. The Pleader, a member of the family of Mazilpur Dutts, with whom he claims to have walked from Magrahat Station to Mazilpur, has not been called as a witness, but Jotindra Dutt and Hem Chandra Mondal have been called to corroborate Lolit's story of his journey with the loot from Mazilpur to Barnipore, for this is the route Lolit says he, Rajoni and Chuni took when carrying the loot back to Calcutta. Why they should have gone to Barnipore Station which is 16 miles from Mazilpur, instead of Magrahat Station, which is considerably nearer, and the station from which Lolit went to Mazilpur, does not appear. But be that as it may, can it be said that Jotin corroborates Lolit? I think not. He does not fix with precision the date to which he deposes, and this I feel is a matter that might have been placed beyond dispute. But more than this his evidence throws the gravest doubt on the story that the party had the loot with them. He could not have failed to observe the receptacles in which according to Lolit the loot was, for he describes them as "a very big earthen vessel and a very big trunk." Moreover, Jotin never saw Lolit. Jotin's failure to see either the "very big earthen vessel and the very big trunk" or Lolit, cannot be attributed to darkness, for it was day-light when he says he saw Rajoni and Chuni.

Hem Chandra Mondal's evidence is not very helpful. He is a *ticca ghari* driver who professes to remember having dirven three men with a tin box and a *handi* to Barnipore from Barasat, and to be able to recognise Lolit as one of the party. But his story is hopelessly at variance with that told by Lolit and Jotindra: for he declares that it was in the night that he was roused by his master to drive these three fares to Barnipore, and that he reached the station before sunrise. He was not in the service of the man who owned the *ghari* when he gave evidence before us. It does not appear when he left that service, or how it became known that he could give this evidence. He was not a witness whose evidence would command confidence, particularly when he professed before us an ability to speak with particularity as to remote dates, which he apparently was not in a position to do before the Magistrate. Why his master, who is alive and who is said to have made the arrangement for the hire of the *ghari*, was not called, does not appear. The result is that the story cannot be taken to be proved. In addition to this, there is a difficulty in the way of holding that Rajoni conspired with any of those included in the charge. Some literature was found on the search of the grandfather's house where Rajoni was living, but there were several other residents of this house, and the prosecution have failed to establish facts that would justify our holding that this literature was in Rajoni's possession, and so it is unnecessary to deal with it. This then is the case against Rajoni: and, in my opinion, it fails to establish his guilt of the charge of conspiracy.

* See p. 604 *ante*. *Ed.*

The only remaining accused of this group is Chuni Lal Nandi. Apart from minor incidents, which stand uncorroborated, Lolit would merely connect him with the Netra dacoity and residence at Benares. He is said to have been present at the Netra dacoity, but of this there is no corroboration. He is also said to have been a party to the carriage of Netra loot from Mazilpur, and this story I have discussed at length in dealing with Rajoni's case.

Chuni Lal's alleged residence at Benares has given rise to much discussion. The case made by the prosecution is that Chuni and Pabitra went from Calcutta to Benares in June 1908, that they started the day before the *Rat jatra*, *i.e.*, on the 30th of June, or the 16th of *Assar*, and that they broke their journey at Gaya, and resumed their journey the following day. Though the defence maintain that, even if the journey was taken, there was nothing incriminating in it, still they deny that either Chuni or Pabitra went to Benares at that time and they contend that the story of the prosecution is demonstrably false. Both Chuni and Pabitra were in the service of the *Chatra Bhandar*, and it is on the entries in the books of that Association that the case for the defence is founded. The entries on which reliance has been placed have been very fully discussed before us, and the conclusion to which I come is that they disprove the story of the prosecution, and they also go to show that Chuni and Pabitra did not stay at Benares as is alleged. Moreover, the story told by the prosecution is intrinsically improbable. The version of the journey and its coincidences as told by prosecution witness No. 80 does not commend itself to me, and the reason Lolit gives for their journey, or, as he would suggest, their flight to Benares, is not shown to have any foundation in fact. He has suggested that they left Calcutta because they had been named by Gossain the informer in the Alipur Bomb Case, and he says he heard this from Pabitra. Not only, however, is it not shown that they were so named, but it so happens that Pabitra was actually examined as a witness for the Crown in that case.

Chuni's house was searched at Mazilpur, and several documents were found there on which reliance has been placed by the prosecution. The utmost they do is to show connection with the accused Pabitra, with the *Chatra Bhandar* and with some person whose address was at Dr. Sarat Mitter's at 86-1, Diamond Harbour Road, and that he had in his possession such books as *Desher Katha* and *Siraji* by Sakharam Gouesh Deoskar and this certainly cannot be taken as conclusive of his gulit. The case against Chuni Lal fails.

The Haludbari group, as arranged by Counsel for the prosecution, included nine of the accused but as two of them, Bidhu Bhusan Biswas and Monmatha Biswas, were acquitted of the Haludbari dacoity; they are obviously not properly placed in this group which should be confined to the seven accused convicted of that offence. They are Soilen Das, Susil Biswas, Atul Mukherjee, Kiron Rai, Gones Das, Soilendra Chatterjee, and Upendra Kristo Deb. Of these the two first were sentenced to seven years' rigorous imprisonment, and the remaining five to eight years' rigorous imprisonment, in the Haludbari case.

The case against Kiron Roy, as I have already stated, has been dropped, and so it only remains to be considered whether the remaining six accused of this group are guilty of the conspiracy into which we are inquiring. Their guilt of the Haludbari dacoity is established and is not questioned, and that offence is alleged to be an overt act of the conspiracy. In my opinion this is made out. Having regard to the position of these six accused, the articles found on them and all the circumstances of the case, I can come to no other conclusion than that this dacoity was the work of a conspiracy, that the conspiracy was of the character charged, and that these accused were parties to it.

The only member of the Krishnagar group now before the Court is Suresh Mozumdar *alias* Poran, the case against the two other members of this group having been dropped in the trial for want of evidence. The case against Suresh is extremely weak. The endeavour to establish his connection with the revolver used in the murder of Shamsul Alum has failed, and this was conceded by Counsel for the Crown. His connection with the *Chatra Bhandar* was merely that of a customer and can prove nothing for the purposes of this case. Then Lolit says that Suresh took him to the house of Kishori Babu, but there is no confirmation of this association though it was open to the prosecution to have

called Kishori Babu, a well-known Vakil of this Court, and one of the senior members of the Pleaders' Bar. Suresh's house was searched, as well as the premises of the Arya Chemical Works with which he was associated, but nothing incriminating was found. The result then is that the case against Suresh Mozumdar fails.

The Nattore group consists of Sirish Sarkar and Bejoy Chakrabutty. Sirish is the son of Dr. Girish Sarkar of Nattore, and the principal oral evidence against him is that of Lolit who speaks to association with him at Beliashishi, at Nattore and at Darjeeling. Lolit deposes that he met him at Beliashishi during his flight from justice after the Netra dacoity. Now this must have been (if at all) in May 1909, and if the account Lolit gives of his movements is even approximately true, then it must have been about the 13th or 14th of May. But it is impossible to reconcile this with what we know from other sources of Sirish's movements, and this meeting at Beliashishi cannot be accepted as true. That they met at Nattore is not questioned: Dr. Girish, it seems, was a hospitable man who kept open house and Lolit came there. It was while he was there that he was introduced by Sirish to Bhubaneswar Singh, who was on the look-out for a tutor; and this enables us to get at a date fixed beyond dispute, for Bhubaneswar Singh is, by reference to his books of account, able to fix the date when Lolit entered his service as the 17th *Joista* or the 31st of May 1909, and the date of his leaving as the 26th of *Assar* or the 10th of July following. This brings me to the alleged theft of a gold ornament at Patna, with which the prosecution would associate Sirish. Lolit's story is that a few days after he entered Bhubaneswar's service, Sirish went to Patna, and on his return made over to him a lump of half melted gold, which he said he brought back from Patna. The prosecution theory is that this gold represents a gold ornament stolen from Hemangini, the wife of Kedar Nath Banerjee, a Patna Pleader. But Lolit's story is manifestly untrustworthy, for while he would place Sirish's journey a few days after he, Lolit, entered Bhubaneswar's service, *i.e.*, in June, the theft of the gold ornament was some time before the 18th of May. But, while Lolit's story is false, there is no doubt, and indeed it is not disputed, that Sirish was at Patna at the time of the alleged theft. It is, however, denied that Sirish had anything to do with the theft, and it was admitted on behalf of the Crown that, on the evidence, it would be impossible to convict Sirish of the theft.

No doubt gold was sold by Lolit to Jamini, a *poddar* at Dighapatia, on the 18th of June, and in the record of the transaction in the *poddar's* books, the name of Sirish appears. But it so appears only on the debit side of the account, and the mode in which it is written suggests that Sirish's name was subsequently added, and this agrees with the absence of Sirish's name from the credit entry of the transaction. Moreover, the amount of gold sold does not correspond with the weight of that stolen. Jamini declares that of the notes handed over by him on this occasion one for Rs. 100 bore the No. V 67 87042, and this note, which has been produced before us, was endorsed by Jamini on the 4th of *Assar*, the date of the sale of gold, and subsequently endorsed by Dr. Girish. Still, I think it was rightly stated by Counsel for the Crown that the evidence does not prove Sirish to have been the thief, though the matter is not free from suspicion. That Sirish and Lolit went to Darjeeling is conceded, and from Exhibit No. 38 written on the 25th of August by Dr. Girish, his father, it appears that Sirish went up to the hills in the hopes of recovery from a somewhat distressing ailment, and from Exhibit No. 153 that he resided in the Lowis Jubilee Sanitarium from the 26th of August 1909. Lolit, too, it seems, was ill, suffering from malaria, and Exhibit No. 151 shows that he resided in the Sanitarium from the 26th of August 1909. Sirish left on the 1st of October, and Lolit was arrested on the 27th.

The mere fact that Sirish and Lolit went at the same time to the Darjeeling Sanitarium would not go for much in the circumstances I have described, but what is relied on is the fact that Lolit there gave his true name in place of the assumed name of Lal Mohan Chowdhury, under which he had passed at Nattore, for this, it is said, shows that Sirish must have known throughout that he was passing under an assumed name, and can only have tolerated it because he was in league with him. Indeed, an attempt was made to show that Sirish must otherwise have known that Lolit was passing under

an assumed name, by suggesting that Lolit had previously visited Nattore under his true name. But Lolit himself has exploded that theory, so that I only have to deal with the fact that Lolit gave his true name at the Sanitarium. I fail to see how that in itself can show Sirish knew, when Lolit was at Nattore, that he was passing under an assumed name. Even if it be assumed that Sirish knew what name Lolit gave at the Sanitarium,—a matter not clearly established,—that in itself would only show that he gave a different name at the Sanitarium from that under which he passed at Nattore it could not possibly antedate Sirish's knowledge. This then is the case against Sirish: undoubtedly there are in it elements of suspicion, but I am not satisfied that it establishes against Sirish a conspiracy to wage war against the King.

Bejoy Kumar Chakarvarty has been convicted under the Arms Act and sentenced to three years' rigorous imprisonment from the 15th of March 1910. This conviction is conclusive so far as it goes, and it would not be profitable to discuss its propriety. But the conviction itself would not warrant the inference that the accused was a member of this conspiracy, so Lolit again, as in so many other cases, comes forward with his timely aid. The arms found in Bejoy's possession were four revolvers, and Lolit says that he handed to Bejoy at Rajshahye five revolvers that came from Calcutta in *Assar* 1909. But this story is belated; it is after the discovery of the revolvers at the search of the 6th of January 1910; and in his confession of the 5th of November 1909, which preceded the search, he speaks of swords only in connection with Bejoy, without a word about revolvers. It is true that it was in consequence of a statement made by Lolit that Mr. Mawson applied for warrants, but there is no suggestion that Lolit gave any information as to pistols, or that Mr Mawson expected to find any in the office.

Then, again, it is doubtful whether Lolit ever went to Rajshahye. In his confession he mentions no such visit, and even states that in consequence of the tutorship he got in the *zemindar's* family, he "desisted from going to Rajshahye." Before Mr. Duval, however, he stated that he went to Rajshahye with the *zemindar's* leave, but he did not repeat this before us, nor was Bhubaneswar asked any question on this subject. Further than that, I find that Lolit in the course of the verifications proceedings said that Bejoy was at the time Head Master of the National School, and lived at the house of Sarat Babu. Before Mr. Duval he shifted his ground, and said Bejoy told him he was living at the house of Sarat Babu, the Head Master of the National School. Now the documentary evidence shows that Bejoy's services, as a School Master at the Bhola Nath Academy, Rajshahye, were dispensed with in November 1908, and Gangadhar Bhattacharjee, in whose *basha* he lived from 1904 to November or December 1908, deposes that Bejoy then went to Dighapatia and he did not see him in Rajshahye after that. Moreover, the prosecution have not adduced evidence to support either of Lolit's two rival stories, either the first story that Bejoy was the Head Master of the National School or the altered story.

On the whole, therefore, I am unable to accept this story that Lolit went to Rajshahye, and handed over the revolvers to Bejoy. And so the endeavour to connect Bejoy with Calcutta fails, and his membership of the conspiracy is not proved.

The members of the Jowgacha group are Kalipada Chakravarty and Pulin Sarkar and they may be dismissed from consideration very briefly, for there really is no evidence against them on which any reliance can be placed. Apart from the approvers, the witnesses called against them merely speak to an association with their fellow villagers, which had nothing incriminating about it. The case fails against these two accused.

Then I come to Kartick Dutta and Tara Nath Roy Choudhury whom the prosecution would place side by side, on the ground of their alleged connection with the *Jugantar* newspaper.

I have already dealt with the suggestion that the *Jugantar* was a limb of this conspiracy and have shown that it has not been made good. Kartick's complicity in the Bighati dacoity cannot be questioned, but is there anything which shows that dacoity to have been the work of this conspiracy? We start with the fact that the two men convicted with Kartick of this dacoity are not alleged to be conspirators, and when this was brought to the

notice of Counsel for the prosecution, it was said, in explanation of this omission, that mere participation in this dacoity would not prove membership of the conspiracy. Then, again, Lolit did not mention Kartick as a conspirator, either in his confession or in the course of the verification, while his attempt to connect this dacoity with the conspiracy by the story he tells of the dispute as to the Bighati loot, is manifestly absurd.

Panna Lal Chatterjee, the approver in the Bighati case, and now in the employ of the Criminal Investigation Department, attempted before Mr. Duval to connect the dacoity with the conspiracy by stating that one Keshab had told him that three of the men in the Bighati case "were of the Howrah gang." Before us he has altered his story and has deposed that he thought the three men went there from Howrah as he "inferred it from their conversation," having overheard one or two things, though he admits they did not tell him about the dacoity. But if we go back to Panna Lal's statements before Mr. Patterson in the Bighati case, there is not a word of this or of the conspiracy to overthrow the British Government, though Panna Lal, in making his confession, showed every anxiety to bring the wrong-doers to book, as is apparent from his remark, "I shall tell you everything and you will please see all the members of the gang are punished."

Panna Lal's story obviously cannot be accepted; it developed to suit the exigencies of the case. Panna Lal gives evidence that Kartick took him to the *Jugantar* office, and Purna Chandra Lahiri says he saw Kartick frequently at the *Jugantar* office, but he was doing nothing; he used to put up in the building where the offices were. Besides the *Jugantar* office it appears from Purna Chandra Lahiri's evidence that the *Sumati Press* was also there, and it is urged for Kartick that his presence on the premises was in connection with the press and not with the *Jugantar*. This is a point that has not been cleared up; but, whichever be the true version, it matters not for the purposes of this case, in the view I take of the *Jugantar's* alleged relations with the conspiracy into which we are inquiring.

The documentary evidence used against Kartick consists of certain letters. Exhibit 159, the Thakur letter, is, in my opinion, innocuous, for reasons which I will set forth, when I come to discuss the case against Annoda. Nor do I think the other documents in any way go to show he was a member of this conspiracy. The real case against Kartick is that he has been held guilty of the Bighati dacoity. I have already given my reason for thinking that dacoity was not connected with the conspiracy, and it follows that, of whatever Kartick may have been guilty, it is not proved that he was a member of this conspiracy, and so the case against him fails.

Tara Nath Roy Chowdhury has been convicted under the Arms Act and has been sentenced to three years' rigorous imprisonment from the 19th of May 1910. Lolit speaks of him as a conspirator, and before Mr. Duval he said, "I have known Tara Nath since 1906. He lived in Rajah's Lane." As a matter of fact he had no connection with 4, Rajah's Lane, until September or October 1907, and he only remained there six or seven months. More than that, I find that in the verification proceedings, Lolit pointed out 3-1, Rajah's Lane, as Tara Nath's residence, whereas in fact he lived at 4-1. Then, again, it is significant that, though Lolit mentions Tara Nath in his confession, he makes no reference to arms being taken to his house from Colonel Nandi's garden, which is the story he now tells.

That Tara Nath lived in Benares and was arrested there is established, but it is denied that he associated there with Lolit and there is no reliable evidence to that effect. So, again, it is clearly proved that Tara Nath was the Manager of the *Jugantar*, and the period of his management was from November 1907 to April 1908, but whatever may be his criminal responsibility for what was written during that period, his managership does not prove his membership of this conspiracy, for reasons which I have already set forth. We have a confession and a retraction by Tara Nath but, giving them all their due effect, they fall short of connecting Tara Nath with this conspiracy. We are only concerned with the question whether it has been proved that

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Tara Nath is guilty of the conspiracy to which this case relates, and not with any other delinquencies he may have committed, and the evidence fails to prove him to be a conspirator for the purposes of this case.

The *Chatra Bhandar* group consists of Pabtiro Dutta, Annoda Rai, Herendra Banerjee and Norendra Nath Bose.

For reasons I have already set forth, I hold that the *Chatra Bhandar* is not proved to be a limb of the conspiracy, and mere association with it will not suffice to establish the guilt of these four accused. Nor does it advance the case against Pabitro that he was associated with Annoda in the management of the *Chatra Bhandar*. In this view, the case against Pabitro may be dismissed with a few words. It is not proved that he managed, controlled, or worked for the *Jugantar* and the argument based on his alleged connection with that paper fails. At the same time, the prosecution has wholly failed to prove any criminal association between Pabitro and Tara Nath or anyone else at Benares; indeed, as I have already shown, the documentary evidence casts grave doubt on the truth of Lolit's story. Pabitro, therefore, is not proved to be guilty.

The case against Annoda Rai or Annoda Kabiraj must also fail. It is in the May complaint that his name first appears, and he was not mentioned by Lolit until he gave his evidence before Mr. Duval. He was arrested on the 26th May 1910, and placed before the Magistrate on the 27th. He was not, however, identified by Lolit till the 15th of June, though on the 6th both he and Lolit were in the Magistrate's Court. The prosecution would make much of Exhibit 159, the Thakur letter, as it has been termed, and it is necessary that I should examine this letter and the evidence relating to it with some care. It is a letter purporting to be written by Kartick to the Kabiraj, and, though the handwriting is not proved, it is not disputed that Kartick was the writer. The prosecution would have it that the mention of a Thakur was a cryptic reference to a revolver, that the allusion to a printer was the proffer of Kartick's services to find a substitute in place of the printer of the *Jugantar* who had been convicted, and that the Baikuntha named in the letter was the covicted printer. The interpretation placed on the word "Thakur" was sought to be fortified by the evidence of Panna Lal, the approver in the Bighati case, to whom I have already referred. He was asked in the course of his examination in-chief, "Had you any secret code"? His answer was, "yes. We used to call revolvers Thakurs, Indur, Pakhi." The records in this case furnish us with a suggestion as to how this evidence originated. There was nothing as to this in Panna Lal's statements before Mr. Patterson. We first find a reference to the secret Code when Panna Lal passed into the hands of Mr. Sati Prosad Ganguly for the purpose of verification, a class of work on which this Magistrate seems to be frequently employed, for in this case we find him conducting verification proceedings in connection with Lolit and Jotin, and he has told us that he verified the confessions in the Bighati case and the Khulna conspiracy case.

Now, in his confession which was being verified by Mr. Sati Prosad Ganguly, Panna Lal said nothing about Annoda in connection with 202, Cornwallis Street, nor did he say a word about a secret Code. And yet, when he was taken by Mr. Ganguly to 202, Cornwallis Street, where Annoda's name was prominently placed on a placard, he volunteers the remark "we had code words." It is asked with considerable pertinence, what was the association of ideas that prompted this remark? True, the Thakur letter had been found at the search of Annoda's premises, but how did Panna Lal know this or that Annoda had anything to do with the secret meaning ascribed to the word Thakur? Perhaps, a consideration of a few dates may help to the solution of this question. Annoda's house was searched on the 20th of September 1908, and Inspector Mullick of the Criminal Investigation Department in answer to Counsel for the Crown has given us the history of certain documents including the Thakur letter. He has told us that this letter, with other documents, was, after the search, produced before Mr. Denham, the Special Assistant to the Deputy Inspector-General of Police, Special Department, who took a note of the letter he thought important. Inspector Mullick received this letter and other documents back from Mr. Denham, and retained them in his custody

until they were produced before Mr. Duval. There is no reason to doubt the accuracy of Inspector Mullick's evidence, and, in fact, he had a note of the letters to which he has so deposed. We see, therefore, that the Thakur letter was in the custody of the Criminal Investigation Department. But so was Panna Lal for a short time; he was arrested on the 9th November 1908, and he was for some days kept at Royd Street, the office of the Criminal Investigation Department. Then he was taken by Mr. Ganguly for verification proceedings which were completed on the 22nd of January 1909.

I have set out the facts without comment, for I think they furnish the best answer to the problem, how the sight of Annoda's name at 20*A*, Cornwall's Street, prompted Panna Lal to tell the verifying officer that there was a secret code. And, in my opinion, the facts furnish an explanation which shows the worthlesness of Panna Lal's suggestion that Thakur means revolver, a suggestion for which there is no warrant in the voluminous records of this case. I feel no doubt that the origin of Panna Lal's statement was the Thakur letter, and at the same time it has been demonstrated to my satisfaction that the reference in that letter was not to a revolver but to a Thakur in its proper sense.

It is necessary that I should now examine this Thakur letter, Exhibit 159;* with some minuteness. A superficial reading of it by itself would lend some colour to the prosecution theory, but Mr. Sen Gupta who has appeared for Annoda very properly insisted that all the documents found at the search of Annoda's premises should be produced, and this ultimately resulted in his being able to place before the Court, Exhibit V.* in all fairness, this document should from the first have been placed by the prosecution on the record, and we owe it simply to the commendable persistence and industry of Mr. Sen Gupta that this most important document is before the Court. Now, this letter Exhibit V is dated the 18th *Aughran* 1314, that is, the 4th of December 1907, while the Thakur letter is written on the 22nd of January 1908. Both refer to the purchase of a Thakur, and though the prosecution place on the word in the second

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* The following is the *Thakur* letter.—C. W. N.

"Collections in small quantities are being made; besides, there are many other things to do, which will have to be done in conjunction with Jogen, and will take about a month to do them. For this reason I shall be late in going to Calcutta. Ananta Babu will send a money-order of Rs. 45. I have told you the reason. The price of the Thakur is Rs. 40, the expenses of my coming are Rs. 5; total Rs. 45 has been spent. Out of this amount Rs. 5 is on my own account. I notice that the person to whom the Thakur belongs is a man of crooked policy; whatever may be had from him (is enough). Pramatha Babu has taken me to Ullapara from there. I am at Ullapara for the present. Afterwards I shall go to Shahajadpur, Salap, to Modhu Babu and to Sirajganj. The field is excellent. Write to me what you think good. Pramatha Babu wishes that I should remain here for some time. You will please give me Rs. 10 and I will go and do what I can. Please send the Rs. 10 to my mother, for they have got nothing for two months and are therefore in difficulty. Send the money order for Rs. 10 in my mother's name. If this prayer of mine be granted, I may do my work with a mind free from anxiety. Please arrange that my distressed mother gets the money. Be sure I will not return with my hands empty. If a printer be required, inform me by letter, and I will send a printer. Concluded."

*The portion of the letter (Ex. V) which referred to the *Thakur* was as follows.—C. W. N.

"The generous minded Srijut Saivananda Baisnab who is a great friend of mine and in whose family I officiate as a priest has taken up an idea to instal the images called Krishna and Radhika, and requested me to entrust you with the duty of making purchase of the said Thakur and Thakurani. I accordingly send you money and request you either to purchase or order for excellent patterns of (these) images, according to your (own) taste of selection Krishna made of stone, 12 *angulis* in height, excluding the *padmashan* (lotus-shaped stand) and the place of the *choora* (crest), and Radhika, of a composition of eight metals to match with Him; and what you should see is that there must not be any fissures or chasms in Them."

"These people will instal the Thakurs on the last day of the month of *Pous*. It is (therefore) necessary that they should get the Thakurs 15 or 16 days earlier.

"If ready made Thakurs are purchased, they may in all likelihood turn out either broken or cleft. You are, therefore, requested to have them made by placing an order. If it costs more (the party) is ready to meet it. Please enter into a term with the artist that if the Thakurs made out on order be found in the near future either broken or cleft in any way he shall be held liable for damages. Thakuranis made of eight metals are not available. So that you will please place an order for that too and you will please keep one of your men waiting at the time of melting, and he should cause a quantity of the eight metals poured into the mould just on receipt of (this) letter please let me know the details of informations relating to this matter and (also) write as to whether arrangements to bring the Thakurs should have to be made from here or there. . . .

letter a sinister gloss, it is not suggested that in the first letter the word is patent of any but its ordinary meaning. The first letter points to Ananta Kumar Chakravarti as negotiating the purchase of the Thakur, and the second letter points to Ananta Babu as the person who will pay, and the identity of these two cannot reasonably be doubted, and without prolonging a critical examination of the two letters, it is enough for me to say that I am satisfied both letters refer to the same Thakur, and that the Thakur in the first letter is clearly a Thakur in its ordinary sense, and that the Thakur in the second letter is not a revolver.

Though it was on the meaning wrongly imputed to the word Thakur that the prosecution principally relied, they also read in the mention of Baikuntha a reference to Baikuntha Acharya, the convicted printer of the *Jugantar*. This reading, however, is not only fanciful, but there is reason to think that it is baseless, and that the reference was to Baikunta Nath Chakravarti whose connection with Annoda is shown by documentary evidence, and who is stated before us to have been his relative. And, finally, it is said by the prosecution that the offer to find a printer means a printer for the *Jugantar*. This is mere speculation, and the defence have urged on us an explanation that is at least as plausible, and I am disposed to think more probable, which goes to show that the writer of the letter had not the *Jugantar* in mind.

I have thought it necessary to discuss this letter at length as so much stress was laid on it against both Kartick and Annoda. I have set forth the grounds on which I hold this letter to be innocent of the meaning attributed to it by the prosecution, and I have drawn attention to the dates which appear to me to show how it was sought to bolster up this meaning by the evidence of Panna Lal. There is nothing to show that the Annoda mentioned in Exhibit No. 217 is this accused; on the contrary, it seems even more probable that the person referred to is Annoda Charan Roy, said to be an uncle of Tara Nath. That Annoda's name should appear in Exhibit No. 115 as a subscriber to the *Jugantar* proves nothing, for it is shown that this paper was bought far and wide. Exhibit No. 274 (1) *b* is explained by Exhibit No. 314, and it is quite clear that these letters contain no sinister significance. Therefore, the case against Annoda must fail.

Horendra Banerjee has been treated by the prosecution as a member of the *Chatra Bhandar* group, though why he should be so ranged is not obvious, as his only connection with the *Chatra Bhandar* is that he dealt with it, while there is nothing to connect him with the other members of the group. Counsel for the prosecution has utilized this grouping for the purpose of connecting the *Chatra Bhandar* and the Haludbari groups, but this contention cannot succeed. Lolit's testimony connecting Horen with the conspiracy is unconfirmed, as is that of Jotin Hazra, and it is only the documentary evidence that calls for consideration. The document on which reliance is principally placed is Exhibit No. 162, but I am unable to treat anything in this letter as a confession of guilt by Horen. The utmost that can be said is that it may attribute guilt to Soilen, but certainly not that Horen was a partner in that guilt.

The reference to 1A/251 and 1A/254 in Exhibit No. 161 (1) when read in conjunction with Exhibit No. 87 (2) may give rise to some suspicion, but it is a suspicion that ows its existence and force to lack of knowledge. This suspicion may have been worthy of further investigation, but as things stand, we have no clear indication what these numbers mean. The document in which they have been found is a note-book, and the entries in it point to Horen's being concerned in some business, possibly that of a broker. In two instances I find names of persons with their addresses given in conjunction with these supposed symbols. Thus, I find 1A/258 evidently referring to Radha Benode Bose, 35-1-1, Mondol Street, Pathuriaghata, and 1A/259 to Amrita Lal Banerjee 4-1, Gomesh Lane, Calcutta. Now, neither of these men is named as a conspirator in the charge, nor is there any evidence led or suggestion made that they are not perfectly respectable individuals. No endeavour has been made to explain who or what they are, and, in the circumstances, it would be wrong for us to allow the suspicion of the prosecution to take the place of proof. In my opinion the case against Horen fails.

The last of this so-called *Chatra Bhandar*

group is Norendra Nath Bose: why he should have been so classed is not clear, unless it was hoped by this means to establish a connection with the Kidderpore group through Bimola Deb, an idea that has failed in consequence of the prosecution's determination not to proceed with the case against Bimola. Of the overt acts set forth in the complaint, Lolit would only connect him with the murder of Nanda Lal Banerjee and the Netra dacoity, but as to neither is there any corroboration. That Noren was at Cheddapathar and at Benares has not been denied, but it is urged that his presence at those places implies nothing to his detriment. First, I will take up the prosecution case as to Cheddapathar. It is said by the prosecution that it was used as a place for the conspirators to meet, and for arms to be stored, and that the work there was divided, some for instance recruiting Bengalis, some Santhals. But there is nothing that supports this beyond Lolit's word, and it is at least problematical whether Lolit ever was there, when regard is had to the variance in his successive stories, and the difficulty of reconciling his description with the place as it actually is. I do not overlook the fact that evidence is given, and notably by Keshab Chandra Banerjee, of Lolit's having been there. Now Keshab left Cheddapathar last Bhadra; of that there seems to be no doubt. But when he goes on to say, as he does in his examination-in-chief, that Lolit was there in Magh or Falgoon, preceding the Bhadra in which he left, he is obviously wrong, for not only was Lolit then in custody, but the prosecution case is that it was in 1906, not 1909 that Lolit was there. But even if Lolit was there,—and I will assume he was,—the evidence does not disclose anything sinister in the life at Cheddapathar. The young men seem to have erected a *khamar bari*, and to have cut down the surrounding *jungle* with a view to re-claiming land for cultivation. It cannot be suggested that there is anything that shows that arms were stored there, and I say this notwithstanding the evidence in all seriousness adduced before us that five bamboo bows were brought from one of the neighbouring *jungle* folk, and even though the story as to one revolver be credited.

Then there is the evidence of Noren's presence at Benares to be considered. It is not denied, on the contrary it is the case for the defence, that Noren took his old and ailing mother to Benares, and this, it is said, was a natural thing for him to do, regard being had to his mother's state. He further says that he started a shop there, and this agrees with the prosecution story. But he denies that this was done, as the prosecution say, with conspiracy funds, nor is there any trustworthy evidence in support of the prosecution theory. The evidence is that Noren started the shop in September 1908, and attended to it until September 1909, when it was sold. Reliance is in fact placed on this to refute Lolit's story that Noren was at the Netra dacoity, for it is urged that it is difficult to believe that Noren should have left his shop at Benares to attend the dacoity. The refutation is not conclusive, but the facts cast grave doubt on the truth of Lolit's story, more especially when regard is had to the statement of Kali Krishna Chakravarty, prosecution witness No. 79. who declares that Noren was all through at Benares. Nothing obviously can be made of the fact that Noren dealt with the *Chatra Bhandar*.

Exhibit No. 103 (5) is sought to be used against him and principally because it contains the name "Lolit" and because it indicates that on the 4th and 5th October 1909, he met "Hrishikesh" and "Gonesh." There is nothing to show what Lolit is here intended, or that Gonesh is the accused in this case, but the suggestion that Hrishikesh is Hrishikesh Kanjilal, the accused in the Alipur Bomb Case, is reckless, seeing that Hrishikesh Kanjilal was then, and for months before had been, in prison. The case against Noren fails.

The next group consists of Monmatho Nath Biswas, Bidhu Bhusan Biswas, Rampada Mukherjee and Bhupendra Nath Rai Chowdhury, who are shown to have been associated at Rampore Boalia in the District of Rajshahye where they were fellow students.

Mr. P. L. Roy included Monmatho Nath Biswas and Bidhu Bhusan Biswas in the Haludbari group, but for that I have shown there was no justification. According to the evidence in this case their activities were confined to Rajshahye. Rampada Mukherjee and Bhupendra Nath Rai Chowdhury were treated by the Counsel for the Crown as constituting the Raita group, but their only

association with Raita is the mention of their names in connection with the Raita dacoity in Sushil's retracted confession. This dacoity was committed as far back as November 1908; no steps have been taken against these accused on the basis of their being concerned in that offence, and there is no evidence against either of them of being so concerned, and in the circumstances this retracted confession certainly would not support a conviction against them. Therefore, their being grouped as connected with Raita rests on no sound foundation. It is in these circumstances that I think these four accused ought to be considered as the Rajshahye group, and in the view I take of the evidence it is unnecessary to treat their cases at length.

Monmatho is not even named by Lolit in his confession, though he there names certain persons as conspirators who reside in Chitli-Beliashishi. In his deposition before Mr. Duval, however, he names him as a conspirator, and also here. But beyond so naming him with a very great number of others he says nothing of him and does not implicate him in anything specific. It is to be noticed that between the date of Lolit's confession and deposition, Monmatho, had been arrested for the Haludbari dacoity. Then, what other evidence is there against Monmatho? Merely that of association with fellow students at Rajshahye and *lathi* play. The evidence falls far short of establishing that these four youths, who stand isolated from the rest of the accused, were members of the conspiracy charged in this case. I do not overlook Bhupen's diary, but I have carefully taken it into consideration in arriving at the conclusion I have expressed. The case against Monmatho fails.

The case against Bidhu Bhushan Biswas of association in Rajshahye is substantially the same as that against Monmatho. In addition to that Lolit declares that after the Netra dacoity Bidhu, having met him at 10-1, Mussulmanpara Lane, took him to Beliashishi. But, apart from the absence of any corroboration, Lolit's story is open to grave doubt. No adverse inference can be drawn from the fact that Sushil and Bidhu, who were cousins, were seen together at Nattore, even if credence be given to the somewhat improbable story of the witness who declares he so saw them. The case against him fails.

Against Ram Pada Mukherjee the evidence is even weaker, and there is nothing against him on which a conviction could be based. The case against him fails.

Bhupendra Nath Rai Chowdhury is the author of the diary to which I have already referred. Sushil mentions him in his confession in connection with Raita, and some reliance has been placed on the school register for this purpose, but the confession has been retracted and Sushil afterwards failed to identify Bhupen. It is obviously impossible to hold that Bhupen was at Raita. The Exhibits do not advance the case against Bhupen, nor does the fact of his previous conviction. The result is that, in my opinion, the prosecution have failed to show his membership of this conspiracy.

It cannot, I think, be disputed that these four young Rajshahye men are, or have been troublesome characters, and the description "rowdies" attributed to some of them in Bhupen's diary is probably not far wide of the mark. But that is a different matter from holding them members of the particular conspiracy to wage war against the King: the prosecution have failed to link them with any of the other accused, nor have they shown them to be parties to the conspiracy charged in this case.

This then ends the case against all the accused, and the result is we all hold the charge under section 121A of the Penal Code established against Soilen Das, Sushil Biswas, Atul Mukherjee, Gonesh Das, Soilendra Nath Chatterjee and Upendra Kristo Deb.

The rest of the accused must, in our opinion, be acquitted of the charges against them, and, with the exception of those at present serving sentences that have been inflicted on them, they must be set at liberty as the law directs.

It only remains to consider what sentences should be passed on those whom the Court holds guilty of the offence with which they stand charged. The sentences that they have merited is, in our opinion, eight years' transportation from this date, and that is the sentence we would have passed, but for the fact that they are already undergoing sentences as the result of their conviction in the Haludbari case; we must have regard to these sentences and to the somewhat inconvenient provisions of sections 397 and 398 of the Cirminal

Procedure Code, and this accounts for the form in which our sentence is framed.

The Court sentences Soilen Das and Sushil Biswas to two years' rigorous imprisonment and directs that the sentence on each shall commence at the expiration of the imprisonment to which he has been previously sentenced in the Haludbari case, and the Court sentences Atul Mukherjee, Gonesh Das, Soilendra Nath Chatterjee and Upendra Kristo Deb to one year's rigorous imprisonment, and directs that the sentence on each shall commence at the expiration of the imprisonment to which he has been previously sentenced in the Haludbari case.

I would only add my appreciation of the admirable temper with which this long and anxious case has been conducted on both sides, and my acknowledgment of the assistance we have received.

CALCUTTA HIGH COURT.

CRIMINAL REVISION CASE NO. 187 OF 1911.

April 3, 1911.

Present:—Mr. Justice Holmwood and Mr. Justice Sharf-ud-Din.

DOWLAT KOER—SECOND PARTY—PETITIONER

versus

SIVA PERSHAD PANDIT—FIRST PARTY—OPPOSITE PARTY.

Criminal Procedure Code (*Act V of* 1898), *ss.* 147, 148—*Local investigation, how to be made—Easements, whether s.* 147 *confined to—Order for costs, when to be made—Direction to Police to assist Party to remove obstruction, whether illegal.*

The rule that in criminal cases, Courts are only justified in holding a local inspection in order to explain the facts appearing in evidence, does not apply to cases under section 147 of the Criminal Procedure Code: nor is there anything in the law to prevent the presiding Magistrate from making a local investigation himself, provided he records what he saw and does not act upon hearsay evidence.

Section 147 is not confined to mere easements.

The right which the first party claimed in this case was the natural right of every landholder to the use and enjoyment of his own land, and among the necessary incidents to such an enjoyment is the right to let off water by the natural course in which it has always flowed and would alway flow, so as to prevent inundation of his own land. The second party erected a *bund* on the boundary of the first party's village:

Held, that the erection of the *bund* was an infringement of that natural right, and that the case was a fit one for the exercise of jurisdiction under section 147;

that the order to the Police to assist the first party removing the obstruction was legal and was made within jurisdiction.

Pasupatinath Bose v. *Nando Lal Bose*, 5 C. W. N. 67 and *Lalit Chandra Neogi* v. *Tarini Persad Gupta*, 5 C. W. N. 335, followed.

Dalmir Puri v. *Khodadad Khan*, 36 C. 923; 4 Ind. Cas. 415; 14 C. W. N. 179; 10 Cr. L. J. 579, distinguished.

An order for costs in a case under section 147 need not be made at the time judgment is delivered.

Rule praying that the order of the Deputy Magistrate of Gya, dated December 16th, 1910 directing the second party petitioner or any one in their interest not to interfere with the opposite party in removing a *bund* until the said petitioner shall obtain a decree or order of a competent Civil Court adjudging them to be entitled to put up the *bund* be set aside.

Babus *Atulya Charan Bose*, and *Rajeswari Prasad*, for the Petitioner.

Babus *Dasarathi Sanyal* and *Lachmi Narain Singh*, for the Opposite Party.

JUDGMENT.—This was a Rule calling upon the District Magistrate of Gya and on the opposite party to show cause why the order under section 147 should not be set aside on the grounds, *firstly*, that it appears to be based solely on local inspection, *secondly*, that no easement was established or found, *thirdly*, that the order as to costs was not made part of the judgment, and *fourthly*, that the order to the Police to cut the *bund* was without jurisdiction.

As regards the first point we find that there was evidence on all the points and that the lower Court acted upon that evidence. It is objected that the inspection was made before the evidence was heard, and well-known rulings are referred to which have laid down in criminal cases that a Court is only justified in holding a local inspection in order to explain the facts appearing in the evidence. But we do not think that this rule in any way applies to section 147. In fact, special provision is made in the Code for local investigation in these cases, and it is obvious, in a case where levels and the fall of water are concerned, that a local inspection is eminently necessary, and although section 148 empowers a Court to depute some other person to make such an investigation, and although as a rule we think that it is better to have such an investigation made by some other person there seems to be nothing in

law to prevent the presiding Magistrate from making the investigation himself, provided he records what he saw and does not act upon hearsay evidence.

As regards the second point we do not think that the right claimed was an easement. Certainly, it does not fall within the definition of section 4 of Act V of 1882. But that Act does not appear to have any application in Bengal; and the right which is claimed is a natural right of every landholder to the use and enjoyment of his own land and among the necessary incidents to such enjoyment is the right to let off water by the natural course in which it has always flowed and would always flow so as to prevent inundation of his own land. Section 147 is by its very wording not confined to mere easements, and we think that the erection of a *bund* on the boundary of the opposite party's village was an infringement of that natural right and that, therefore, this was a fit case for the exercise of jurisdiction under section 147.

As to the order for costs there appears to be no decision of this Court that an order for costs must necessarily be made at the time the judgment is delivered. The law is that it must be made within a reasonable time and that it must be made after due notice on the other side. But we can find no authority for saying that the particular moment at which it is to be made is when the Court is giving its decision and that does not appear to be capable of being read into the section itself.

Then, as regards the order to the Police to assist the first party in removing the obstruction we find that that is fully covered by the rulings in the case of *Pasupati Nath Bose* v. *Nando Lal Bose* (1), and *Lalit Chandra Neogi* v. *Tarini Persad Gupta* (2). The case of *Dalmir Puri* v. *Khodadad Khan* (3) is clearly distinguishable. There a similar order had originally been passed in the case in Calcutta Weekly Notes, and the learned Judges do not find that that order was in any way bad. What they do find was bad is this, that after the other side had obtained an injunction from the Subordinate Judge staying the removal of this *bund*, that the Magistrate without calling upon the parties any further and in defiance of the order of the Civil Court directed the Police to remove this obstruction. This order was, of course, entirely without jurisdiction. But in finding that it was so, the learned Judges who decided the case did not dissent from the two cases which we have cited above and those two cases fully cover the present case.

We, therefore, are of opinion for all these reasons that this Rule must be discharged.

Rule discharged.

(1) 5 C. W. N. 67.
(2) 5 C. W. N. 335.
(3) 14 C. W. N. 179; 36 C. 923; 4 Ind. Cas 415; 10 Cr. L. J. 579.

SIND JUDICIAL COMMISSIONER'S COURT.

CRIMINAL APPLICATION No. 169 OF 1910.

April 10, 1911.

Present:—Mr. Pratt, J. C.

EMPEROR—COMPLAINANT

versus

JHAMANDAS AND ANOTHER—APPLICANTS.

Criminal Procedure Code (Act V of 1898), ss. 195, 215, 476, 537—Penal Code (Act XLV of 1860), ss. 196, 471—Sanction to prosecute given to the serishtadar—*No application for sanction—Effect of sanction—Application of s. 537—Defect in procedure—Sanction granted in respect of one offence—Framing charge in respect of another offence disclosed by facts.*

Where there is no application for sanction the proceeding is virtually a complaint and the procedure enjoined by section 476, Criminal Procedure Code, should be followed.

Where sanction to prosecute was granted to a *serishtedar* without any application and the procedure laid down in section 476, Criminal Procedure Code, was not followed but the complaint against the petitioner was heard and a preliminary inquiry held which showed that there was a *prima facie* case against the petitioners:

Held, that the defect in the procedure in granting sanction was cured by section 537.

Though section 537 applies in terms to orders made in appeal or revision, the principles contained therein should guide Courts in dealing with applications under section 215.

Where the inquiry in a case has proceeded far enough to enable the test required by section 476 to be applied, section 537 will cure any defect not prejudicing the accused.

Where sanction to prosecute has been granted in respect of an offence and thus the bar to the Magistrate taking cognizance of the case has been removed by the sanction, the Magistrate may frame a charge in respect of any other offence referred to in section 195 and which is disclosed by the facts.

Mr. *Teckchand Udhavdas*, for the Applicants.

Mr. *Raymond*, for the Crown.

JUDGMENT.—The two applicants filed a claim in the Court of the Manager Encumbered Estates in suit supported by a note-

of-hand and account books. The Manager dismissed the claim on the ground that the note-of-hand and the entries in the account books were forgeries. He then gave his *serishtedar* a sanction to prosecute the applicants in respect of the account books and the *serishtedar* filed a complaint in the Court of the City Magistrate, Hyderabad, for offences under sections 471 and 196, Indian Penal Code, and the sanction was filed with the complaint.

The preliminary inquiry has been completed by the City Magistrate and the accused have been committed for trial to the Court of Session, Hyderabad, for offences under sections 471 and 196, Indian Penal Code, in respect of entries in the account books and also is respect of the note-of-hand.

The applicants pray that the order of commitment be quashed on the ground that the sanction given by the Manager was irregular in that no application for sanction had been made by the *serishtedar*.

Much stress is laid upon the case of *Emperor* v. *Kissumal* (1) recently decided in the High Court jurisdiction of this Court. In that case the Sub-Divisional Magistrate, Hala, directed his *serishtedar* to file a complaint under section 174, Indian Penal Code, against a witness who had failed to attend in his Court. The order was quashed on the ground that the Magistrate should have taken proceedings under section 476, Criminal Procedure Code. But that case is distinguishable as the Sub-Divisional Magistrate gave his *serishtedar* no sanction to prosecute. In fact the judgment so far from supporting the applicants appears to suggest that the course adopted in this case would have been legal, for it contains the following passage:—"The attention of the Magistrate is directed to Rule 18 of Magisterial Procedure in Notification No. A 882, J. D., of 21st July 1910. if he had intended to proceed under section 195 he should have given a sanction signed and sealed by himself to his clerk. But the proper procedure was under section 476."

No doubt it may be urged that when there is no application for sanction, the proceeding is virtually a complaint by the Court and in that case the procedure followed should be that enjoined in section 476, Criminal Procedure Code. But how does this defect of procedure affect the accused. They might complain that if the regular procedure had been followed, they might have had an opportunity of satisfying the Manager that they were innocent and that it was desirable that they should not be prosecuted, if they had come to this Court as soon as the Magistrate took cognizance of the case and asked that the Magistrate's order taking cognizance of the case be set aside, they might possibly have obtained an order staying proceedings until the Manager had complied with the provisions of section 476.

But these considerations have no place now, for the City Magistrate has completed his inquiry and has found that there is a *prima facie* case against the accused.

It is urged, however, that section 537 does not apply to cure the irregularity in the Manager's proceedings which must be taken to be under section 476, as this is not an appeal or revision. No doubt section 537 applies in terms to orders made in appeal or revision, but I think the principles there laid down must guide the Court in dealing with an application such as this under section 215, otherwise a committal order would be liable to be quashed because the Magistrate had initialled the deposition of the witnesses instead of signing them. It has also been said that section 537 can only be applied after the case is decided for it is not till then that it can be determined whether the irregularity has caused a failure of justice—see *Nilratan Sen* v. *Jogesh* (2). But the inquiry in this case has proceeded far enough to enable the test required by the section to be applied for the charge and the order of committal completely justifies the Manager's order instituting the prosecution.

It is next urged that the Magistrate should not have framed a charge in respect of the note-of-hand when the sanction only referred to the account books but section 195 sub-section 5 is quite clear on this point. When the bar to the Magistrate taking cognizance of the case has been removed by the sanction he may frame a charge in respect of any other offence referred to in section 195 and which is disclosed by the facts.

I, therefore, dismiss the application.

Application dismissed.

(1) Cr. Rev. App. No. 116 of 1910.

(2) 23 C. 983; 1 C. W. N. 561.

RUDOLF STALLMAN *v.* EMPEROR.

CALCUTTA HIGH COURT.
CRIMINAL REVISION No. 577 OF 1911.
May 24, 1911.
Present:—Mr. Justice Caspersz and
Mr. Justice Sharf-ud-din.
RUDOLF STALLMAN—PETITIONER
versus
EMPEROR—OPPOSITE PARTY.

Extradition Act (*XV of* 1903)—*High Courts Charter Act* (24 *and* 25 *Vict. C.* 104), *s.* 15—*High Court—Power of supervision—Appellate jurisdiction.*

A Magistrate acting under the Extradition Act is not subject to any appellate jurisdiction: he makes inquiry and reports the result to Government. Consequently, the High Court cannot interfere with his order.

Application for quashing the proceedings under sections 3 and 4 of the Extradition Act (XV of 1903) pending against the petitioner in the Court of the District Magistrate of 24-Pergannahs.

Messrs. *Jackson*, *Stephen*, *K. N. Chaudhuri* and Mr. *Chippendale*, for the Petitioner.

JUDGMENT.—This is an application under section 15 of the High Courts Act, 1861, in respect of certain proceedings under the Indian Extradition Act, 1903, pending before the District Magistrate of the 24-Pergannahs at Alipur against the petitioner Rudolf Stallman *alias* Rudolf Von Konig who was originally arrested on board the *SS.* Caspian as the steamer was coming up the river Hughly on her way to the Port of Calcutta on the 26th April 1911.

The proceedings are in apparent compliance with the Extradition Act, but we are invited to issue a Rule and to call up all the papers of the case in order to quash the proceedings on two grounds (1) that the District Magistrate of the 24-Pergannahs has no jurisdiction in the matter; and (2) that there is no legal evidence before the District Magistrate to justify the detention of the petitioner.

We have carefully considered this application since hearing learned Counsel yesterday, and, in our opinion, we have no jurisdiction in the matter.

Section 15 of the Charter Act gives this Court "superintendence over all Courts which may be subject to its appellate jurisdiction." The District Magistrate of the 24-Pergannahs acting under the Extradition Act, is not subject to any appellate jurisdiction: he makes inquiry and reports the result to Government: his powers are specially conferred for the limited purposes of the Act. No appeal lies to this Court from the decision which any Magistrate may arrive at under the Act. On this ground alone, if for no other reason, we must decline to interfere.

The same view was adopted by Hill and Stevens, JJ., on the 5th January 1898, on an application by *Mahant Deva Das* (1), in respect of an inquiry pending before the Magistrate of Mozufferpore under the provisions of section 14 of Act XXI of 1879. The learned Judges observed:—"We do not think that we possess any power to control or interfere in the conduct of an inquiry under section 14 of the Act" and, in another passage, they say,—"the competency of a Magistrate to hold an inquiry under the section depends on the authorization of the executive Government" such authorization (under section 14) was by means of "an order to any Magistrate who would have had jurisdiction to inquire into the offence if it had been committed within the local limits of his jurisdiction directing him to inquire into the truth of such accusation." The language of the present Act is the same in essentials. Here, we may observe that the words "local limits" do not refer to the territorial jurisdiction of the Magistrate selected by Government to conduct the inquiry, for "any Magistrate" may be so authorized, if he be a first Class Magistrate or a Magistrate empowered by the Local Government in that behalf.

The petitioner is not without remedy. He may, under section 3 (6) of the Act, submit any written statement for the consideration of the Government, and if the report of the Magistrate or the written statement of the petitioner, raises an important question of law, that question may be referred to this Court for decision. This special procedure, it seems, takes the place of that indicated in section 491 of the Code of Criminal Procedure which gives directions of the nature of a *habeas corpus*. If the Legislature had intended that proceedings under the Extradition Act should be subject to the superintendence of this Court, it would not have provided the machinery we have just mentioned.

It may be added that the proceedings against the petitioner may be stayed under section 5 (2) of the Act by Government and not by this Court.

We have also examined for ourselves the procedure under the English Statute, but it

(1) 10 Ind. Cas. 946; 15 C. W. N. 735.

would serve no useful purpose to fortify our conclusion by discussing it.

The application is refused.

Application refused.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE No. 78 OF 1911.
(CRIMINAL REVISION PETITION No. 61 OF 1911).

May 4, 1911.

Present:—Mr. Justice Sundara Aiyar and Mr. Justice Ayling.

In re KACHI MADAR LABHAI—PETITIONER.

Criminal Procedure Code (Act V of 1898), ss. 202, 476—Prosecution ordered under s. 476 on evidence taken under s. 202—Whether valid—Dismissal of complaint under s. 202—Further inquiry ordered by Sessions Judge—Sessions Judge's order silent as to order for prosecution by lower Court under s. 476—Whether amounts to a quashing of the order.

Per *Sundara Aiyar, J.*—Where a Magistrate dismisses a complaint as the result of an inquiry under section 202, Criminal Procedure Code, and at the same time orders the prosecution of the complainant under section 476, and the Sessions Judge in revision directs further inquiry without saying anything as to the order under section 476, the latter order does not cease to be operative without being quashed.

Kannullah v. *Emperor*, 12 C. W. N. 1; 6 C. L. J. 603; 6 Cr. L. J. 354, explained and distinguished.

Per *Sundara Aiyar, J.* (*Ayling, J., dissenting*).—An order passed under section 476, Criminal Procedure Code, based on evidence taken under section 202 which is not legal evidence, is illegal. *Contra*, if the order was passed on the sworn statement of the complainant alone.

Queen-Empress v. *Vencatramanna*, 23 M. 223; *Asmatulla* v. *Emperor*, 4 C. W. N. 366; *In re Chotalal Mathuradas*, 22 B. 936, referred to.

Obiter.—If the order were passed on the sworn statement of the complainant alone it would be open to the objection that the complainant was not allowed to adduce all his evidence in support of the complaint.

Laljee Gope v. *Giridhari Chaudhri*, 5 C. W. N. 106; *Queen-Empress* v. *Shamlal*, 14 C. 707, referred to.

Per *Ayling, J.*—An order may be passed under section 476 of the Criminal Procedure Code as the result of an inquiry under section 202. The wording of section 476 is wide enough to cover the consideration of other than strictly legal evidence.

Petition, under sections 435 and 439 of the Criminal Procedure Code, praying the High Court to revise and cancel the order dated the 22nd November 1909, passed under section 476, Criminal Procedure Code, by the first Class Sub-Divisional Magistrate of Tuticorin, in C. C. No. 119 of 1909 on his file.

Mr. *P. Appasawmi*, for the Petitioner.

JUDGMENT.

SUNDARA AIYAR, J.—This is an application to set aside an order of the Sub-Divisional Magistrate of Tuticorin passed under section 476, Criminal Procedure Code, directing the prosecution of the petitioner for offences under sections 182 and 211 of the Indian Penal Code. The circumstances under which the order was passed are briefly as follows. The petitioner laid a complaint before the Sub-Divisional Magistrate of extortion and receiving illegal gratification against four persons, two of whom were Police Officers. The Magistrate, after the examination of the complainant on oath, held a preliminary inquiry under section 202, Criminal Procedure Code, without issuing process for the appearance of the accused and, after considering the result of the investigation, he dismissed the complaint and directed the prosecution of the complainant as mentioned above on the 22nd November 1909. The complainant applied to the Sessions Judge of Tinnevelly for the revision of the order of dismissal of the complaint. His application was successful and the Sessions Judge directed a further inquiry into the case. The Sub Divisional Magistrate issued summonses to the accused. The Sessions Judge in disposing of the complainant's petition for revision, passed no order with respect to the direction of the Sub-Divisional Magistrate for the prosecution of the complainant nor did the Sub-Divisional Magistrate, after discharging the accused, again pass any fresh orders under section 476, Criminal Procedure Code. The Head-Quarters Deputy Magistrate of Tinnevelly, to whom the Sub-Divisional Magistrate had forwarded the records under section 476, Criminal Procedure Code, passed orders on receiving the Sessions Judge's order that the proceeding abated and he took no action thereon during the pendency of the revision petition before the Sessions Judge and the re-trial by the Sub-Divisional Magistrate. After the order of discharge by the latter Magistrate the Prosecuting Inspector requested him to proceed with the inquiry. The Deputy Magistrate was of opinion that as he had passed orders that the proceedings abated, he could not take fresh proceedings without an order from a superior Court. The complainant before the Sub-Divisional Magistrate asks us in this revision petition to set aside his order

dated 22nd November 1909 with a view to prevent the proceeding against him before the Deputy Magistrate being revived. Mr. Appasawmi who appears for the petitioner has urged two grounds for our interference, *first*, that the order under section 476, Criminal Procedure Code, ceased to be operative when the Sessions Judge quashed the Sub-Divisional Magistrate's order of dismissal of the complaint, *secondly*, that the order being based on the materials placed before the Sub Divisional Magistrate at the preliminary inquiry and that inquiry not being of a judicial character the order was illegal and made without jurisdiction under section 476, Criminal Procedure Code. I am unable to agree with him with respect to his first contention. The order under section 476 of the Criminal Procedure Code was distinct from the order of dismissal. The Sessions Judge in directing further inquiry did not decide that the Sub-Divisional Magistrate's view as to the falsity of the complaint was incorrect. The order to make further inquiry was, on the other hand, quite consistent with his concurrence with the Magistrate as to the probable nature of the complaint. The case relied on by the learned Counsel, *Kamullah* v. *The Emperor* (1), does not support his contention. That case merely decides that when an Appellate Court dissents from the opinion of the Court of first instance deciding at the hearing of the suit that a statement made by a person was false and reverses the decree of that Court, an order under section 476 of the Criminal Procedure Code, passed by the lower Court directing the prosecution of the deponent should be quashed. It does not support the contention that the order ceases to be operative without being quashed.

Mr. Appasawmi's second contention is sound in my opinion and should be upheld. Section 476, Criminal Procedure Code, empowers a Court to direct a prosecution only when it "is of opinion that there is ground for inquiring into any offence referred to in section 195 and committed before it or brought under its notice in the course of a judicial proceeding" after making any preliminary inquiry that may be necessary. A preliminary investigation by a Court under section 202, Criminal Procedure Code, is not a judicial proceeding and it has been held that a person cannot be prosecuted for an offence brought to the notice of the Court during such investigation (See *Queen-Empress* v. *Venkataramanna* (2). *Asmatulla* v. *The Empror* (3) and *In re Chotalal Mathuradass* (4). The order of the Sub-Divisional Magistrate in this case was admittedly based partly at least on what appeared at the preliminary investigation. The Magistrate says, "There are discrepancies which appear in the evidence adduced by the complainant to support his case. It is very plain that the story is a fabrication. In the original complaint the man who is said to have gone to complainant's house to fetch the money is not the same man who is brought forward to state that he played this part in the affair. There are other discrepancies as to time." The deposition of the witnesses at the investigation were not made on oath. It is clear to my mind that an order under section 476, Criminal Procedure Code, based on statements which do not constitute legal evidence is illegal. This is, if necessary, rendered clearer by section 478 of the Criminal Procedure Code which authorises the Court acting under section 476 to "complete the inquiry" and commit the accused person "to take his trial before the High Court or Court of Session as the case may be." It is, of course, impossible to hold that a committal could be made on what is not legal evidence, and I think it is equally clear that an inquiry which is to be completed must be of the same character as the completing portion. The words, therefore, in section 476, Criminal Procedure Code, "when any Civil, Criminal, or Revenue Court, is of opinion that there is ground for inquiring into any offence . . . ." should be construed as meaning when there is legal ground for inquiring, etc. This is also clear from the fact that the matter should be brought under the notice of the Court in the course of a judicial proceeding in which evidence must be taken according to rules of law. What the section requires is that the Court should be of opinion that a *prima facie* case has been made out against the accused justifying an inquiry similar to what is required when a Court grants sanction for prosecution under section 195, Criminal

(1) 12 C. W. N. 1; 6 C. L. J. 703; 6 Cr. L. J. 354.

(2) 23 M. 223.

(3) 4 C. W. N. 366.

(4) 22 B. 936.

In re KACHI MADAR LABHAI.

Procedure Code. It has never been doubted that under section 195, Criminal Procedure Code, sanction can be accorded only on legal evidence. There is no reason for holding a different view with respect to section 476 of the Criminal Procedure Code. In my opinion the Court directing a prosecution under section 476, Criminal Procedure Code, really takes a heavier responsibility on itself than it does in merely granting a sanction to a private party to prosecute. There are various provisions in the Criminal Procedure Code entitling a Court to initiate an inquiry on information received or on suspicion, but section 476, Criminal Procedure Code, does not authorise it to do so. Moreover, an order under that section, in so far as the Court making it is concerned, is a final order and not merely one initiating proceedings though the order is preliminary to proceedings in another Court, just as an order of committal to a Court of Session is. I am, therefore, of opinion that the Sub-Divisional Magistrate had no power to pass the order under section 476, Criminal Procedure Code, on what appeared before him at the preliminary investigation. There may be cases where a Magistrate might come to the conclusion on the sworn statement of the complainant alone, that his complaint was false and it may not be illegal to pass an order under section 476 on what appears in the sworn statement. But here the order is not based on the complainant's statement alone and material reliance was placed by the Sub-Divisional Magistrate on the statement of complainant's witnesses not made on oath. If the order were made on the sworn statement only, I should be prepared to hold that the Magistrate did not exercise a sound judicial discretion in passing the order and to set it aside on that ground. It has been held in several cases that it is unfair to direct a prosecution under section 182 or 211 of the Indian Penal Code without giving complainant an opportunity to adduce all his evidence in support of his complaint. See *Lolji Gope* v. *Giridhari Chaudhury* (5) and *Queen-Empress* v. *Sham Lal* (6). It was open to the Sub-Divisional Magistrate in this case to pass fresh orders under section 576 of the Criminal Procedure Code after the discharge of the accused if the evidence taken on oath justified such an order in his opinion. He has not, however, done so, and this Court is concerned only with the order passed on the 22nd November 1909. I would set aside that order.

(5) 5 C. W. N. 106.
(6) 14 C. 707.

AYLING, J.—With great deference to my learned brother whose judgment I have had the advantage of reading, I am unable to concur in his view that an order under section 476 of the Criminal Procedure Code must necessarily be set aside, because it proceeds (wholly or partly) on a consideration of the result of a preliminary inquiry under section 202 of the Criminal Procedure Code. The wording of section 476 (when any Civil, Criminal or Revenue Court, is of opinion that there is *ground for inquiry* into any offence, etc.,) is wide enough, in my opinion, to cover the consideration of other than strictly legal evidence already on record. The result of an inquiry under section 202 has to be taken into consideration by the Magistrate in deciding whether to dismiss the complaint or proceed with the case (*vide* section 203) and I cannot see why it may not be legitimately considered before passing an order under section 476.

I do not propose to deal with the question in detail, because, nevertheless, I concur in the order proposed by my learned borther. I quite agree that strong reasons are required to justify an order under section 476 in cases where the complainant has not been allowed to adduce the whole of his evidence in support of his complaint. In the present case only three of petitioner's nine witnesses were examined by Mr. Stodart. His Vakil's prayer for the production and consideration of certain Police records was disregarded and the Magistrate's order now sought to be revised while containing sufficient ground for dismissing the complaint, gives reasons which I should certainly not regard as adequate ground for ordering prosecution. It is an order passed somewhat hastily and after very imperfect inquiry and one which, in my opinion, cannot be upheld on its merits. I, therefore, concur that the order of the Joint Magistrate under section 476 of the Criminal Procedure Code dated the 22nd November 1909 should be set aside.

In the result the order of the Sub-Divisional Magistrate, dated 22nd November 1909, is set aside.

Order set aside.

EMPEROR *v.* KACHRI.

(s. c. 7 N. L. R. 65.)

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CRIMINAL REVISION No. 241 OF 1910.

August 12, 1910.

Present:—Mr. Skinner, A. J. C.

EMPEROR—COMPLAINANT

versus

Musammat KACHRI AND ANOTHER—ACCUSED.

Criminal Procedure Code (*Act V of* 1898), *s.* 339—*Pardon, forfeiture of—Commitment of approver for offence in respect of which pardon tendered—No order revoking pardon necessary—Duty of Court trying approver.*

Where it is intended to prosecute an approver for the offence in respect of which a pardon was tendered to, and accepted by him, an order revoking the pardon is not necessary.

The question whether a pardon has in fact been forfeited by an approver having, by either wilfully concealing anything essential or by giving false evidence, failed to comply with the condition on which the tender of pardon was made, is to be decided by the Court that is asked to try him for the offence in respect of which the pardon was tendered.

Emperor v. *Kothia*, 30 Bom. 611; 8 Bom. L. R. 740, 4 Cr. L. J. 346, followed.

Revision, under section 215, Criminal Procedure Code, against the order of the Additional Sessions Judge, West Berar.

JUDGMENT.—The Additional Sessions Judge asks me to quash the commitment of the accused women Kachri and Aheli, who have been committed for trial on charges of murder. They had been pardoned under the provisions of section 337 of the Code of Criminal Procedure, and examined as witnesses against other persons accused of the same murder but their evidence was disbelieved by the Sessions Judge, and the then accused were acquitted.

The ground of the learned Additional Sessions Judge's reference is, I understand, that no formal order forfeiting the present accuseds' pardons has ever been recorded, either by the Magistrate, who granted them, or by the Sessions Judge. He cites the decision of the Bombay High Court in *Emperor* v. *Kothia* (1), but he does not seem to me to have correctly understood the effect of the judgments delivered in that case. Both the learned Judges, who dealt with it (Aston, J., at page 617, and Beaman, J., at page 620) point out in almost identical terms that 'the

(1) 30 Bom. 611; 8 Bom. L. R. 740; 4 Cr. L. J. 346

law contains no provision whatever for any one withdrawing, revoking, or cancelling a pardon.' And they proceed to hold that the question whether a pardon has in fact been forfeited by the approver's having 'either wilfuly concealed anything essential or by giving false evidence not complied with the condition on which the tender was made' is one to be decided by the Court that is asked to try him for the offence in respect of which a pardon was tendered to him.

Without committing myself to agreement with everything stated in the judgments of those learned Judges, I see no reason to dissent from that concluison, and in view of it I see no illegality in the commitment under reference. The records will, therefore, be returned to the Additional Sessions Judge, who should proceed to dispose of the case with as little further delay as possible, deciding first whether the accused persons have forfeited the pardons, which he has found were tendered to, and accepted by them, and if he decides this question against either or both of them, then deciding whether the charge of murder is proved against such person or persons.

Case remanded.

SIND JUDICIAL COMMISSIONER'S COURT.

HIGH COURT JURISDICTION.

CRIMINAL REPORTS NOS. 32 AND 33 OF 1911.

June 1, 1911.

Present:—Mr. Pratt, J. C. and Mr. Crouch, A. J. C.

EMPEROR

versus

BAKSHO *valad* TAHIRO AND ANOTHER—

Criminal Procedure Code (*Act V of* 1898), *s.* 476—*Judicial proceeding—Transfer application—Examination of witnesses after disposal—Prosecution of witnesses not legal.*

During the pendency of a case of riot before a Magistrate, some of the accused applied to the Sub-Divisional Magistrate to transfer the case on the ground *inter alia* that the Magistrate had received a bribe in the presence of *A.* and *B.*

The Sub-Divisional Magistrate made an order transferring the case and thereafter recorded the statements of *A.* and *B.* on oath. He then made an order under section 476, Criminal Procedure Code, directing their prosecution for an offence under section 193, Indian Penal Code:

CHEDULURU BANGARAYA *v.* EMPEROR.

Held, that the proceeding before the Sub-Divisional Magistrate was clearly not a judicial proceeding, as there was no case pending in his Court for he had already disposed of the application for transfer.

Reg. v. *Venkatacalam Pehari*, 2 M. H. C. R. 43, relied upon.

Held, further, that the statements of *A.* and *B.* having been made *coram non judice* were not evidence. The act of the Magistrate was not a Magisterial act, consequently he had no jurisdiction to administer the oath.

Hari Charan v. *Queen*, 27 C. 455, relied upon.

In the circumstances the Magistrate's order under section 476, Criminal Procedure Code, was made without jurisdiction.

Mr. *Raymond*, for the Crown.

JUDGMENT.—This is a report by the Sessions Judge, Hyderabad, of a proceeding of the Sub-Divisional Magistrate, Noushahro.

A case of riot against one Jiand and others was pending before the third class Magistrate of Kandiaro. Some of the accused then applied to the Sub- Divisional Magistrate for transfer of the case alleging *inter alia* that the third class Magistrate had received a bribe in the presence of two witnesses Baksho and Kadirbaksh.

The Sub-Divisional Magistrate made an order for the transfer of the case on the 28th October, 1910, and then afterwards on 14th November, 1910 examined Baksho and Kaderbaksh on oath in order, apparently, to satisfy himself as to the falsehood of the allegations made against the third class Magistrate. After taking their depositions on oath, he ordered under section 476 their prosecution for an offence under section 193, Indian Penal Code. This assumes that the proceeding before the Sub-Divisicnal Magistrate was a judicial proceeding.

But the proceeding before the Sub-Divisional Magistrate was clearly not judicial. A judicial proceeding has been said to include "a step taken by the Court in the course of the administration of justice in connection with a case pending" *Reg.* v. *Venkatacalam Pehari* (1). Here there was no case pending in the Court of the Sub-Divisional Magistrate for he had already disposed of the transfer application.

Mr. Raymond urges that the offence might fall under the second part of section 193 giving false evidence in a proceeding other than a judicial proceeding. But the answer to this is two-fold. In the first place, the statements made by Baksho and Kadirbaksh were not evidence for they were *coram non judice*. The Magistrate was not acting *qua* Magistrate and had no jurisdiction to administer the oath. See on this point the case of *Hari Charan* v. *Queen* (2).

Again, if the proceeding before the Sub-Divisional Magistrate was not a judicial proceeding, he had no jurisdiction to take action under section 476, Criminal Procedure Code.

We, therefore, reverse the order made by the Sub-Divisional Magistrate for the prosecution of Baksho and Kadirbaksh.

Order reversed.

(1) 2 M. H. C. R. 43.

(2) 27 C. 455.

MADRAS HIGH COURT.

CRIMINAL REVISION CASE NO. 607 OF 1910
(CRIMINAL REVISION PETITION NO. 305 OF 1910.)

May 4, 1911.

Present:—Mr. Justice Ayling.

CHEDULURU BANGARAYA—PETITIONER

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 476—Postponement of proceedings under this section till termination of original case, whether legal.

Proceedings under section 476, Criminal Procedure Code, should not be postponed till after the disposal of the original case.

Where, at the request of the petitioner, the Joint Magistrate transferred a criminal case pending against him from the file of the Salur to that of the Bobbili Magistrate, but by an order, under section 476, Criminal Procedure Code, deferred taking action against him till the disposal of the case by the Bobbili Magistrate:

Held, that the delay was fatal to the legality of the order.

Ayyakannu Pillay v. *Emperor*, 32 M. 49; 1 Ind. Cas. 597; 19 M. L. J. 42; 4 M. L. T. 404; 9 Cr. L. J. 41, referred to.

Petition, under sections 435 and 439 of the Criminal Procedure Code, praying the High Court to revise the order of the Joint Magistrate Parvatipur Division, dated the 27th July 1910, on the Salur Magistrate's *Arzi*, dated the 20th April 1910.

Mr. *V. Ramesam*, for the Petitioner.

In re BILLA APPPAYYA.

The Public Prosecutor (Mr. *C. F. Napier*), for the Crown.

ORDER.—The explanation of the Salur Sub-Magistrate was received on 27th April 1910. On the 2nd May 1910 the Joint Magistrate passed an order transferring the case as requested by the petitioner to the Bobbili Sub-Magistrate but reserved the consideration of the propriety of taking action against the petitioner till after disposal of the case by the Bobbili Sub-Magistrate. It is difficult to imagine how the issue of that case could affect the question of ordering the petitioner's prosecution. The matter was again taken up only on the 26th July 1910 when the petitioner was called on to show cause and order under section 476, Criminal Procedure Code, was not passed till 27th July 1910. The delay is fatal to its legality; *vide* discussion of the Full Bench in *Ayyakannu Pillai* v. *Emperor* (1).

The order of the Joint Magistrate is set aside.

Order set aside.

(1) 32 M. 49; 1 Ind. Cas. 597; 19 M. L. J. 42; 4 M. L. T. 404; 9 Cr. L. J. 41.

MADRAS HIGH COURT.

Vacation Sitting.

CRIMINAL REVISION CASE NO 274 OF 1911.

May 13, 1911.

Present:—Mr. Justice Sundara Aiyar.

In re BILLA APPAYYA—ACCUSED.

(IN CRIMINAL MISCELLANEOUS CASE NO. 24 OF 1910 ON THE FILE OF THE SUB-DIVISIONAL MAGISTRATE OF PUTTUR).

Criminal Procedure Code (*Act V of* 1898), *s.* 110—*Security proceedings—Demanding security from a person trying to reform himself.*

Where it is found that an accused person is trying to reform himself and has for a fortnight led an honest life, security should not be demanded from him under section 110, Criminal Procedure Code, on the ground that there was no guarantee that he had mended his ways.

Section 110 of the Criminal Procedure Code, 1898, is preventive, and not punitive. Its object is to protect society against persons who are so likely to commit offences that it is not advisable to leave them at large unchecked. It is very undesirable to proceed under that section against a person who is trying to reform himself and to live an honest life.

The *Public Prosecutor*, for the District Magistrate.

ORDER.—The District Magistrate observes that at the time that proceedings were initiated against the accused, Billa Appayya, he was engaged in honest work in the neighbourhood of Charmadi but that he had been there only for a fortnight. He says,—"The fact is no guarantee that he has mended his ways." He, therefore, confirmed the first Class Magistrate's order requiring the accused to give security for good behaviour under section 110 of the Criminal Procedure Code. In my opinion, security should not have been demanded on the facts found. Section 110 is preventive and not punitive. Its object is to protect society against persons who are so likely to commit offences that it is not advisable to leave them at large unchecked. It is very undesirable to proceed under that section against a person who is trying to reform himself and to proceed under that life. It is true that a fortnight's attempt to reform is no guarantee that the accused has ceased to be a source of danger to the community, but it is obvious that he could not become an honest man without being given time to do so. Proceedings under section 110 are discretionary and ought not to be resorted to except in cases where the present conduct of a person renders it necessary to do so. I set aside the order of the first Class Magistrate and direct that Billa Appayya, the accused, be set at liberty.

Order set aside.

ALOKESHI DASI *v.* BIRAJ MOHINI DASI.

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL NO. 350 OF 1910.

May 9, 1911.

Present:—Mr. Justice Coxe and Mr. Justice Teunon.

ALOKESHI DASI—JUDGMENT-DEBTOR—APPELLANT

versus

BIRAJ MOHINI DASI—DECREE-HOLDER—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 47 and O. XXI, r. 90—Fraud—Payment to decree-holder before date of sale—Fraud in conduct or publication of sale—Second appeal, whether lies.

An application to set aside an execution-sale was made on the ground of fraud, the fraud being that the decree had been satisfied by payment to the husband of the decree-holder on the day before the sale, but the payment was not certified and the sale was held:

Held, that the matter did not come within the scope of Order XXI, rule 90, of the Code, inasmuch as the fraud alleged was not fraud in the conduct or publication of the sale, but it came within the scope of section 47 of the Code, and that, therefore, a second appeal lay:

Held, also, that so far as the execution Court was concerned, the payment could not be regarded as having been made and the allegation of fraud consequently fell to the ground, and that the sale could not be set aside.

Appeal from the order of the District Judge of Hooghly, dated March 18th, 1910, reversing that of the Munsif of Howrah, dated October 2nd, 1909.

Babu *Trailakya Nath Ghose*, for the Appellant.

Babu *Shib Chandra Palit*, for the Respondent.

JUDGMENT.—This was an application to set aside an execution sale on the ground of fraud, the fraud being that the decree had been satisfied by payment to the husband of the decree-holder on the day before the sale. The application was granted by the Munsif; but on appeal the learned District Judge held that it did not come within the scope of Order XXI, rule 90, of the Code of Civil Procedure inasmuch as the fraud alleged was not fraud in the conduct or publication of the sale. He held, therefore, that there was no ground for setting aside the sale under that section and accordingly allowed the appeal and set aside the order of the Munsif.

The judgment-debtor appeals to this Court.

A preliminary objection is taken that no appeal lies. No doubt, if the matter came within the scope of rule 90, no second appeal would lie to this Court; but it appears to us that the matter does not come within that rule, but within the scope of section 47 of the Code of Civil Procedure.

We think, therefore, that the decision of the learned District Judge was not correct: for although he was right in holding that the sale could not be set aside under the provisions of rule 90, that was no reason why he should not have disposed of the matter under section 47 of the Code. But in the circumstances of the case, it seems to us that nothing could possibly be gained by a remand to the District Judge for decision of the question whether the sale ought to be set aside under section 47 of the Code. The only fraud which was accepted by the Munsif was that the decree had been satisfied and money paid on the day before the sale, that is to say, on the 17th January 1909. But it is admitted that this payment was not certified and this application to set aside the sale, which was the first action taken by the judgment-debtor, is dated the 22nd April, that is to say, more than ninety days after the payment. The executing Court, therefore, and the District Judge in appeal therefrom could not recognize that payment in any way under Order XXI, rule 2; and could not hold that the sale was rendered fraudulent by the fact of that payment. That being so nothing would be gained by remanding the case for further decision.

It has been argued that the judgment-debtor was entitled to an extension of the time allowed him for certifying payment, by reason of the fraud of the decree-holder; but his petition has been read to us, and it is perfectly clear that in that he did not allege any specific fraud such as would entitle him to any extension of time. So far, then, as the execution Court is concerned, the money cannot be regarded as having been paid; and that being so the whole allegation of fraud on which the petition is based necessarily falls to the ground.

The appeal is dismissed with costs, one gold *mohur*.

Appeal dismissed.

ALLAHABAD HIGH COURT.
SECOND CIVIL APPEAL No. 1125 OF 1910.
May 9, 1911.
Present:—Mr. Richards, K. C., Chief Justice, and Mr. Justice Banerji.
SRI KISHAN SINGH—PLAINTIFF—APPELLANT
versus
BACHA PANDE AND OTHERS—DEFENDANTS RESPONDENTS.

Pre-emption—Refusal by pre-emptor to purchase at price offered under the belief that price was unreasonable —Loss of pre-emptive right.

A pre-emptor does not lose his right by merely refusing to purchase at the price at which the property is offered to him because he honestly believed that that price was in excess of the real price.

Lajja Prasad v. *Debi Prashad*, 3 A. 236; *Amir Chand* v. *Ishar Das*, A. W. N. (1882) 46; *Bholi Bibi* v. *Fahima Bibi*, A. W. N. (1882) 137; *Karim Baksh* v. *Khuda Baksh*, 16 A. 247, referred to.

Second appeal from the decision of the District Judge of Benares, dated the 10th September 1910.

Mr. *Gokal Prashad*, for the Appellant.

Dr. *Tej Bahadur Sapru*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for pre-emption which has been dismissed by the lower Appellate Court on the ground that the plaintiff must be deemed to have refused to purchase the property when it was offered to him before the sale to the defendants vendees, and thus waived his right of pre-emption. The property was sold to the defendants-vendees for a consideration of Rs. 1,500. The plaintiff alleged in his plaint that this amount was not the actual amount of consideration paid but that the real consideration was Rs. 800. The Court of first instance was of opinion that the real consideration was Rs. 911-1-9. The lower Appellate Court, however, found that the actual c nsideration was Rs. 1,500. It appears that before the sale, namely on the 2nd of March 1909, the vendor sent a notice addressed to the plaintiff and other members of his family in which he stated that he was about to sell the property to the vendees for Rs. 1,500 and he asked the plaintiff and his co-sharers to purchase the property for that price. The notice was actually delivered on the 15th March 1909. The time allowed for sending a reply was one week. On the 22nd of March 1909 the plaintiff's brother sent a reply in which he said that he and his co-sharers were willing to purchase the property for Rs. 800 which he said was the real price of the property. The plaintiff himself sent no reply and for this reason the learned Judge was of opinion that as the plaintiff himself paid no attention to the notice sent by the vendor, he was not entitled to rely on the reply which was sent by his brother. We do not agree with the learned Judge on this point. It is true that the plaintiff as *lambardar* had the right of pre-emption but he was a member of a joint Hindu family and the vendor issued his notice to all the members of the joint family. The reasonable view to take in respect of the reply is that it was sent on behalf of all the persons to whom the original notice was addressed and as an answer to that notice. Therefore, it must be taken to be an answer not only on behalf of the plaintiff's brother but also on behalf of the plaintiff himself. The effect of this answer was that the plaintiff was willing to purchase the property for what was the real consideration for the sale. The plaintiff and his co-sharers did not believe that Rs. 1,500 was the real consideration and, therefore, they refused to purchase for a price which they honestly believed to be considerably in excess of the real price. The fact that the Court of first instance found the real price to be far below the amount mentioned in the sale-deed and the notice is a circumstance which suggests that the plaintiffs were justified in believing that the property was not being sold for the price mentioned. The plaintiff swore that the property had been purchased by the vendor for Rs. 800 only a few years before the date of the sale in question. So that it may be reasonably inferred that in refusing to purchase for the price mentioned the plaintiff was under the *bona fide* belief that the refusal to purchase was due to the belief that the price of the property had been greatly inflated. That being so, this case comes within the purview of the ruling of this Court in *Lajja Prasad* v. *Debi Prasad* (1).

In that case it was held that a person having a right of pre-emption does not lose it by refusing to purchase the property at the price at which it was offered to him because he believes that such price is in excess of the real price where the belief is entertained and expressed in good faith.

(1) 3 A. 236.

This case was followed in *Amir Chand* v. *Ishar Das* (2), *Bholi Bibi* v. *Fahima Bibi* (3) and in *Karim Bakhsh* v. *Khuda Bakhsh* (4). In accordance with these rulings we must hold that the plaintiff has not forfeited his right of pre-emption. Having regard, however, to the fact that he made untrue allegations in his plaint and deposition and also to the fact that the actual price has been found by the lower Appellate Court to be Rs. 1,500 we are of opinion that he must bear the costs of the litigation.

We accordingly allow the appeal and decree the plaintiff's claim for pre-emption conditional upon his paying Rs. 1,500 within two months from this date. In any event, the plaintiff must pay the costs of the respondents in all Courts including in this Court fees on the higher scale. If the plaintiffs fail to pay the purchase-money and the costs within the time fixed the suit will stand dismissed.

Appeal allowed.

(2) A. W. N. (1882) 46.
(3) A. W. N. (1882) 137.
(4) 16 A. 247.

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 134 OF 1908.

April 11, 1911.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Sundara Aiyar.

RUNGIAH GOWNDEN—APPELLANT

versus

HAJEE FAKIR MAHOMED SAIT AND OTHERS—RESPONDENTS.

Mortgage—Agreement by third party to pay mortgage amount to mortgagee and interest—Part-payment of interest—Breach of other conditions of agreement—Right of suit by mortgagee on the mortgage—Whether mortgagee bound to refund the amount received from third party—Agreement to pay intending purchaser for not competing for purchase of property—Consideration.

An agreement whereby a person undertakes to pay money to another in consideration of the latter not competing for the purchase of certain property with the former is not illegal.

Second defendant executed three mortgage-bonds to plaintiffs. First defendant entered into an agreement with the plaintiffs whereby he agreed to pay a certain portion of the principal within 3 months, the interest on the principal amount immediately and to execute a fresh mortgage for the balance. The agreement was not carried out save that the 1st defendant paid Rs. 10,000 out of the principal and the interest on the whole liability undertaken under the agreement up to a certain date. In consequence of the breach of the agreement by 1st defendant plaintiffs sued for the balance of the amount due to them under the 3 mortgage bonds executed by 1st defendant:

Held, (1) that plaintiffs were entitled to sue on the mortgages and that they were not bound to enforce specific performance of 1st defendant's agreement;

(2) that the 1st defendant was not entitled to refund of the interest he had paid in part performance of his obligations under the agreement.

Appeal against the decree of the Subordinate Judge of the Nilgiris, in Original Suit No. 85 of 1907.

Mr. *A. S. Cowdell*, for the Appellant.

Mr. *C. R. Tiruvenkatachariar*, for the Respondents.

JUDGMENT.—In this appeal, preferred from the judgment of the Subordinate Judge of the Nilgiris, the first defendant is the appellant. The facts necessary for the decision of the appeal are as follows:—The immoveable property described in schedules 1 and 2 of the plaint was mortgaged by the second defendant to the plaintiffs on the 22nd October 1897 under Exhibit A to secure the re-payment of a sum of Rs. 20,000. The rate of interest provided was 24 per cent. per annum subject to the acceptance of 12 per cent. by the plaintiffs in case of punctual payment at the times stipulated in the bond. The time fixed for repayment of the principal amount was the 31st October 1900. He then executed another bond, Exhibit B, dated the 22nd August 1893 to the plaintiffs charging the same property for the re-payment of a further sum of Rs. 15,000 re-payable on the same date as the amount due under Exhibit A and containing similar provisions as to interest. For the aggregate amount of Rs. 35,000 due under both these bonds and the interest due thereon the second defendant also executed Exhibit C, charging the property described in schedules 1, 2 and 3 of the plaint The first defendant's firm (which we shall hereafter call the first defendant), wishing to purchase the properties in schedules 1 and 3 of the plaint, borrowed a sum of Rs. 9,000 from the plaintiffs, and for this amount and for a further sum of Rs. 1,000 which the lower Court finds that the firm agreed to pay to the plaintiffs as a consideration for the plaintiffs not competing for the purchase of those properties, the first defendant executed two pro-notes for Rs. 10,000 on the 12th May 1902. The second defendant then executed an agreement, Exhibit V, on the

12th May 1902, promising to convey to the first defendant those properties for Rs. 55,000 made up for Rs. 9,000 paid in cash by means of the amount received by the first defendant from the plaintiffs on the pro-notes already referred to and Rs. 46,000 which the vendee agreed to pay to the plaintiffs, Rs. 35,000 thereof being the principal of the bonds, Exhibits A, B and C and Rs. 11,000 the interest which had accrued due thereon. This sum of Rs. 46,000 was payable within six months, then the second defendant was to execute a formal conveyance and the plaintiffs were to execute a reconveyance to the second defendant of the mortgaged properties not conveyed by him to the first defendant. On the same day *i. e.*, the 12th May 1902, the first defendant entered into direct relations with the plaintiffs and executed in their favour Exhibit I which, not being carried out at the time fixed therein, was afterwards renewed by the execution of a fresh agreement, Exhibit D, dated the 5th June 1905. The object of both these agreements was to provide for the payment to the plaintiffs of the sum of Rs. 46,000 due to them on their mortgages as stated above and of Rs. 10,000 due on the pro-notes. According to this agreement (Exhibit I) the first defendant was to pay Rs. 16,000 out of the principal amount of the mortgages within six months and for the remaining Rs. 30,000 a fresh mortgage was to be executed to the plaintiffs. The first defendant agreed under Exhibit I to pay to the plaintiffs within six months a further sum of Rs. 10,000 acknowledged as received as a loan by the first defendant from the plaintiffs on the pro-note. Exhibit I also provided for the re-conveyance by the plaintiffs to the second defendant of the properties included in their mortgages not agreed to be sold to the first defendant. As no portion of the amount was payable to the plaintiffs immediately according to the Exhibit I it provided that the first defendant should pay to the plaintiffs interest on the whole amount of Rs. 56,000, of which it will be seen that Rs. 11,000 was the interest due on the mortgages at the date of Exhibit I. The rate of interest was reduced to 12 per cent, both with respect to what was payable before the execution of the intended fresh mortgage for Rs. 30,000 and with respect to what was to be provided in that mortgage bond. No payment, however, was made nor was the fresh mortgage-deed executed, although, in the meanwhile, first defendant had obtained from the second defendant, a sale-deed for the properties intended to be sold to him by the second defendant, the sale-deed providing for the payment by the first defendant of the amount due to the plaintiffs under their mortgages. Exhibit D, dated the 5th June 1905 already referred to as executed by the first defendant in renewal of Exhibit I, provides for the repayment of Rs. 26,000 within three months and for the execution of a fresh mortgage-bond for the remaining Rs. 30,000 and for the payment of interest on the whole contained in Exhibit I. The terms of this agreement were not carried out, except that interest on the Rs. 56,000 up to the 11th July 1907 was paid and a sum of Rs. 10,000 out of the principal. The plaintiffs, therefore, claim in this suit to recover the balance of Rs. 36,000 with interest from the 12th July 1907 alleged to be due to them on the mortgages, Exhibits A, B and C, as well as the amount of Rs. 10,000 due on the pro-notes and the interest due thereon from the same date. They set out in their plaint the mortgages and the agreement, Exhibit D, and the failure on the first defendant's part to carry out the mian portion of that agreement. They claim only the reduced rate of interest that they had agreed to receive by Exhibits I and D. They seek in their plaint to make the first defendant also personally liable for the amounts due on the mortgages, but this claim was finally given up. The first defendant's main contention in the lower Court was that the mortgage-bonds, Exhibits A, B and C were completely superseded by and merged in Exhibit D; that no relief could, thorefore, be claimed on the footing of those documents, that the plaintiff's only right was to enforce specific performance of the agreement, Exhibit D; and that the suit should, therefore, be dismissed. This contention was disallowed by the Subordinate Judge in a careful and elaborate judgment in which he held that the mortgage-bonds Exhibits A, B and C, were intended according to Exhibit D to remain in force unless and until the provisions of Exhibit D were carried out by the first defendant and a fresh mortgage-bond was executed by him according to its terms. This contention was not argued

before us in appeal by the learned Counsel who appeared for the appellant. His principal contention may be stated thus,—The plaintiffs not having insisted on enforcing specific performance of the agreement Exhibit D and having rescinded it their only rights now are under the mortgages, Exhibits A, B and C. According to the bonds they were entitled to interest only on Rs. 35,000 but they received interest on Rs. 46,000 up to the 11th July 1907, that in determining the amount that the plaintiffs are entitled to recover in this suit the lower Court should have given the defendant credit for the amount paid to the plaintiffs as interest on the Rs. 11,000, and that not to do so would be to enable the plaintiffs to recover on the unregistered agreement, Exhibit D, as if it were a mortgage securing the payment of Rs. 11,000 and interest in addition to the sum of Rs 35,000 secured by the mortgages. Mr. Cowdell contends, at the same time, that the plaintiffs would not be entitled to interest at 24 per cent. payable according to the bonds. We are entirely unable to uphold his contention. According to Exhibit D the first defendant agreed to pay interest on the sum of Rs. 11,000, which was the interest due on the bonds till the date of Exhibit D. That agreement was supported by ample consideration as the plaintiffs not only extended the time for payment of the whole amount including the arrears of interest due, but consented to give up part of their security under their mortgages, if the first defendant carried out the stipulation contained in Exhibit D. The first defendant carried out part of the stipulations in paying the interest on the Rs. 11,000 up to the 11th July 1907, and the plaintiffs were entitled to accept the partial performance of the agreement. This would not disentitle them to insist on the mortgages, for the first defendant failed to carry out his obligations under Exhibit D in full. The payment of interest due up to the 5th September 1905 was according to Exhibit D to be made before the execution of the new mortgage, but whether it was to be paid before or after is immaterial as payment of interest subsequent to that date was also clearly enforceable under the terms of Exhibit D. What the first defendant now claims is really the refund of the interest he paid in performance of his obligations under Exhibit D. This, in our opinion, he is not entitled to. We cannot hold that by seeking to enforce their mortgages, the plaintiffs became disentitled to retain the benefit of the payment by the first defendant in pursuance of Exhibit D. They are entitled to do so and to enforce the mortgages for the remainder of the amount due to them on the mortgages. This is the view held by the Subordinate Judge and there is no inconsistency between his doing so and his holding that the plaintiffs are not entitled to treat Rs. 46,000 as due to them as the principal amount due on the bonds. No authority has been cited to us, in support of the position that, as the plaintiffs have sued to enforce Exhibits A, B and C in consequence of the first defendant's failure to perform the whole of his obligations under Exhibit D they are bound to give back what they have received in part performance. We do not agree with the argument that the plaintiffs have rescinded the agreement Exhibit D. They are merely asking for the enforcement of the rights which they are entitled in consequence of the breach of that agreement by the first defendant. They were not bound to call upon him to carry out after he had failed to do so.

The appellant's Counsel also contended that the plaintiffs were not entitled to recover the sum of Rs. 1,000 included in the pronotes as only Rs. 9,000 was really paid by the plaintiffs; but the finding of the lower Court is that the sum was a bonus agreed to be paid to the plaintiffs in consideration of his abstaining from competing with the first defendant for the purchase of the properties in schedules 1 and 3 of the plaint, and that finding is not shown to be wrong. We do not think that the absence of a specific issue on the point which is complained of in appeal has prejudiced the appellant.

The Subordinate Court was wrong in allowing Pleader's fee separately on the two sums of Rs. 36,700 and Rs. 10,200 claimed in the plaint. The fee must be computed on the total sum awarded to the plaintiffs according to the rules framed under the Legal Practitioners Act. With this slight modification we dismiss the appeal.

The parties will pay and receive proportionate costs.

The form of the decree is open to misconception though, no doubt, the lower Court

did not intend to pass a personal decree against the first defendant. The decree should declare the amount due to the plaintiffs with respect to the mortgages, and direct that in default of payment within the time fixed for payment, the mortgaged property should be sold The time allowed for payment of the mortgage-money is three months from this date.

Appeal dismissed.

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 912 OF 1910.

May 8, 1911.

Present:—Mr. Justice Richards, K. C., Chief Justice, and Mr. Justice Banerji.

BALBHADAR RAI AND OTHERS—PLAINTIFFS—APPELLANTS

versus

BIRJRAJ RAI AND OTHERS—DEFENDANTS—RESPONDENTS.

Transfer of Property Act (*IV of* 1882), *s.* 59—*Sale or mortgage—Application for partition in Revenue Court by mortgagees, whether affects the mortgagor—Redemption—U. P. Land Revenue Act* (*III of* 1901), *s.* 233K, *application of.*

A document purporting to be a sale contained a clause to the effect that if, within six years from the date of the transaction, the amount secured was paid back the sale would become void:

Held, that the document was a mortgage by conditional sale and not an out and out sale.

Balkeshen Das v. *W. F. Legge*, 22 A. 149; 27 I. A. 58; 4 C. W. N. 153; followed.

Ghulam Nabi Khan v. *Niazunnissa*, 8 A. L. J. 119; 9 Ind. Cas. 140, distinguished.

If the mortgagees of certain property make an application in a Revenue Court for partition of the property and the mortgagor raises no objection to the application, the right of redemption is not affected by such partition and section 233*K* of the Land Revenue Act does not preclude the mortgagor from bringing a suit for redemption.

Second appeal from the decision of the Additional District Judge of Gorakhpur, dated the 25th July 1910.

The Hon'ble Mr. *Sunder Lal*, for the Appellants.

Messrs. *J. N. Choudhri* and *Iswar Saran*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for redemption of a mortgage made on the 23rd of March 1871 by Ajait Rai, the predecessor in title of the plaintiffs. The property mortgaged is a 6 pie share. Ostensibly, the document purports to be a deed of sale but it contains a clause to the effect that if, within six years from the date of the transaction, the amount secured was paid back the sale became void. The plaintiffs assert that this was a transaction of the nature of a conditional sale and was, therefore, a mortgage and they are entitled to redeem it. The defendants, who represent the mortgagees, contend, on the other hand, that there was an absolute sale in their favour and not a mortgage. They further urge that in certain partition proceedings which took place in 1906 the plaintiffs did not assert that the 6-pie share in question held by the defendant as mortgagees, and that, therefore, the plaintiffs were precluded from claiming it inasmuch as the 6-pie share was allotted under partition to the defendants. On the first point the lower Appellate Court accepted the contention of the defendants and held that the transaction was one of sale with a right of repurchase and not a mortgage and that, therefore, the plaintiffs had no right to sue. On the other question raised it was of opinion that as regards a 2-pie share the plaintiffs were precluded from maintaining the suit but not in regard to the remaining 4-pie. This appeal has been preferred by the plaintiffs and the correctness of the decision of the Court below on both the points mentioned above has been impugned. In our judgment the pleas argued on behalf of the appellant must prevail. As we have already said, the document of the 23rd of March 1871 is ostensibly a sale of a 6-pie share, but there is a condition that on the amount of the consideration being paid within 6 years the sale shall become void. This document, in our opinion, exactly fulfils the requirements of the definition of a mortgage by conditional sale given in section 59 clause (*c*) of the Transfer of Property Act. Under that clause—"When the mortgagor ostensibly sells the mortgaged property on condition that on default of payment of the mortgage-money on a certain date the sale shall become absolute, or on condition that on such payment being made the sale shall become void, or on condition that on such payment being made the buyer shall transfer the property to the seller, the transaction is called a mortgage by conditional sale." In the present case the mortgagor ostensibly

sold the mortgaged property on condition that on payment being made on certain date the sale shall become void. Therefore, this is clearly a case of mortgage by conditional sale as defined in section 58. It is true that the mortgage in this case was made prior to the passing of the Transfer of Property Act, but as in *Balkishen Dass* v. *W. F. Legge* (1), their Lordships of the Privy Council, referring to section 58 of the Act and also to the fact that mortgage in that case was made before the passing of that Act observed,—"It may be assumed that the framers of it (The Transfer of Property Act) in this section intend to state the existing Law and practice of India." The learned Vakil for the respondents referred to the case of *Ghulamnabi Khan* v. *Niazunnissa* (2). That case seems to us to be distinguishable from the present as there were two separate documents in it and it decided with reference to its own peculiar circumstances. The case of *Balkishen Dass* v. *W. F. Legge* (1), referred to above was not alluded to in the judgment and was apparently not cited. We are, therefore, unable to agree with the Court below in holding that the document of the 23rd of March 1871 was not mortgage by conditional sale.

As to the next question the facts are these,—On the 22nd of May 1906 three of the co-sharers in the village, namely, Birjraj Rai and others defendants Nos. 1, 5 and 6 presented an application to the Revenue Court for partition of their shares. In it they stated that their names were recorded in respect of a 1-anna 2-pie and odd share, that they owned other shares in regard to which their names were not recorded, and that they wished these shares to be partitioned. They further alleged that they were in possession of certain other shares as mortgagees and did not seek partition of these shares. Proclamation was issued as required be law and on the 26th of June 1906 the present plaintiffs appeared and prayed that a 9-pie share which they owned in the village should be formed into a separate *mahal*. This 9-pie share, we may observe, did not include the 6-pie share comprised in the mortgage of the 23rd of March 1871. On the 5th of July 1906 Ramlal Rai and others, and the set of co-sharers who included the defendants Nos. 7-10, 16 and 17, applied for partition of a 2-anna 8-pie and odd share. The Court below holds that when the defendants Birajraj Rai and others made their application for partition, it was the duty of the present plaintiffs to have come forward and objected to the partition and to have alleged that they owned a 6-pie share of which the applicants for partition were mortgagees and as they did not do so, they were precluded from maintaining their present claim. The learned Subordinate Judge apparently refers to section 233 K of the Land Revenue Act. As to this, we may point out that as in the application for partition it was clearly stated that the applicants did not wish the property held by them under mortgage to be included in the partition, there was no occasion for the plaintiffs, to raise any objections. Furthermore, if in applying for partition, the defendants included in their application the property mortgaged to them such application could not affect the interest of the mortgagors. If the mortgagee and the mortgagors had jointly made an application for partition of the mortgaged property, the said property could clearly have been partitioned under the provisions of the Land Revenue Act. The fact of the omission of the plaintiffs to raise any objection to the application made by the defendants was in substance an assent on their part to the application for partition of the mortgaged property. The effect of the partition was to divide the 6-pie share between the two sets of defendants, namely, the original applicants, for partition and Ram Lal Rai and others who, on the 5th of July 1906, also made an applicatien for partition of that share. There could be no objection to the mortgaged property being divided between the several mortgagees with the assent of the mortgagors. When the mortgagors redeemed the mortgage they would step into the shoes of the mortgagees in respect of the mortgaged share of each of the mortgagees and thus become co-sharers in the separate *mahals* formed under partition and the partition would not be interfered with. The present suit,

(1) 22 A. 149, 27 I. A. 58; 4 C. W. N. 153.

(2) 8 A. L. J. 129; 9 Ind. Cas. 140.

in our opinion, does not seek to disturb the partition which has taken place and in no way offends against the provisions of section 233 of the Land Revenue Act.

In this view we think the Court below was wrong in holding that as regards a 2-pie share, the plaintiffs were precluded by reason of the partition proceedings from maintaining the suit.

As there is no question that the property in dispute belongs to the plaintiffs, and as we have held that their predecessor in title mortgaged it to the predecessor in title of the defendants, the plaintiffs are entitled to redeem the mortgage. There is no controversy between the parties on any other point. We accordingly allow the appeal, set aside the decrees of the Courts below and decree the plaintiffs' claim with costs. We allow them six months from this date for payment of the mortgage-money, namely Rs. 700. The costs in this Court will include fees on the higher scale. The decree will be drawn up in the terms of Order XXXIV, rule 7, of the Code of Civil Procedure.

Appeal allowed.

MADRAS HIGH COURT.

APPEAL AGAINST ORDER No. 242 OF 1909.

April 25, 1911.

Present:—Mr. Justice Munro and Mr. Justice Sankaran Nair.

KONDAMA NAIDU AND OTHERS—APPELLANTS

versus

VENKALAKSHMI AND OTHERS—RESPONDENTS.

Decree, execution of—Construction of decree—Estoppel—Res judicata.

In execution of a maintenance decree the decree-holder made applications for sale of certain properties alleging that they were liable to be sold under the decree. The judgment-debtor had notice of these applications but did not object to the sale. In a subsequent application for sale it was contended that the decree did not authorise the sale of property:

Held, that the plea was untenable.

Subrama Iyyar v. *Nagammal*, 24 M. 683, referred to.

Appeal against the order of the District Court of Trichinopoly, in E. P. No. 125 of 1908, C. M. P. No. 236 of 1909, C. M. P. No. 241 of 1909, dated the 20th September 1909, in O. S. No. 1 of 1889 on the file of the District Court of Trichinopoly.

Mr. *K. N. Aiya*, for the Appellants.

Mr. *J. Natesa Aiyar*, for the Respondents.

JUDGMENT.—It appears that there have been previous applications for sale and that the sale has been ordered, the decree there being construed as directing a sale. This being so, if the 6th respondent in the lower Court (second respondent herein) had notice of these previous applications, he cannot now be heard to say that the decree does not direct sale of the properties made liable for maintenance. *Subbrama Iyer* v. *Nagammal* (1). The District Judge says it is not shown that the respondent had notice. It does not appear that any evidence has been taken on the point and neither party can refer us to any. We, therefore, ask the District Judge to find, taking such evidence as may be adduced, whether the sixth respondent in the lower Court (second respondent herein) had notice of the prior application for sale.

The finding should be submitted within six weeks and seven days will be allowed for filing objections.

In compliance with the direction contained in the above judgment the District Judge of Trichinopoly submitted the following

FINDING.—The appellants have filed six documents. The respondents have let in no evidence.

I am asked to find whether the sixth respondent in this Court (second respondent in the High Court and 21st defendant in the original suit) had notice of the prior applications for sale. Sale of the properties charged under the decree was ordered on 13th October 1894 under Exhibit B after attachment had been by an order of 23rd July 1894 (Exhibit A) and sale took place on 28th November 1894 (*vide* Exhibit E) and was confirmed on 13th December 1895 in Exhibit F (N.B. 94 is an obvious mistake for 95). I find that the sixth respondent became aware of this sale before it took place, because he put in a petition (Exhibit C) dated 10th November 1894, alleging that he became aware on 5th November 1894 of the intention to bring the properties to sale and asking that satisfaction might be entered up for Rs. 1,400 and that the attached property might be ordered to be sold for the balance. This petition was withdrawn on 27th November 1894. When execu-

(1) 24 M. 683.

tion was again taken in 1897 this respondent was served personally with notice (Exhibit H) upon an order which is Exhibit G but no attachment or sale took place. The application for sale in 1894 being within one year of the previous execution proceedings no notice was required by law to be given to the judgment-debtors. The sixth respondent, therefore, had the legal notice that the law requires, and he cannot plead want of notice. He himself asked that the sale should proceed and he cannot, therefore, now raise the objection that the decree does not direct sale of the properties made liable for maintenance. My attention has been called to certain remarks in the decision in *Ramasamy Naick* v. *Ramasawmi Chetty* (2) to the effect that notice, that further execution is to he applied for, will not be sufficient to make the order to sell certain property *res judicata* against a defendant. As in the present case the sixth respondent was clearly aware that execution was being taken by way of sale, I consider that the ruling has no application to the circumstances of the present case.

I answer the reference in the affirmative.

This appeal against order coming on for final hearing after the return of the finding of the lower Court, the Court delivered the following

JUDGMENT.—Accepting the finding we allow the appeal and remand the execution petition for disposal according to law. The appellants will have the costs of this appeal.

Appeal allowed

(2) 30 M. 255 at p. 258; 2 M. L. T. 167; 17 M. L. J. 201.

MADRAS HIGH COURT.

FULL BENCH.

FIRST CIVIL APPEAL NO. 107 OF 1905.

April 24, 1911.

Present:—Sir Arnold White, KT., Chief Justice, Mr. Justice Munro and Mr. Justice Sankaran Nair.

THE ZEMINDAR OF NUSVID—

APPELLANT

versus

THE SECRETARY OF STATE FOR INDIA, REPRESENTED BY THE COLLECTOR OF KISTNA—RESPONDENT.

Madras Act (*VII of* 1865), *ss.* 1 *and* 2 *and Rules framed under the Act—Levy of water-cess by Government—"Arrears of water-cess", meaning of—Right to levy cess retrospectively to the date of order.*

The right vested in Government under Madras Act VII of 1865 and the rules framed thereunder to levy water-cess can have effect only from the date of the levy. This levy cannot operate so as to entitle Government to claim arrears for a period antecedent to the levy.

The word 'arrears' in section 2 of the Act means payments which have become due and have remained unpaid after the levy was made.

Harrison v. *Stickney*, 2 H. L. Cas. 108; *Rajah Srinat Vencatraya Appa Rao* v. *Secretary of State*, 26 M. 51, distinguished.

Per *Sankaran Nair, J.*—The language of section 1 of Act VII of 1865 does not mean that the liability to pay water-cess attaches itself the moment that Government water is used.

Government cannot, at any time at their pleasure, impose the cess, the cess has to be imposed within the *fasli*, *i. e.*, before the crop on the land has been harvested.

On appeal from the judgment of the Subordinate Judge of Kistna.

Mr. *K. N. Aiya*, for the Appellant.

The Hon'ble the Advocate-General (Mr. *P. S. Sivaswami Aiyar*) and Government Pleader (Mr. *C. F. Napier*), for the Respondent.

JUDGMENT.

WHITE, C. J.—This is a suit in which the plaintiff claims a refund of water-cess and a declaration that the lands for which the cess has been paid are not liable to water-cess. The Subordinate Judge dismissed the suit and the plaintiff appeals. The claim for a declaration was not pressed in appeal.

Water-cess on the lands in question was collected in 1895, but it was refunded on the ground that it had been illegally collected. (See the order of the Tahsildar, Exhibit L. L., dated the 18th June 1895). This order states that the order for the refund of the tax was made by the Collector: The order of the Officer who directed the refund on the ground that the cess had been illegally collected is not in evidence. Nothig appears to have been done till March 1903, when the Collector served a notice on the plaintiff to show cause why water-tax should not be levied on the land in question. Subsequently, the Collector made an order directing that single water-tax should be charged on the land during the previous ten years and *fasli* 1312 (apparently taking things back to the year when tax had been collected, and refunded under the order of the Officer of Government). See Exhibit A. A. A. The plaintiff

asks for a refund of the cess paid by him under protest for the period antecedent to this order, that is for the 11 years up to and inclusive of *fasli* 1312; he does not now dispute his liability to pay the tax from and after the receipt of the order of the 6th March 1903. The Government claim the right to collect the tax for 11 years as arrears of water-cess payable under Madras Act VII of 1865. The circumstances in which the tax was collected in 1895, and refunded on the ground that the collection was illegal, are not very clear. But I am quite prepared to hold, for the purposes ef this case, following *K. Chidambara Rao* v. *The Secretary of State for India in Council* (1) that the action of the Officer of Government in 1895 did not bind Government in the sense that they could not thereafter levy at pleasure on the land a separate cess for the water. But I am not prepared to hold that the order of the Collector, notwithstanding the fact that it was not repudiated by Government till 8 years later, was ineffective for all purposes. Assuming that what was done prior to 1895 amounted to a levy of a separate cess for water under the Act, Government have, in my opinion, not made out(and the onus is clearly on them) that whereas the Officer who made the levy was the authorized agent of Government in that behalf, the officer who set aside the levy and directed the refund was not.

Government have recently levied a separate cess for the water and the question is – and this was the main question argued before us --does this levy, under the powers conferred by the Act, or under the rules, which by the Act Government are empowered to make, operate retrospectively so as to entitled the Government to claim "arrears".

I know of no other fiscal enactment in which such a power has been given. The cess is levied on the land. It is a charge on the land irrespective of the fact whether the owner of the land for the time being has had any benefit from the supply or use of the water or not. To create such a charge retrospectively might, specially in cases where there had been a change of ownership, in my opinion, in many cases work a hardship.

Under the Act the Government have a discretien "to levy at pleasure on the land so irrigated a separate cess for such water." They are under no obligation to levy this separate cess. Rules have been made as to the circumstances in which and the rates at which the separate cess is to be levied. It was not suggested that the making of these rules constituted a levy of the cess. If I am right in my mind that we cannot hold on the evidence that the tax continued to be "levied" from 1895 or some earlier date, onwards, there can, I think, be no question (in fact I don't think the Advocate-General contended otherwise) that the Collector's order of the 6th March 1903 constituted the levy. We are asked by the Advocate-General to hold that the tax is payale for a period of time before it was "levied," in my opinion, there is nothing in the Act or the rules, which would warrant such a conclusion.

I think the word "arrears" in section 2 of the Act means payments which have become due and have remained unpaid after the levy was made. The section provides that arrears of water-cess payable under the Act shall be realised in the same manner as arrears of land revenue. Under section 3 of the Land Revenue Act (II of 1864) the land-holder pays the land revenue due on his land or according to the *kistbandi* or other enjoyment." Section 4 provides that when this revenue is not so "paid" it is to be deemed to be an arrear of revenue. Under the Land Revenue Act an arrear is *kist* not paid under an engagement. I think an "arrear" of water cess under the Act of 1867 has the same meaning. The engagement may, of course, be express or implid, but I do not think the mere use of the water, at any rate when the use was under the *bona fide* belief—a belief brought about by the action of the officer of the Government—that Government did not intend to charge for the use, constitutes an engagement. The case of *Harrison* v. *Stickney* (2) and the other authorities cited by the Advocate-General, with all respect to him, seem to me to have very little bearing on the question we have to decide. I, of course, accept the proposition that there is no rule of law which prohibits a retrospective rate, that is, a rate for the purpose of raising funds for the purpose of discharging a liability already incurred. But the contention on behalf of Government

(1) 26 M. 66.

(2) 2 H. L. Cas. 108.

is that they have power to collect the rate for a period before the levy is made. *Raja Suraneni Venkata Papayya Rau* v. *The Secretary of State for India* (3) does not touch this point, as in that case I understand it, there was no claim for "arrears". In that case, the right of Government to levy wet assessment and supply water was held to be a right by way of easement and not a right under the Act. As regards the rules, they would seem to contemplate two classes of cases—cases where cultivators of land registered as dry apply for water (Rule VI, Standing Orders of the Board of Revenue, Volume II, page 3) and cases where water is taken before an application is made (Rule V). The present case obviously does not fall within rule I. The only rule which applies would seem to be rule V under which Government have taken power to levy a penal right.

The defence that the plaintiff did not pay under coercion was not pressed. I would allow the appeal as regards the claim for the period prior to March 6th, 1903, that is, Rs. 9,391-10-4 and interest at 6 per cent. from date of plaint up to date of payment on Rs. 9,118-1-8. Time for payment is 6 weeks from this date. Respondent will pay the Court-fee on the claim for refund here and in the Court below. In other respects the parties will pay their own costs.

SANKARAN NAIR, J.—For the Agraharam village of Veluporum quit rent was charged and *inam patta* issued in the year 1859 by the *Inam* Commissioner. In that *patta* the lands situate in the said Agraharam were entered as dry land. In 1868 the wet *ayacut* of the Agraharam village was fixed at 177 acres and from that date in all the accounts of the subsequent *faslis* it was shown that 177 acres were exempted from water-tax, that is, were lands for which water had to be supplied free from sources of irrigation belonging to Government. On the 3rd June 1892 the Deputy Collector Mr. Surya Rao Naidu localised the *mamool* wet and passed an order declaring that the extent aforesaid was exempt from any water-tax. However, on 31 acres out of this land water-cess appears to have been collected sometime after. But on the 27th June 1895, the Collector passed orders refunding to the *inamdar* owner of the village Rs. 124-0-8, the amount of tax collected as in his opinion no cess ought to have been levied. In 1903 another considered that the Deputy Collector's order of 1892 was passed under a wrong impression and without proper inquiry and cancelled it and levied from the plaintiff (*inamdar*) the charge which he was of opinion ought to have been paid on the extent of land which was irrigated during the ten previous *faslis*.

The plaintiff now brings this suit for a declaration that the lands in his Agraharam village were wrongly entered in the *patta* given to him by the *Inam* Commissioner as dry lands; that they were really *mamool* wet lands, that is to say, lands in respect of which he is entitled to be supplied with water by the Government to carry on wet cultivation without any liability to pay water-cess; and to recover from the Secretary of State the sum of Rs. 9,391-10-4 the amount collected by the defendant from the plaintiff on account of water-cess for 11 years from *faslis* 1302 to 1312.

The Subordinate Judge found that the entry in the *patta* by the *Inam* Commissioner was not an error. His finding on this point is not challenged in appeal with reference to the plaintiff's contention that the *ayacut* of wet cultivation was finally declared after a full consideration in 1868 by the Deputy Collector and that it was afterwards acted upon by the Collector and such decision is, therefore, binding upon the defendant, he held that the *Inam* Commissioner was the proper person empowered by the Government to deal with these questions and the Collector's action in this matter based, as it was, on an erroneous principle was *ultra vires* and not, therefore, binding upon the defendant. Against this finding also no objection has been taken before. The only question, therefore, which has to be determined is the plaintiff's right to recover the amount levied for water-cess. This cess is levied under Act VII of 1865 which is an Act to enable the Government to levy a separate cess for the use of water supplied for irrigation purposes in certain cases.

Section 1 of the Act declares that when water from a source belonging to Government is supplied or used for irrigating land "it shall be lawful for the Government to levy at pleasure on the land so irrigated a separate cess for such water" and it also provides that the Government may prescribe the rules under which and the rates at which it shall

(3) 26 M. 51

be levied, under section 2 arrears shall be realised in the same manner as land revenue is realized. The rules, therefore, so far as they are authorised by the Act, have the force of law. Under these rules a cultivator may apply for water to the head of the village who is required to submit it to the *Tahsildar*. In certain cases the *Tahsildar* has to submit them to the Public Works Department. And the *Tahsildar* may then pass final orders on the application. There are printed forms of application on which orders have to be passed. In that application the applicant has to state the area for which water is wanted and whether it is required only for one year or not. If it is not stated to be for a year only water will continue to be supplied for the succeeding years without any fresh application. There are water rates per acre fixed for the extent for which water is supplied. Thus, the applicant knows the cess he has to pay for the water that may be supplied to him. When water is taken for land without the sanction of the *Tahsildar* double water rate is charged for persistent breach of rules or for other sufficient cause a penal charge equal to five times the ordinary water rate may be levied.

The Advocate-General contends that when water is used for the cultivation of the land a liability to pay the water-cess attaches itself to the land and that such liability is not imposed by reason of the engagement between the cultivator who applies for the water and the Government as evidenced by the grant of his application in the first case and the supply of water in accordance therewith nor by the imposition of the cess under section 1, clause (*b*), after the Collector has satisfied himself that the conditions referred to therein exist when the water is used without such sanction of Government. If the Advocate-General is right, the Government may enforce that liability at any time and no official unless specially authorized to do so can waive it.

The words of the section are that "it shall be lawful for the Government to levy at pleasure on the land irrigated a separate cess." These words do not support the contention advanced that the liability attaches itself the moment water is used.

I am also satisfied that the Government cannot any time at their pleasure impose the cess; the cess, in my opinion, has to be imposed within the *fasli*, (*i. e.*,) before the crop on the land has been harvested. If this view is right that would also show that the liability arises only by the imposition and not by the use of the water; otherwise the Government would be able to recover it at any time. This appears to be the case from the words of the section itself and also from the rules, section 1 clause (*b*) provides that in the circumstances therein referred to, the Collector has to satisfy himself that the irrigation is beneficial to and sufficient for the requirements of the crop on the land irrigated. This can only be properly done when the crop is on the land, as it appears to me that it was not contemplated that the Collector is to decide these questions by taking evidence after the year is over. Whether the irrigation is beneficial and whether it is sufficient for the requirements of the crop can only be satisfactorily settled by personal inspection. It would depend upon various circumstances about which evidence can scarcely be forthcoming afterwards. The fact that the jurisdiction of the Civil Courts is ousted in this respect also supports this view. This is also consistent with the rules which require that *jamabandi*, *i. e.*, the annual settlement "must be completed within the *fasli* year at the latest"; and that such annual settlement should be conducted with a view to ascertain and record the demand of all the items of land revenue within the *Taluks.* (The word "all" italics in the rule itself). A different rule cannot apply to clause (*a*) of section (1). It seems to me to be clear, therefore, that if lands have been cultivated with water from Government sources then it is the duty of the Government officials at the time of the *jamabandi* wihin the *fasli* and before the crop is harvested to impose the charge liable if such water has been used without the sanction of the authorized officials.

The fact that there is another rule which provides for the persistent breach of the rules would also go to show that double water rate is to be imposed within the *fasli*. Under the Act, therefore, the Collector was not authorised to levy the water-cess for ten years.

If the plaintiff *Inamdar* may now be declared liable for water which was used by the cultivators how is he to apportion the liability or recover any additional rent from the tenants. It would be extremely difficult

to ascertain their liabilites *inter se* and, even if ascertained, recovery of arrears for a comparatively long time would in some cases be impossible and in other cases difficult. If the Government demand is collected during the *fasli* these difficulties are avoided.

If the charge could be levied years after, if the Collector, as he claims in this case, is entitled to recover in *Fasli* 1313 the water-cess for *faslis* subsequent to *Fasli* 1302, a *bona fide* purchaser may be called upon to pay the cesses due long before his purchase of which he had no notice and about which there may have been previous orders (as in this case) exempting the owner from payment.

These considerations support the inference derivable from the natural meaning of the words that the liability arises from the imposition of the cess not by the use only and that the cess has to be imposed before the expiry of the *fasli* year when the crop is on the land.

It also appears to me that the rules framed by the Government under the Act which have got the force of law in so far as they are authorized by the Act itself show that the plaintiff is not bound to pay this assessment. The rules which I have set forth above contemplate two classes of cases. Whether water is used with sanction applied for and granted and water is used without such sanction.

The present case does not fall within the first class where the cess payable is ascertained, nor within the second class which refers to unauthorized use of water. The *Tahsildar* is the person to sanction the application for water, but an officer to whom he is subordinate, the Deputy Collector, had issued orders, under which water had to be supplied to the plaintiff and when the *Tahsildar* on one occasion collected a water-cess, the District Collector directed a refund. It cannot be said that there was any unauthorized use of water for which a "penal" charge can be levied.

As I have already pointed out, it is unnecessary to make applications for water every year once the application is granted until the order granting it is cancelled.

Every year's demand has to be ascertained within the year itself and among the objects of the *jamabandi* is stated to be the careful inspection of cultivation, the consideration of all claims to remission and the collection of all *kists* as they fall due. If the Collector had the power to declare in 1903 that the land is liable to pay water-cess, his predecessor had also the power, it appears to me, to decide that such land is not liable to pay the cess. The Collector, in 1903, may cancel the orders issued before just in the same way as the Collector, who passed the order in 1895 could have cancelled it himself as there is no law preventing him from doing so. But until the order is cancelled by himself or by a superior authority there is no reason why those interested should not be bound thereby.

I am, therefore, of opinion that the claim of the Collector to impose assessment on the lands for the ten *faslis* in question cannot be sustained as to the *Faslis* 1312, as the Collector's order was in force till it was cancelled, and as it was alleged that no water was taken during the rest of the *fasli*, the claim to impose assessment during that year also cannot be sustained. The plaintiff is entitled to a refund with interest at 6 per cent. I accordingly agree to the decree suggested by my Lord the Chief Justice.

MUNRO, J.—The material facts are not now in dispute and may be briefly stated. The Government is entitled under Act VII of 1865 and the rules framed thereunder to levy water-cess on the lands to which the suit relates when irrigated by Government water, for a long time the lands were so irrigated, that no charge for water was made save on one occasion. The amount thus collected was in 1895 refunded by the Collector on the ground that the charge was illegal and water continued thereafter to be supplied without charge. In 1903, the then Collector found out the mistake that was being made, and by an order dated 6th March 1903, directed that single water rate should be charged for 10 *faslis* ending with *fasli* 1311, and also for *fasli* 1312, in which *fasli* the order was passed. The amount thus held to be due was collected on the 27th May 1903, the plaintiff-appellant paying under protest. The plaintiff then brought the suit out of which the present appeal arises to recover the amount paid and for other reliefs not now pressed.

To the charge for *Fasli* 1312, I do not think the plaintiff is entitled to object. Water was taken in that *fasli* and was charged for within the *fasli*. The question then is, whether the charge for the previous 10 *faslis* was illegal. This will depend upon whether the charge was justified by Madras Act VII of 1865 or the rules framed thereunder.

Under section 1 of the Act whenever water from a Government source is supplied or used for purposes of irrigation, the Government, certain conditions being fulfilled, "may levy at pleasure on the land so irrigated a separate cess for such water, and the Government may prescribe the rules under which and the rates at which water-cess as aforesaid may be levied, and alter and amend the same from time to time." For the rules made by the Governmet under the section and relevant in the present case we have been referred to the second and following pages of Volume II of the Standing Orders of the Board of Revenue, Edition of 1907. The Act also provides under section 2 that arrears of water-cess may be realised in the same manner as arrears of land revenue, that is in accordance with the procedure laid down in Madras Act II of 1864.

It has been contended for the defendant that the water-cess charged for the 10 *faslis* prior to *Fasli* 1312 may be properly regarded as arrears of water-cess for those *faslis*, and is, therefore, recoverable under section 2 of the Act. Now, an arrear of land revenue is defined in Act II of 1864 as revenue which is not paid by the date on which it falls due according to the *kistabandi*, water-cess is under the rules payable according to the *kistabandi*, and an arrear of water-cess should, I think, be defined, *mutatis mutandis* in the same way as an arrear of land revenue. It is difficult to conceive how water-cess which was not demanded in respect of the lands in suit till *Fasli* 1312 and which the plaintiff was given to understand was not due as above stated, can be said to have fallen due in *faslis* prior to 1312, so as to come under the definition of arrears for those *faslis*. It is contended, however, that the liability to pay water-cess was incurred in each *fasli* by the mere fact of taking Government water and apart from any order of the authorities demanding payment for the water. A perusal of the Act and rules shows that this contention is untenable, under section 1 the Government may at pleasure levy water-cess. Equally "at pleasure," it may not. Until, therefore, the Government indicates its intention to charge water-cess, no liability is incurred by taking water. Turning to the rules we find in Rule V, which deals with the unauthorised use of water, that the Collector has power to make a penal charge, and may also at his discretion reduce or remit the penalty, so that there is no liability until the Collector has made his order.

It is not alleged that the Government has itself made any charge for water taken for the lands in suit. The only charge is the charge made by the Collector by his order of the 6th March 1903; the legality of that order depends upon whether it is authorized by the rules under which the Government has delegated certain powers. The question is whether the rules justified any order charging water-cess for *faslis* other than the *fasli* in which the order is made. One of the underlying principles of the land revenue administration is that all charges should be ascertained and recorded within the *fasli* to which they relate.

(See B. S. Order XII, which deals with the *Jamabandi* or annual settlement.)

I have no doubt that the principle is meant to underly rules for charging water-cess, and there are numerous indications in the rules that it does. On the other hand, I can find nothing in the rules which can be construed as a provision for imposing water-cess for prior *faslis*. The rule which, according to the defendant's contention, applies to the present case is Rule V. I think, however, it would be very difficult to hold that the present is a case of unauthorized use of water. If the rules do not apply, and I think they do not, the charge was illegal, and the plaintiff is entitled to recover. Even if Rule V is held to be applicable the defendant is in no better position. Under that rule when water is taken without permission, a water rate equal to twice the water rate prescribed in Rule 1 for the particular crop irrigated is ordinarily to be levied as a penalty. One object of the penalty is, it may reasonably be presumed, to deter the person charged from taking water without permission in future years. For persistent breach of the rules or other sufficient cause the Collector may enhance the penal charge up to five times the ordinary water rate, "persistent" breach of

the rules would imply that the person charged has already been warned and possibly penalised in prior *faslis*, and to that extent, no doubt what has happened in prior *faslis* is inquired into. But the charge for persistent breach of the rules is manifestly a charge for the last breach and not a charge for water taken in prior *faslis*.

The manner in which the penalties are limited is also a clear indication that they are imposed in respect of the last occasion on which water has been taken without permission. Nor can it be successfully argued that the charge may be treated as good for the five *faslis* ending with 1312, inasmuch as for 1312, the Collector might have charged five times the ordinary water-cess. If the rule applies, the Collector might have done so, but in fact he did not and we are only concerned with what he did. I think it is clear, therefore, that the Collector had no authority to pass the order of the 6th March 1903, with regard to *faslis* to prior to 1312. I would, therefore, allow the appeal as regards the charge for the ten *faslis* ending with *Fasli* 1311, and dismiss it as regards the charge for *Fasli* 1312 and the other relief not pressed. I agree with the principle on which costs are awarded by my learned colleagues.

Appeal allowed.

(s. c. 13 Bom. L. R. 273).

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 115 OF 1906.

February 18, 1911.

Present:—Sir N. G. Chandavarkar, KT., Justice, and Mr. Justice Heaton.

THE SECRETARY OF STATE—APPELLANT

versus

GAJANAN KRISHNA MAVLANKAR—RESPONDENT.

Civil Procedure Code (Act XIV of 1882), s. 424—Interpretation—Suit against Secretary of State—Injunction—Notice may be dispensed with in case of immediate need.

In section 424 of the Civil Procedure Code of 1882 the repetition of the word 'against' shows that the 'act' described in the section was meant to relate only to the public officer, not to the Secretary of State.

The words "no suit shall be instituted against the Secretary of State in Council" are wide enough to include suits of every kind, whether for injunction or otherwise.

Where there is serious injury so imminent that it can only be prevented by an immediate injunction, a Court will not be debarred from entertaining the suit and issuing the injunction though the section requires previous notice, if it is owing to the immediate need of the injunction that the plaintiff has come to the Court for relief before giving the required notice.

First appeal from the decision of the District Judge of Ahmedabad, in Suit No. 18 of 1904.

Mr. *Strangman* (Advocate-General), (with Mr. *R. W. Desai*), for the Appellant.

Mr. *Lowndes* (with Messrs. *G. S. Rao* and *Ratanlal Ranchhoddas*), for the Respondent.

JUDGMENT.

CHANDAVARKAR, J.—In my opinion, on a proper construction of section 424 of the Civil Procedure Code of 1882, notice was necessary in this case, as a condition precedent to suit. The words in the section are: "No suit shall be instituted against the Secretary of State in Council, or against a public officer in respect of an act purporting to be done by him in his official capacity." From the repetition of the word "against" I think the "act," described in the section, was meant to relate only to the public officer, not to the Secretary of State. It shows that the Legislature intended to differentiate between the Secretary of State and other public officers. Further, if the words "in respect of an Act", etc., had been intended by the Legislature to apply to the Secretary of State also, it would have been more appropriate to use the words "done by either" instead of the words "done by him."

The question is not quite free from difficulty. In *The Secretary of State for India in Council* v. *Rajlucki Debi* (1), Ameer Ali, J., construed the section in a different way. In appeal from his decision Maclean, C. J., was inclined to differ from that construction; but the appeal was decided on other grounds and so the learned Chief Justice's opinion was a mere *obiter dictum*.

The considerations in support of the construction contended for by the learned Advocate-General in support of the present appeal seem to me to be stronger than those urged for the other construction.

But it is urged by Mr. Lowndes for the respondent that, at all events, notice is not necessary in a suit for an injunction against the Secretary of State; and in support of that the learned Counsel relies on the principle of the decision in *Flower* v. *Local Board of Low Leyton* (2) as controlling the in-

(1) 25 C. 239.

(2) (1871) 5 Ch. D. 347; 45 L. J. Ch. 621; 36 L. T. 760; 25 W. R. 545.

terpretation of section 424 of the Code of Civil Procedure. No doubt, in that English case, it was held that in suits for an injunction no notice is necessary; but that was on the construction of the particular section of the Act there concerned. The words of the section which had to be construed there were, "an act done or intended to be done or omitted to be done" and the learned Judges held that upon a proper construction of the language of the section there, what the Legislature had in view, was an act done, not an act threatened. An injunction, it was said there, is sought in respect of an act threatened; and, therefore, the words in question were held not to apply to a suit for an injunction. But that is not the case before us.

If I am right in my construction of section 424, the words "no suit shall be instituted against the Secretary of State in Council" are wide enough to include suits of every kind, whether for injunction or otherwise. It may be that in any particular case the circumstances might be such as to satisfy the Court that it was practically impossible to give a notice, because the act threatened was so imminent that the plaintiff was driven to a suit by the conduct of Government. In such a case it might be that the Court would hold that no notice as a condition precedent to suit was necessary.

But that would be, not because of the law in section 424 of the Civil Procedure Code, but because of the introduction into the suit of another law, *viz.*, that the defendant by his conduct had brought about a state of things which prevented the plaintiff from complying with the provisions of the section in question.

No such case arises here. On the ground, therefore, that no notice was given by the plaintiff as required by section 424, the suit must be held bad. The decree of the Court below must be reversed and the suit dismissed with costs throughout upon the respondent.

HEATON, J.—I am of the same opinion as to the construction of section 424. I am unable to understand how *Flower's case* (2) is an authority for saying that a suit is excluded from the operation of section 424 of the Civil Procedure Code because it is a suit for an injunction. On this point the observations of the Chief Justice of Bengal reported in the case of *The Secretary of State for India in Council* v. *Rajlucki Debi* (1) are very pertinent. We cannot take *Flower's case* (2) as an authority for the construction of a section in an entirely different Act, in different terms and for a different purpose. We can at best only look to the principle underlying the decision there. The principle of that case is not, as I understand it, that the words of such a section as that under consideration, though in terms covering such a suit, cannot apply to any suit for an injunction. Its meaning, so far as it is general, is, I think, this : where there is a serious injury so imminent that it can only be prevented by an immediate injunction, a Court will not be debarred from entertaining the suit and issuing the injunction though the section requires previous notice; if it is owing to the immediate need of the injunction that the plaintiff has come to the Court for relief before giving the required notice. The reason is that to wait until the due notice had been given would be to allow the injury which it is the object of the suit to prevent, so there would be a clear denial of justice. The principle is, that in construing an Act we are to read the words in the light of the object of the Act and are to presume that a consistent purpose underlies those words. The purpose of the Code of Civil Procedure, broadly put, is to regularise and facilitate the work of the Courts ; so that they may be best able to do justice. That purpose would, no doubt, be defeated if an injunction were immediately required and absolutely necessary in order to prevent serious injury and yet the Court could not issue it. It must be presumed that this is not intended unless it is specifically expressed. To that extent, speaking for myself, I would follow the principle of *Flower's case* (2). But, of course, one would have to be very clearly satisfied that an immediate injunction was absolutely essential. There is no indication here that serious and irreparable injury would follow from failure, to obtain an immediate injunction: or that any injury whatever, which could not be amply and appropriately recompensed by damages, would ensue from delay in issuing an injunction.

Appeal allowed.

BHAGABATI BARMANYA *v.* KALI CHARAN SINGH.

(s. c. 15 C. W. N. 393; 9 M. L. T. 411; 13 C. L. J. 434; 21 M. L. J. 387; 8 A. L. J. 433; 13 Bom. L. R. 375.)

PRIVY COUNCIL.

APPEAL FROM THE CALCUTTA HIGH COURT.

February 14, 1911.

Present: - Lord Macnaghten, Lord Robson, Sir Arthur Wilson and Mr. Justice Ameer Ali.

BHAGABATI BARMANYA AND ANOTHER — DEFENDANTS—APPELLANTS

versus

KALI CHARAN SINGH AND ANOTHER — RESPONDENTS.

Hindu Law—Will—Bequest to a class some of whom unborn—Bequest not void - Valid as to those born at testator's death - Construction of documents - English rules not applicable.

Where there is a gift to a class, some of whom are or may be incapacitated from taking because not born at the date of gift or testator's death, as the case may be, and where there is no other objection to the gift, it should enure for the benefit of those members of the class who are capable of taking.

Ram Lal Sett v. *Kanai Lal Sett*, 12 C. 663, approved.

Leake v. *Robinson*, (1817) 2 Mer. 363; 16 R. R. 168, not followed.

Rules established in English Courts for construing English documents are not as such applicable to transactions between natives of this country.

Appeal from the judgment of the High Court of Calcutta, dated June 1st, 1905, reported in 32 C. 992, 9 C. W. N. 749, affirming that of the District Judge of Murshidabad, dated April 24th, 1903.

Sir *R. Finlay*, *K. C.* and Mr. *G. E. H. Ross*, for the Appellants.

Mr. *DeGruyther*, *K. C.* and Mr. *Dube*, for the Respondents.

JUDGMENT.

LORD MACNAGHTEN.—This is an appeal from a judgment of the Calcutta High Court delivered by Maclean, C. J., affirming a decree of the District Judge of Murshidabad.

The question turns upon the meaning and effect of the Will of a Hindu gentleman named Ram Lal Singh. The Will was executed on the 2nd of March 1868. The testator died on the following day.

At the date of the Will the state of the testator's family was this. The testator had no issue. His mother and his wife were alive and he had four sisters living. Two were childless widows. The other two had male offspring.

The Will, so far as material, is in the following terms:—

"My mother, Phudan Kumari Barmanya and my wife, Bhagabati Barmanya, shall, as long as they live, hold possession of all my properties, moveable and immoveable, and enjoy and possess the same on payment of the Collectorate revenue and the *zemindars'* rents, and by maintaining intact and continuing the service of the established deities and the ancestral rites according to the practice heretofore obtaining, and shall pay off my debts and realise my dues. They shall not be competent in any way to transfer the immoveable property to anyone. On the death of my mother and my wife, the sons of my sisters, Golap Sundari Barmanya and Anrapurna Barmanya, that is to say, their sons who are now in existence, as also those who may be born hereafter, shall, in equal shares, hold the said properties in possession and enjoyment by right of inheritance, and shall maintain intact and continue the service of the established deities and the ancestral rites according to the practice heretofore obtaining."

The difficulty, so far as there is any difficulty in construing the Will, is occasioned by the bequest to the afterborn sons of the testator's two sisters which has been taken to include nephews born after the testator's death. It may perhaps be doubted whether the Will properly construed gives rise to the question on which so much argument has been expended. If an English Will expressed in similar terms were before an English Court it would probably be held that the gift to after-born children was confined to children coming into existence between the date of the Will and the testator's death. There is nothing in the circumstances in which this Will was made, though the testator died the next day, to render that view improbable, for he expressly provides that if he recovers the Will shall hold good unless altered.

"The real doctrine of the Court," says Wood, V. C., in *Mann* v. *Thompson* (1), "is that when children are mentioned in a Will that means *prima facie*, if no intervening interest be given, that which is considered to be the testator's meaning in the case of a gift to individuals, namely, those who may be living at the death of the testator. If the gift be not immediate it may be that he intends to include all those children who may be living at the time of distribution, and the Court judges

(1) (1854) 1 Kay. 638 at p. 643; 18 Jur. 826; 2 W. R. 582.

of the intention in this respect from the whole scope of the Will."

The rule is not altered by the addition of words of futurity as if the gift be to children "born and to be born" or to children "begotten and to be begotten." In accordance with this rule a gift expressed to be to a daughter and her husband and "their child now existing and also the other children which may hereafter be procreated" was held by this Board to be limited to children born between the date of the Will and the testator's death. *Dias* v. *De Livera* (2). The fact that this rule is a rule of convenience is some reason for applying it to Hindu Wills, and an additional reason may be found in the well-known doctrine of Hindu Law that a gift to an object not in existence is absolutely void. But, however, this may be it has been assumed throughout that the testator intended children born after his death to be included in the gift. And their Lordships propose to deal with the case on that assumption.

It will be convenient at the outset to dispose of a point suggested by the words "by right of inheritance." It was said that there was really no bequest in favour of the nephews and that so far as they were concerned the Will only declared a right of inheritance. The High Court had no difficulty in rejecting that contention, and their Lordships are of the same opinion. It is not very easy to determine the proper meaning of the expression translated by the words "by right of inheritance." The learned Chief Justice explains that the literal translation should be "as after takers," and he adds that "it may be that the testator used the expression in the sense that the nephews would take with the same incidents of proprietorship as heirs would." Whatever the exact meaning of this doubtful expression may be, it cannot, in their Lordships' opinion, have been inserted for the purpose of rendering meaningless words which had only just been used.

Apart from this point, the learned Counsel for the appellant argued in the first place that there was no vesting until the death of the survivor of the mother and the widow. Their Lordships, however, think it is clear on the construction of this Will that the nephews were intended to take a vested and transmitable interest on the death of the testator, though their possession and enjoyment were postponed. Whether it was the intention of the testator that on the birth of nephews after his death interest vested should be divested so as to let in such after-born nephews is another question.

It was contended, in the second place, (and this, of course, was the principal contention) that the gift including, as it did, a gift to persons not in existence at the time of the testator's death was altogether void.

Upon this question there has been, as the learned Chief Justice observes, a conflict of judicial opinion in Inida. But in their Lordships' opinion the question was set at rest for all practical purposes by the judgment of Wilson, J., as he then was, in the case of *Ram Lal Sett* v. *Kanai Lal Sett* (3).

In that case the learned Judge disposed of the cases which had been treated in India as authority for introducing into the construction of Hindu Wills the rule commonly referred to as the rule in *Leake* v. *Robinson*(4). He showed that the rule was introduced into India owing to a mistaken analogy, and at the end of a judgment, which leaves nothing more to be said he stated that he should be "prepared to hold as the general rule that where there is a gift to a class, some of whom are or may be incapacitated from taking because not born at the date of gift or the death of the testator as the case may be and where there is no other objection to the gift, it should enure for the benefit of those members of the class who are capable of taking."

In that conclusion their Lordships agree and they are glad to have this opportunity of expressing their entire concurrence in the judgment to which they have referred. It would serve no useful purpose to recapitulate the learned Judge's arguments. But there is one passage at page 678 to which their Lordships desire emphatically to call attention. It is this:—

(2) (1879) 5 A. C. 122; 49 L. J. P. C. 26; 42 L. T. 726.

(3) 12 C. 663.

(4) (1817) 2 Mer. 363; 16 R. R. 168.

FAUJA SINGH *v.* EMPEROR.

"It is no new doctrine that rules established in English Courts for construing English documents are not as such applicable to transactions between natives of this country. Rules of construction are rules designed to assist in ascertaining intention, and the applicability of many such rules depends upon the habits of thought and modes of expression prevalent amongst those to whose language they are applied. English rules of construction have grown up side by side with a very special law of property and a very artificial system of conveyancing, and the success of those rules in giving effect to the real intention of those whose language they are used to interpret depends not more upon their original fitness for that purpose than upon the fact that English documents of a formal kind are ordinarily framed with a knowledge of the very rules of construction which are afterwards applied to them. It is a very serious thing to use such rules in interpreting the instruments of Hindus, who view most transactions from a different point, think differently, and speak differently from Englishmen, and who have never heard of the rules in question."

Their Lordships will humbly advise His Majesty that this appeal should be dismissed.

The appellant will pay the costs of the appeal.

Solicitors for the Appellants: *Mr. G. C. Farr.*

Solicitors for the Respondents: *Messrs. T. L. Wilson & Co.*

Appeal dismissed.

(s. c. 55 P. L. R. 1911; 10 P. W. R. 1911 Cr.).

PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 565 OF 1910.

January 14, 1911.

Present:—Mr. Justice Kensington and Mr. Justice Rattigan.

FAUJA SINGH AND OTHERS—CONVICTS—APPELLANTS

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), ss. 149, 304—Culpable homicide not amounting to murder—Unlawful assembly, offence committed by a member of.

B. reported to the Police that she had been assaulted by *F.* and others. The Police declined to take action and referred her to a Magistrate. The accused *F.* and his companions went to *B.*'s house to taunt her on her failure to obtain any satisfaction from the Police. A tenant of *B.*, who was in *B.*'s house at the time, took up a stick and came out and abused and threatened the intruders but *F.* struck him on the head with a *chhavi* from which he died. *F.* was convicted under section 304, Indian Penal Code, and his companions under section 149 read with section 304 of the Indian Penal Code:

Held, that *F.* was rightly convicted but that his companions must be acquitted, because none of them took any part in the assault at *B.*'s house. Their going to *B.*'s house to jeer at her did not make them members of an unlawful assembly.

Appeal from the order of the Sessions Judge, Lahore Division, dated the 15th July 1910, convicting the appellants.

Messrs. *Grey* and *Ganpat Rai*, for the Appellants.

Lala *Mul Chand*, for the Respondent.

JUDGMENT.—The two appeals Nos. 564 and 565 may be disposed of by one order. They cover the cases of five persons, who have been convicted as follows:—

Fauja Singh under section 304 part (1) of the Indian Penal Code, sentenced to transportation for life, and the remaining four appellants, including two elder brothers of Fauja Singh, under sections 304 and 149 of the Indian Penal Code, sentenced to rigorous imprisonment for five years each.

The case for the appellants has been argued before us at considerable length and we have to deal with a somewhat confused story, in the course of which reference has been made to no less than four cases of violent death loosely described as murders, which have occurred within the last twelve years or so among various members of the family to which *Musammat* Bhago (P. W. No. 5) and all the appellants belong. The names of the persons described as murdered in this way are (1) Daya Singh, father of *Musammat* Bhago's deceased husband, (2) Arur Singh, uncle of appellants Fauja Singh, Jagat Singh and Teja Singh, (3) Wadhawa Singh and (4) Wadhawa Singh's widow, *Musammat* Jawali, the latter having been killed so recently as 1909. The pedigree-table put forward by the defence has not been properly authenticated, but it is sufficiently clear that the appellants Mangal Singh and Kishan Singh

are very remote collaterals of the remaining three appellants, sons of Suja Singh, and also that the whole of the appellants are remotely related to that section of the family to which Bahadur Singh and *Musammat* Bhago belong. We do not think that any direct connection can be traced between any of the previous so-called murders and the present affair, but it is clear that there is so much bad feeling in the village generally, and in particular between certain *Jat* proprietors and the *Biloch* tenants of some of them, that the prosecution evidence in the present case has to be closely scrutinized.

The present affair occurred according to the prosecution in the early evening of the 12th January 1910. It was not reported till 6 A. M., of the 13th though the *thana* was only 6 *kos* away. The explanation of the delay given by the prosecution is, *firstly*, that the relatives and friends of the deceased Pahlwan were at first taken up with attendance on him and only thought of reporting after his death, and *secondly*, that the village *lambardars* declined to actively assist in getting the matter reported promptly. On the other hand, the allegation of the defence is that the affair really took place at some time in the night, no one exactly knowing when or how Pahlwan met with his fatal injury. We are inclined to think that the prosecution story is the more correct of the two on this particular point, and we take it that the affair really occurred early in the evening and not far on in the night. It follows that whatever the cause of the delay in reporting may really have been, there was at any rate so much delay that the parties interested had ample time to make up their minds what story they would tell before going to the *thana*.

We are supported in this conclusion by the fact that the first report is now admitted to have been exaggerated in various particulars and especially in so far as Bagga Singh, brother of Mangal Singh, appellant, was named as one of the principal offenders. In the course of the inquiry it transpired that there was good reason for holding it to be most improbable that Bagga Singh joined in the affair, and his name was withdrawn form the list of persons eventually *chalaned*.

We see no reason to doubt that the Sessions Judge has arrived at a substantially correct finding as to the more essential facts though we are unable to accept all his conclusions from those facts. On the 12th January *Musammat* Bhago and her brother-in-law Bahadur Singh had gone to the *thana* and reported a somewhat trivial assault on them by the two appellants Fauja Singh and Teja Singh and a third man Sulakhan Singh, who has been discharged by the Committing Magistrate. These two complainants could show no marks of injury and no record was kept of their complaint at the *thana* beyond an entry in the Diary showing that the complainants were referred to a Magistrate, the police themselves declining to take action. Fauja Singh and others seem to have heard of this, and in the evening came to *Musammat* Bhago's house to taunt her with her failure to obtain any satisfaction from the police. The deceased Pahlwan, *Biloch*, a tenant of *Musammat* Bhago, was inside the courtyard, and he appears to have picked up a stick and came out both threatening and abusing the intruders who were all described in the first report as being more or less drunk. There is no suggestion that Pahlwan actually struck any one, but the appellants are said to have resented his interference and to have struck out wildly in all directions injuring Pahlwan severely and others slightly. When we examine the medical evidence, we do not think that this part of the story can be trusted. It is quite clear that some one struck one severe blow with a *chhavi* at Pahlwan's head from which he died some hours later, but we do not believe that there was any thing in the nature of a general fight or that any one else was struck, nor do we think that Pahlwan received more than this one blow with a *chhavi*. He had, it is true, two very trifling abrasions on the shoulder and one on the knee and a bruise on one elbow, but we think that the shoulder abrasions must have been caused by the handle of the weapon in the course of the blow aimed at his head, and that the other petty injuries were due to his fall. The other persons said to have been hurt, namely, Pahlwan's maternal uncle Kaku, and his brother Jalal, witnesses Nos. 6 and 7, could not, we think, have been definitely attacked by any one. Kaku's injury was a mere scratch and Jalal's a slight blow on the heel, neither of these injuries being of the kind which would

have been caused by a gang of well armed *Jats* bent on serious mischief. There is indeed considerable reason for believing that Kaku's injury has been self-inflicted in order to make up a more serious case for the prosecution.

Both the first report and the whole of the prosecution evidence agree in ascribing Pahlwan's fatal injury to a blow given by the appellant Fauja Singh, who is aged 21. To that extent we think that the evidence is trustworthy enough. We can see no reason why Dillu, witness No. 4, father of Pahlwan, should have mentioned any one else as the principal offender than the man who actually did cause his son's death. Fauja Singh was one of the persons named in the previous report made to the police earlier in the day, and we think that he must have been present in the village that night or at any rate on the previous day as there would have been little use in naming a man who was away from the village as having joined in the previous assault of the 11th January. It is urged strongly that Fauja Singh's *alibi* should be believed as he has given good reason for explaining why he should have left the village at about that time. We do not, however, think that this argument carries much weight. It is, no doubt, true that Fauja Singh was found on the 17th January at another village, to which he had fled for refuge, but we believe that he went there in consequence of the part which he had taken in the affair of the 12th January and not because it was unsafe for him to remain in his own village in consequence of a dispute about a woman. We consider that although Fauja Singh struck one blow only he must take the full consequences of this act and especially of his having gone to *Musammat* Bhago's house armed with a *chhavi*. It may be the case that he had been drinking but this again does not mitigate his offence. *Prima facie* that offence was one of murder and we think that the Sessions Judge has gone quite far enough in holding that there was sufficient provocation on Pahlwan's part to take the case out of the category of murder, and we are not disposed to any further leniency. We see no sufficient reason for altering either the conviction or sentence upon Fauja Singh and his appeal is accordingly dismissed.

The case as regards the remaining four appellants stands on a very different footing. It is practically admitted by the Sessions Judge, and it seems to us to be hardly open to doubt, that none of these appellants took an active part in the direct attack on Pahlwan. After carefully considering the evidence, we think that we must go further still and say, that none of them is proved by trustworthy evidence to have taken part in an assault of any kind on any of the persons present at *Musammat* Bhago's house. All that they did was at most to join with Fauja Singh in standing outside *Musammat* Bhago's house and calling out to her that she had got nothing by her journey to the *thana*. The learned Sessions Judge has treated them as members of an unlawful assembly, and in consequence liable to some extent for all that subsequently happened including the death of Pahlwan. He has accordingly convicted them under sections 304 and 149 of the Indian Penal Code, and awarded heavy sentences. We do not think that is a proper way of looking at the matter. The mere calling out to *Musammat* Bhago is not an offence at law and it is not proved that any of these appellants committed or intended to commit any sort of offence such as is included in the definition of unlawful assembly contained in section 141, Indian Penal Code. Fauja Singh and his companions can hardly have intended to attack *Musammat* Bhago, seeing that they had ample opportunity for using violence to her and in fact did not touch her in any way. We do not think that they could have had any common object of what the Sessions Judge describes as the thrashing and maltreating of Pahlwan, seeing that they had no serious grudge against him beforehand and that his appearance on the scene was not anticipated. It is certainly incorrect to treat him as having been thrashed seeing that he received only one serious blow and this must have been given by one person only, more or less on the spur of the moment. In our opinion also it is far from certain that the appellants Kishen Singh and Mangal Singh who were not implicated in the previous affair of the 11th January, were really on the spot at all when Pahlwan met his death. Without going into the details of somewhat obscure matters, we may say that there is reason for believing that these names in particular have been added partly out of previous enmity and partly in order to make up the

full number of five required to constitute an unlawful assembly. It is probable enough that Fauja Singh's two brothers, Teja Singh and Jagat Singh, were on the spot, but we cannot see that they are proved to have committed any offence or to have intended to commit any offence in such a way as to justify a finding that they had a common object with Fauja Singh. There appears to us to have been considerable exaggeration on the part of the prosecution, and that in point of fact Fauja Singh alone should be held solely responsible for the serious consequences which followed without being intended by any of the men who came to *Musammat* Bhago's house merely to jeer at her. It follows that we cannot uphold the convictions of Jagat Singh, Teja Singh, Kishen Singh and Mangal Singh under section 149, Indian Penal Code, and we are not satisfied that they even committed any sort of minor offence. The appeals of these four persons are, therefore, accepted; they are acquitted and will be released.

Appeal accepted.

(s. c. 59 P. L. R. 1911).

PUNJAB CHIEF COURT.

CRIMINAL REVISION NO. 750 OF 1908.

July 30, 1908.

Present:—Mr. Justice Rattigan.

CHIMAN LAL—PETITIONER

versus

GHULAM MOHI-UD-DIN—RESPONDENT.

Penal Code (*Act XLV of* 1860), *s.* 210—*Fraudulent execution of decree—Sanction to prosecute—Criminal Procedure Code* (*Act V of* 1898), *s.* 195.

In an application for execution of a decree the decree-holder (accused) made no mention of having received a certain sum of money from the judgment-debtor three days previous to the application. The Court executing the decree sanctioned prosecution of the decree-holder for an offence under section 210 of the Indian Penal Code. It was contended that the sanction should be revoked for (1) the sum of money was made over to the decree-holder merely as a deposit, (2) the warrant applied for was never in fact issued and the judgment-debtor suffered no loss and was put to no disgrace and the interests of justice did not require a prosecution and (3) in any case there was no completed offence under section 210, Indian Penal Code:

Held, that the sanction was properly granted.

Petition for revision of the order of the Sessions Judge, Multan Division, dated the 15th May 1908, confirming that of the District Judge, Multan, dated the 3rd March 1908, granting sanction to prosecute the petitioner.

Mr. *Oertel*, for the Petitioner.

Mr. *Muhammad Shafi*, for the Respondent.

JUDGMENT.—I have heard Mr. Oertel and Mr. Shafi on behalf of the accused and the complainant, respectively, and have carefully considered their arguments. I have no desire in any way to prejudice the case of the accused, but I agree with the Courts below that there is a *prima facie* case against him, which he should meet. He unquestionably received the Rs. 800 on the 13th December, and it is not denied that when he applied for execution on the 16th December (or three days later) he made no mention of that sum, and that in the application he stated that the full amount of the decretal money was still due to him. His explanation that the Rs. 800 were made over to him on the 13th December in *amanat* (or deposit) and that he was, therefore, not entitled to treat that money as his own until the 17th December when he was (as he says) given authority to retain it for himself, may or may not be true, but I see no reason why the charges alleged against him should not be tried. He will then have full opportunity of establishing, if he can, the truth of the explanation vouchsafed by him. Mr. Oertel argued that as the warrant which was applied for on the 16th December never in fact issued, complainant suffered no loss and was put to no disgrace, and that the interests of justice do not require a prosecution in a case of this kind. I regret I cannot agree with him. I think it is essential in the public interest that persons who have decrees in their favour should be warned that they must not attempt to deceive the Courts and thereby get money from their judgment-debtors to which they are not entitled. It is also very necessary that decree-holders should realise that they must comply strictly and *truthfully* with the requirements of section 235, Civil Procedure Code. I say no more lest any remark of mine might be taken to prejudicially affect the accused's defence as to the merits (or demerits) of which I do not wish to say one word. Mr. Oertel has argued that there was, in any case, no completed offence under section 210, Indian Penal Code, and in this connection has relied on the rulings of this

Court in *Naurang Mal* v. *Emperor* (1), and of the Calcutta High Court in *Shama Charan Das* v. *Kasi Naik* (2). These questions will have to be decided on the facts as disclosed in the prosecution evidence, and I must decline to consider them at this stage of the proceedings.

I accordingly reject this application.

Application rejected.

(1) 13 P. R. 1902 Cr. (2) 23 C. 971.

(s. c. 62 P. L. R. 1911).

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 505 OF 1910.

January 31, 1911.

Present:—Mr. Justice Kensington and Mr. Justice Rattigan.

Musammat CHEMBELI—PLAINTIFF—APPELLANT

versus

NATIONAL BANK OF INDIA, LTD. AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Settlement in favour of mother—Will by mother—Fraudulent transfer—Benami *transaction.*

In 1896 one *K. L*, a well-to-do jeweller of Delhi, died leaving a son *K. C.* and a widow *S.* and a daughter, and his ancestral business in a prosperous condition valued at some *lakhs* of rupees.

In 1898 *K. C.* purchased a block of house property in the name of his mother *S.* for Rs. 18,000, and in 1902 he made a similar purchase in her name of other property for Rs. 12,000. Some years after his father's death, *K. C.* entered on a highly speculative form of business and borrowed large sums of money.

In 1902 *K. C.* was in serious straits. Later on, several decrees were passed against him and the house property purchased in 1898 and 1902 was attached. The mother executed a Will in favour of *C.*, wife of *K.C.*, to whom she bequeathed the two properties purchased in 1898 and 1902 and all other property inherited by her husband *K. L.* Objections were preferred by *C.* to the attachments but they were disallowed. She then filed the present suits for, *inter alia*, a declaration of her title to the attached properties and alleged that the purchases were made by *S.* with her own funds. It was pleaded that the purchases were fictitious, that the Will was a forgery and that the properties did not belong to the plaintiff:

Held, that there was nothing unreasonable or suspicious about the 1898 transaction, for *K. C.* was not at that time seriously embarrassed. Though the purchase was not made by *S.* with her own funds yet she was entitled to the property, for the arrangement made by *K. C.* was a perfectly justifiable one and it did not appear that it was made by him to defraud his creditors. But the 1902 purchase must be treated as one in fraud of creditors for *K. C.* was at that time much involved.

Held, further, that the transactions were not *benami*.

Bura Mal v. *Bhagwan Das*, 61 P. R. 1889, referred to.

Held, also, that the genuineness of the Will was established and that it was not invalid as regards the properties in suit; that it was ineffectual in so far as it purported to deal with property other than the properties purchased in the name of the testator *S.* but it was not on that account open to objection as regards the purchased property.

Kanshi Ram v. *Jiwanun*, 121 P. R. 1893; *Isri Dutt Koer* v. *Hansbatti Koerain*, 10 C. 324, (P. C.); 10 I. A. 150; 13 C. L. R. 418, referred to.

First appeal from the order of the Sub-Judge, 1st Class, Delhi, dated the 30th March 1910, dismissing claim.

Messrs. *Beechey* and *Shadi Lal* and Babu *A. C. Bose*, for the Appellant.

Mr. *Raj Narain*, for National Bank and Mr. *Pestonji Dadhabai*, and Lala *Bhowani Pershad*, for Batha Company of Bombay and Bombay Company Limited, Bombay, Respondents.

JUDGMENT.—The two appeals Nos. 505 and 506 may be disposed of by one order following the procedure which was adopted in the lower Court with the consent of the parties and which has been similarly agreed to in this Court also. The plaintiff in the two suits is the same, namely, *Musammat* Chambeli, wife of Kishen Chand, judgment-debtor. The defendants in one case are,—(1) The National Bank of India; (2) Batha and Company of Bombay; (3) The Bombay Company, Limited, and (4) certain other decree-holders who are apparently acting in collusion with the plaintiff, or who have at any rate taken no prominent part either in the original trials or in the appeals. In the second case the defendants are Messers. E. D. Sassoon and Company and in both suits the judgment-debtor, Kishen Chand, is a formal defendant.

The circumstances leading up to these suits are as follows: the facts being to some extent elucidated from the paper-book of a previous suit between the National Bank of India and Kishen Chand which was decided by the Chief Court on the 4th April 1908 on Civil Appeal No. 50 of 1907. It may be noted that one of the Judges forming the present Bench was also a member of the Bench by which the previous appeal was decided, but it is not proposed to refer to the previous case otherwise than to make the position clear.

In 1896 one Kanhya Lal, a well-to-do jeweller of Delhi died leaving a large estate, the firm was known as Kanhya Lal-Kishen Chand,

the latter being Kanhya Lal's only son, and, so far as is known, the business was then in a prosperous condition. We are told that Kanhya Lal left a property valued at some six *lakhs* of rupees, which may or may not be accurate, but at any rate it is not seriously disputed that he was a very well-to-do man. Besides the son Kishen Chand who was then a comparatively young man, Kanhya Lal left a widow, named *Musammat* Sunder, who died on the 16th November 1904 and a daughter, who is married to Mangi Lal, one of the group of defendants, whom we have referred to as acting in collusion with the plaintiff. We should also note that the business was ancestral and was originally known under the name Hazari Mal-Kanhya Lal, these two being brothers. It appears that Hazari Mal separated from the firm at some time not known precisely and his son Gulzari Mal figures to a minor extent in the present case. On the 29th August 1898, Kishan Chand purchased a block of house property in the name of his mother *Musammat* Sundar for Rs. 18,000 and on the 9th January 1902 he made a similar purchase in her name of other property for Rs. 12,000. It has been urged on behalf of the appellant that both these purchases were really effected by *Musammat* Sundar out of her own money, but of this we can find no proof whatever. On the other hand, after going into the matter at considerable length we think that there is sufficiently conclusive evidence that the money was really supplied from the firm Kanhya Lal Kishan Chand or, in other words, by Kishan Chand himself. There is no reason why a rich man like Kishan Chand should not, if he so desired, have settled money upon his mother by giving her two comparatively small properties out of the funds of a large estate, and at any rate as regards the 1898 transaction we consider that there is no real justification for an attitude of great suspicion.

It appears, however, that Kishan Chand began some years after his father's death to enter on a highly speculative form of business and by June 1901 he was under the necessity of raising large sums from the National Bank on the security of jewels under circumstances which sufficiently appear from the record of the previous case. Owing to circumstances which need not be stated in greater detail Kishan Chand's affairs then became rapidly more and more involved, and so far as we can judge the entire estate is now hopelessly encumbered. Kishen Chand's dealings with the National Bank and possibly with other creditors were highly unsatisfactory and the result has been that eventually a series of decrees have been passed against him, mostly in Bombay, for very large sums. We do not know precisely the dates or amounts of these Bombay decrees, but it is admitted that, in spite of large realizations in Bombay certificates were eventually granted there in 1904 for the realization in Delhi of large outstanding amounts. It is also known to us that the National Bank was in 1905 suing Kishan Chand in Delhi for over Rs. 40,000 though the amount of his liability was eventually limited by this Court's decree of the 6th April 1908 to a little over Rs. 11,000 under the circumstances explained in the judgment of that date. We think that we are justified in saying that Kishan Chand was in serious straits before the second purchase, dated the 9th January 1902, was effected in the name of his mother, but so far as we can judge from all available evidence there is nothing to indicate any sort of crisis in his affairs so far back as the earlier purchase of the 29th August 1898.

In 1904 matters had certainly become very serious and Gulzari Mal, referred to above as Kishan Chand's first cousin, put in a petition under the Punjab Laws Act to have Kishan Chand declared an insolvent, mentioning in the schedule of assets properties covered by *Musammat* Sundar's purchases of 1898 and 1902. We have considerable doubt whether this petition was altogether *bona fide*, and it is possible that Gulzari Mal was really acting in Kishan Chand's interests rather than his own in attempting to have Kishan Chand declared an insolvent. However that may be, on the 20th August 1904, after an order of attachment of all the property had been obtained, *Musammat* Sundar lodged an objection that the purchased property belonged to her. On the 27th October 1904 the objection was allowed and these two properties were released from attachment. We have clear evidence that *Musammat* Sundar was ill at the time and she in fact died on the 16th November 1908. Two days before her death, that is, on the 14th November, she is said to have executed a Will leaving to the present plaintiff, wife of Kishan Chand, not only the two purchased properties but also all other property inherited by her husband Kanhya Lal (*jo ba iris*

shauhari mujh ko mili.) We give the vernacular words in question because in the evidence of Pirbbu Dyal, writer of the Will, at line 32 on page 38, of the present paper book, these words have been wrongly transliterated in such a way as to make it impossible to understand what the witness was referring to. It will be observed that by this Will *Musammat* Sundar purported to go beycnd what she had previously asserted in objection proceedings three months before, and that the object of the Will was to secure to plaintiff's wife as much property as possible to be saved out of the wreck of his fortunes.

Further proceedings were taken at Delhi from 1905 onwards by Kishan Chand's numerous creditors for execution of their decrees, and eventually after all his property had been attached and was on the point of being sold, two objections were lodged on the 19th July 1907 and 23rd July 1907 by *Musammat* Chambeli claiming the purchased property as her own in virtue of the Will. These objections were summarily disallowed by the Executing Court on 24th July 1907, and on the very same day *Musammat* Chambeli instituted the two present suits for a declaration that the property attached belonged to her. We must here notice that the suits covered very much more than the purchased properties. It is quite clear that on coming into Court *Musammat* Chambeli was made by her husband to lay a claim to much of the property left by Kanhya Lal which had not previously been specifically assigned to *Musammat* Sunder. The two suits were at first dismissed by the Subordinate Judge on the 15th November 1907 by an indefensible order which was set aside by this Court's judgment of the 23rd February 1909 on Civil Appeal No. 35 of 1908, given at pages 1 and 2 of the present paper-book. Thereafter, the suits have been tried by the same Subordinate Judge and have been dismissed by him on the 30th March 1910. The cases are accordingly now before us on appeals by the plaintiff *Musammat* Chambeli.

The pleadings of the various decree-holder defendants substantially asserted—

1. That the two purchases in *Musammat* Sundar's name were fictitious;
2. That her Will, dated the 14th November 1904, was a forgery, and
3. That no part of the property, ancestral or acquired, covered by the suits, really belonged to the plaintiff.

In reply, the plaintiff directly traversed all these assertions and in particular maintained that the whole of the property claimed had been acquired by *Musammat* Sundar with her own funds (see plaintiff's replication, dated the 11th October 1907, at page 12 of the earlier paper-book). The issues drawn are given at page 13 of the same paper book and need not be re-produced. They are now summarised by plaintiff's Counsel under the two heads:—

(*a*) were the properties in suit owned by *Musammat* Sundar ? and ;

(*b*) did *Musammat* Sundar execute the Will and was her execution legal ?

The decision of the lower Court on both these points is against the plaintiff.

We must here observe that the whole of the argument of plaintiff's Counsel before us has been directed to show that there was nothing wrong in respect of the purchases made in the name of *Musammat* Sundar, or of that lady's Will, in so far as it covered these properties. Speaking generally, the whole of the evidence recorded in the lower Court on plaintiff's behalf was also directed to these points. At the conclusion of a lengthy argument by plaintiff's Counsel, we expressed some surprise that he had dealt only with the purchased properties and had said nothing at all in regard to any claim which might possibly have been made by *Musammat* Sundar or by present plaintiff to other property originally owned by Kanhya Lal.

Counsel at once admitted, without reservation of any sort, that he was unable to put plaintiff's case on any stronger footing than that she is entitled to the purchase properties. We take this as amounting to an admission that the suits, as laid, cannot be supported except to a minor extent, and after considering the evidence in great detail, we have no doubt that Counsel has been well-advised in now limiting plaintiff's claim to the purchased property only. There is no good evidence and no legal justification based on joint family theories, to support the very much wider claim which had been nominally put forward by *Musammat* Chambeli to start with.

The result is that before us matters are very largely simplified. Instead of having to consider the effect of the Will upon all Kanhya Lal's original estate, we have only

to deal with it so far as the purchased properties are concerned. It is most unfortunate that this should not have been made clear at a much earlier stage in the suits. The decree-holder-defendants have all along, both in the first Court and in this Court, been under the impression that the plaintiff has put forward a very largely exaggerated claim which if successful would go far to deprive them of any hope of further realization under their decrees and they have contested the suits hotly on this understanding. It now appears that they have been much misled both by the plaintiff and by the terms of the appeals to this Court, and that the subject-matter really in dispute is comparatively speaking of quite trifling value. No doubt the money advanced for the two purchases of 1898 and 1902 amounts to Rs. 30,000, which is considerable enough in itself, but we are informed that the present value of even these properties is much reduced by a subsequent mortgage, and even if these properties can be put up for sale the sum to be realised is in all probability a mere trifle compared with amounts of the defendant's decrees. We think it particularly unfortunate that all this should have only transpired at a late stage in the Chief Court, after the hearing of elaborate arguments, and if the defendants had not been misled, the decision of the matters really in dispute would probably have been much facilitated.

As matters stand, we are not now concerned with what was represented to us to be a highly contentious suit involving property of great value; but merely with the simple questions whether the two purchases in the name of *Musammat* Sundar were justified and whether the Will by which they were left to the present plaintiff should be to that extent upheld. We propose now to take these two questions in order, and we do not think that their real importance requires us to discuss the evidence or lengthy arguments of Counsel on a disproportionate scale.

As regards the purchases, we can see nothing unreasonable or suspicious about the 1898 transaction. Kishan Chand was not at that time, so far as is known, seriously embarrassed. It was natural enough for him to wish to provide for his mother, *Musammat* Sundar, to a moderate extent. The Rs. 18,000 which he then invested on her behalf in house property represented a very small portion of his estate and we can see no reason why he should not have settled property of that value on her. We use the word settlement advisedly in its popular rather than in its strictly legal sense as a convenient expression for representing what was actually done. We take it as sufficiently established that the purchase-money came out of the estate and not from funds of which *Musammat* Sundar was possessed in her own rights. We grant this much to the defendants, looking to the evidence on the point, and we need not, therefore, further discuss that evidence.

Where we differ from defendants' Counsel is in holding that an arrangement of the kind was a perfectly justifiable one on Kishan Chand's part, always assuming that it was not made in order to defraud his creditors. We have no evidence at all and we do not ourselves believe that Kishan Chand was in 1898 so situated that the purchase should be interpreted as intended to defraud his creditors. It strikes us as a very natural and proper arrangement to make and one against which there was no sort of legal obstacle. Taking this view, we decide that *Musammat* Sundar became the lawful owner of some part of the property in dispute in 1898.

Turning now to the second similar transaction of January 1902, we feel that we are on less firm ground, Kishan Chand had by that time already been entangled in dangerous speculation and had been compelled to raise large sums of money from the National Bank. We think that he must have known very well when he purchased further property for Rs. 12,000 in the name of *Musammat* Sundar that he was to that extent making it more difficult for his already numerous creditors to eventually succeed in recovering their money. We are urged by plaintiff's Counsel to hold that the mere fact of his being able to produce Rs. 12,000 in ready cash for investments purpose is in itself a sufficient proof that he was not then embarrased, but we cannot take this view. He was already much involved to the Bank and possibly to others and he had launched upon somewhat wide speculation, the result of which was tolerably sure to be ruinous to himself. We think that he ought to have recognised that he had no right to settle a further sum upon his mother and that no such settlement was really required until he had extricated himself from his growing difficulties. Taking this view, we are of opinion that the 1902

purchase ought to be treated as one in defraud of creditors.

Turning now to the Will, we have examined the document in original with the greatest care and have also examined the evidence of the writer and four attesting witnesses who have been called to prove it. Our conclusion is that there is no real reason for declining to accept this document at its face value. The Subordinate Judge has criticised the Will and the circumstances under which it is shown to have been prepared with great severity, but we cannot agree that these criticisms are justified in the main. The document is an exceedingly simple and straightforward deed expressed in plain language. We cannot understand why the Subordinate Judge describes it as drawn up in high flown Urdu containing difficult Arabic and Persian technicalites. The parties are indeed *Jains* and as such may possibly not have a very efficient knowledge of the Urdu language but they are residents of Delhi where that language is universally used, and we cannot find any thing in the Will which would not be readily intelligible to *Musammat* Sundar. We can easily believe that Kishan Chand prompted her to get the Will executed in the hopes that he would thereby save for his wife some considerable property, but this again was an arrangement which *Musammat* Sundar herself would be likely to approve of. She probably knew quite well that the family property was being ruined by Kishan Chand and she had recently been successful in asserting her title at any rate to the purchased property, under the order of the 27th October 1904 referred to above in insolvency proceedings against Kishan Chand. The fact that the Will was executed only two days before *Musammat* Sundar's death does not, in our opinion, indicate a probability that she executed it without knowing what she was doing. The thumb mark attached to the Will is, no doubt, a mere smudge which cannot possibly be identified, but after careful consideration of the deed-writer's register containing a note of the transaction and a better impression of what purports to be *Musammat* Sundar's thumb mark, we consider an assumption of forgery to be altogether out of place. The defendants have complained that the plaintiff made no effort to get this latter thumb mark verified by an expert although there are other well authenticated thumb impressions of *Musammat* Sundar with which it could have been compared, notably one on a general power-of-attorney given by her to Kishan Chand on the 24th January 1903 which is on the record and by which she authorised him to conduct every sort of business on her behalf. This complaint of the defendants is typical of the attitude which they have all along taken up. We can see no reason why the plaintiff should have been called on to verify the thumb impression. She had produced the writer of the Will and no less than four out of six attesting witnesses and, as far as it goes, their evidence appears to us conclusive enough. She was not called on to do anything more. If the defendants were not satisfied, it was for them to produce the expert and rebut the plaintiff's evidence, but they have been afraid themselves to put the matter to so simple a test. Further, we think it nearly certain that if Kishan Chand contemplated forging a Will after *Musammat* Sundar's death, he would have been careful to make matters more secure for his wife by dating the Will much earlier than two days before the lady's death The defendants support their contention of forgery by laying stress on the fact that the Will was not put forward till July 1907, *i.e.*, at a very late stage in execution proceedings which had been draging on at least since 1905. We are not impressed by this argument either. It is true that the execution proceedings had been long in progress, but during the interval the disputes between the decree-holders and judgment-debtors had twice come before the Chief Court, and both Kishan Chand and the plaintiff may very well have thought that they would escape their immediate difficulty without propounding the Will. They would know that the Will was likely to be hotly contested and would, therefore, naturally keep it as a last resort when all other judgment-debtor's devices had failed. Our conclusion on this part of the case is, that the Will was executed by *Musammat* Sundar with knowledge of its contents and in accordance with her own wishes. It was ineffectual in so far as it purported to deal with property other than the properties purchased in her own name, but it is not on that account open to objection as regards the purchased properties. The defendants here lay stress on a ruling of this Court [*Kanshi Ram*

v. *Jiwanun* (1)] as supporting the amazing contention that a Will which is partly ineffectual must, therefore, be wholly disregarded. The contention appears to us to be based on the wording of the head-note to the ruling rather than on the ruling itself, and we do not understand that the ruling professed to lay down any general proposition of so sweeping a nature, or that this was the intention of their Lordships of the Privy Council as expressed in the case then quoted [*Isri Dutt Koer* v. *Hansbutti Koerain* (2)].

These conclusions of ours practically dispose of the appeals. We have omitted to notice that a good deal of argument was addressed to us on both sides regarding the decisions by their Lordships of the Privy Council in respect of *benami* transactions and in respect of the doctrine of what is known in English Law as advancement. We do not think it necessary to reproduce the rulings to which reference has been made, but we may quote in particular *Bura Mal* v. *Bhagwan Das* (3), in which one of the learned Judges, for whose opinion we have the greatest possible respect, briefly summarized the law on the question as understood from decisions given up to that time. We do not desire to contest either the argument or the rulings on this point and in so far as the rulings express decisions of their Lordships of the Privy Council, we are clearly debarred from treating the question as if it was open to argument. But we think that the defendants begged the whole question in describing the purchases of 1898 and 1902 as *benami* transactions. We can ourselves see nothing *benami* in the matter, as that term is commonly understood. Kishan Chand was, in our opinion, not concealing purchases made for his own benefit under the name of another, but was really doing what any one is entitled to do either in England or in India, and that is making a settlement of this sort in favour of his mother. He has, no doubt, subsequently prevailed on his mother to execute the Will the effect of which is that the purchases benefit his own wife, but that subsequent incident should not be regarded as necessarily invalidating his previous purchases for *Musammat* Sundar if they were *bona fide*. As already stated, we consider that the 1898 purchase was *bona fide* and that the 1902 purchase was not, and we proceed to determine the appeals on this basis rather than upon argument based upon *benami* transactions strictly so-called.

The net result is that the appeals succeed to only a small extent. The plaintiff's claim has been given up to all property other than that covered by the purchases of 1898 and 1902, and we rule that it must also fail as regards the 1902 purchase. The appeals accordingly fail except as to such property as is covered by the 1898 purchase. We accept them to that extent only and give plaintiff decrees in each of the cases, that the property covered by the purchase of the 29th August 1898 in favour of *Musammat* Sundar belongs to the plaintiff by virtue of the Will executed by *Musammat* Sundar on the 14th November 1904 and is, therefore, exempt from attachment under the defendants' decrees. The property includes what are described as houses Nos. (1) (2) and (3) in List (*a*) attached to the plaint and as Nos. (1) (2) and (5) in the furthermore detalied List of twelve properties given at pages 3 and 4 of the paper book containing the plaint. The decree will, therefore, be drawn up in these terms. We have then to consider the question of costs and here we take into account the fact that much expensive litigation had been forced on the defendants owing to the plaintiff's action in filing suits covering a very large amount of property in regard to the greater part of which she has entirely failed.

As a rough and ready adjustment of the matter we direct that the plaintiff shall pay the whole of the defendants' costs in the lower Court and one half of their costs in appeal. This may appear a somewhat stringent order as to costs, but if it had not been for the exaggerated claim put forward by Kishan Chand in plaintiff's name it is probable that a satisfactory settlement would have been arrived at either without litigation or at least at a much earlier stage in the proceedings.

(1) 121 P. R. 1893.
(2) 10 C. 324 (P. C.); 10 I. A. 150; 13 C. L. R. 418.
(3) 61 P. R. 1889.

MURTI SANKARAN *v.* MANAVIKRAMAN.

(s. c. 2 M. W. N. 213; 9 M. L. T. 415).

MADRAS HIGH COURT.

FIRST CIVIL APPEAL Nos. 15 AND 16 OF 1906.

February 16, 1911.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Sundara Aiyar.

IN APPEAL No. 15 OF 1906.

VADAKKINIYEDATH KIRANGAT SANKARAN NAMBUDRIPAD, STYLED MURTI SANKARAN, AND OTHERS—DEFENDANTS—APPELLANTS

versus

NILAMBUR THACHARAKANIL MANAVIKRAMAN, STYLED VALIA THIRUMALPAD, AND OTHERS—PLAINTIFFS—RESPONDENTS.

IN APPEAL No. 16 OF 1906.

NILAMBUR THACHARAKANIL MANAVIKRAMAN, STYLED VALIA THIRUMALPAD, AND OTHERS—PLAINTIFFS—APPELLANTS

versus

THAMBARRA KUNHAMMUTLI AND OTHERS—DEFEDANTS—RESPON ENTS.

Evidence Act (I of 1872), s. 83—Maps and plans prepared by Government—Admissibility in evidence.

Maps and surveys made in India for revenue purposes are official documents prepared by competent persons and with such publicity and notice to persons interested as to be admissible, and are valuable evidence of the state of things at the time they were made. They are not conclusive and may be shown to be wrong; but in the absence of evidence to the contrary, they may be properly received in evidence as correct *when made*.

Jagadindranath Roy v. *Secretary of State for India*, 30 C. 291, followed.

Appeals against the decree of the Subordinate Judge's Court of South Malabar at Callicut, dated the 12th September 1905, in O. S. No. 11 of 1903.

Mr. *J. L. Rosario*, for the Appellants.

Mr. *T. R. Ramachandrier*, for the Respondents.

JUDGMENT.—These appeals relate to the ownership of certain hill forests which are claimed as their *jenm* property both by the plaintiff, who is the Thirumalpad of Nilambur, and by the 4th defendant who is the Uralan of the Trikalayur Devasom. Defendants Nos. 1 to 3 are persons who had obtained felling leases from the 4th defendant. The lands in dispute are shown in the plan Exhibit O, prepared by a Commissioner for the purposes of the case. The plaintiff claimed the lands shown as A to A (7), B, C, D, E and E(1). The 4th defendant at the trial admitted the plaintiff's title to the lands C and E and (1) but claimed A to A (7), B and D as the *jenm* of his Devasom. The Subordinate Judge found that only A, A (1) and A (2) belonged to the 4th defendant, and that the other lands, A (3) to A (7), B and D belonged to the plaintiff and decreed accordingly. The plaintiff (in A. S. No. 16) and the 4th defendant (in A. S. No. 15) now appeal against the decree so far as it is adverse to their respective claims. We, however, find that the decision of the Subordinate Judge is right.

The lands in dispute form part of the wild unsurveyed tract of the forest at the foot of the western Ghats, so that the proofs of title and possession usually available for occupied lands are not forthcoming in this case. Both sides have to rely mainly on oral evidence and a few timber felling leases as proof both of possession and title. There is also, as is usual in such cases, much uncertainty and indefiniteness as to the names and position of places referred to in the leases and in the evidence of the witnesses. Some facts are, however, agreed to on both sides, and some are established by the proceedings which took place in 1840 and subsequently, in connection with land acquired by Government on lease from the Devasom. This land is shown in plan, Exhibit O as "Government Erambadam Forest," lying on the south and east of the land in dispute and it is fully and exactly shown in the Government Survey plan Exhibit XXIII. It is admitted that the plaintiff owns all the land on the west and north of the land in dispute, that is, all the land marked. "I" (including 'G' and H), E, E (1). F and C in the plan Exhibit O. He also owns the land on the east of the disputed lands marked B, A-5 and A. It is also admitted that the 4th defendant's Devasom owns the land shown as "Government, Erambadam Forest" which land lies immediately to the south of the disputed land, and also forms the eastern boundary of that part of the disputed land which is marked D. It will be observed that in the Government Survey plan Exhibit XXIII, the land lying to the north of the Government Erambadam Forest is shown as belonging to the Triklayur Devasom. The plaintiff's Vakil strenuously contest that the plaintiff is not shown to have been a party to this plan, and that the entry in it is not admissible as evidence against

him, or if admissible, is of little or no weight, since the plan was made for the purpose of showing the portion leased to Government (a matter not now in dispute) but not for the purpose of showing who were the owners of the lands adjacent to the land leased. That the plan is admissible, we entertain no doubt. Section 83 of the Indian Evidence Act declares that "the Courts shall presume that maps or plans purporting to be made by the authority of Government were so made, and are accurate" and the Privy Council in the recent case of *Jagadindranath Roy* v. *Secretary of State for India* (1) state the law to be as follows:—"Maps and surveys made in India for revenue purposes are official documents prepared by competent persons and with such publicity and notice to persons interested as to be admissible and valuable evidence of the state of things at the time they are made. They are not conclusive, and may be shown to be wrong; but, in the absence of evidence to the contrary, they may be properly judicially received in evidence as correct 'when made.'" The weight to be attached to the entries in the plan Exhibit XXIII depends, no doubt, largely on the circumstances under which it was prepared. It appears that in the year 1840 the Government resolved to form large teak plantations and for that purpose, took a lease of 49 pieces of forest land from the 4th defendant under Exhibit IV dated the 10th December 1840. Each of these 49 pieces of land is distinguished by its own number and name in the Schedule to Exhibit IV. Six of these pieces of forest (Nos. 30 to 35 in Exhibit IV) form one block defined by one set of boundaries and this block it is that is shown in plan Exhibit XXIII as land leased to Government by the Devasom. This block is shown in Exhibit IV to be bounded on the east by "Chaliyar River" on the south by Kotti Kallu Mannu, Janmam of Trickalayur Devasom, on the west by eastern slope of Velli Muthammala and on the north by southern slope of Muthippan Mala, Janmam of Trikalayur Devasom.

According to this document, then, the Devasom owned as *jenmi* the land which formed the northern boundary of the forest leased to Government, and this land was described as "the southern slope of Muthappan Mala." In order to see how far this recital in a document between the Devasom and Government is evidence against the plaintiff, it is necessary to go back a little, and refer to the transactions connected with the acquisition of the lands by Government. Exhibit VI shows that on the 21st November 1840 the then Thirumalapad being called on by the Collector to state whether he had any claim to the lands proposed to be taken by Government, made a general claim to some of them and asked the Collector "to direct that an account showing the names and particulars of the Malas, *pattis* and Mannus" which the Devasom proposed to lease to Government should be sent to him in order that he might state in detail which of them belonged to him and which to the Devasom. In Exhibit VII, dated the 1st December 1840, the Tirumalpad acknowledged receipt of "a schedule containing the names and descriptions of Malas and *pattis* which belong to Triklayur Devasom and in receipt of which it has been resolved to obtain a document executed for Government." He says he has "perused them and learned the particulars" and he then goes on make claims to about a dozen out of the first 24 parcels of land in the schedule to Exhibit IV. He makes no claim in regard to any lands that correspond to numbers 30 to 35. He, however, asks for further time to put in other documents, and furnish further particulars. Three days later the Tirumalapad's *Kariastan* (agent) was examined (Exhibit IX) at length but makes no reference to the lands, numbers 30 to 35. Three days after this, the Triumalapad writes to the Collector and recites the previous negotiations and says,—"As my Ma'as and Devasom Malas are adjacent properties * * * * * *. I further request you to obtain a document executed after getting the boundaries inspected and ascertained in the presence of my agent and the Devasom agent." Three days after this, that is on the 10th December, we find that Exhibit IV was executed. The Thirumalapad, however, continued to make objections in regard to some of the lands and in reply to a call by the Collector for particulars of his objections he states in Exhibit XV dated the 13th September 1842, that the Karar (*i. e.*, Exhibit IV) has been shown to him, and "I state hereunder the particulars of my right over certain Malas and Mannus" mentioned in the Karar *as well as of discrepancy regarding boundaries*. He then proceeds

(1) 30 C. 291.

to claim one or two of the lands, and raises objections to the boundaries of some seventeen of the lands in the schedule to Exhibit IV. He, however, raises no objection to the boundaries shown for the block consisting of numbers 30 to 35. That he examined the boundaries of this block is clear, for he expressly withdraws an objection which he had formerly made in regard to the boundary of one pracel (No. 35) in the block stating that it had been made under a misapprehension. In the following January, however, the Tirumalapad and the Devasom adjusted all their disputes both as to the lands and boundaries. In Exhibit XXVI dated January 1843, the Tirumalapad writes to the Collector and after explaining that his former objections were largely due to the fact that in Exhibit IV the Devasom had not clearly described the boundaries of some Malas and Mannus, and while some Malas and Mannus whose boundaries are mentioned belong to me in *jenm*, he has simply mentioned their names *but has not stated that they are my jenm properties* goes on to say that they have now settled the boundaries and agreed to ask Government to make certain alterations in the *karar*. (Exhibit IV) *so that the boundaries may be clear and dispute may not arise in future*. He then states in detail the alteration agreed to but they do not include any alteration in the boundaries, of numbers 30 to 35. In the face of all this we think it is plain, beyond, all doubt that the then Tirumalapad after full and protracted inquiry accepted the statement in Exhibit IV that the land to the north of the block formed by lands Nos. 30 to 35 was the *jenm* of the Devasom and was known as the "southern slope of Muthappan Mala." This block and a great many other blocks acquired by Government from the Tirumalapad and the Devasom for the teak plantations were demarcated and surveyed under the order of Government No. 2618 of the 5th November 1867. Exhibit XXIII is the survey plan of the block formed by number 30 to 35 in Exhibit IV, and as already stated it shows the land immediately north of the land leased to Government to be the *jenm* of th Trikalayur Devasom. The plaintiff contends that it is not shown that this plan was made after notice to him. Looking to what is stated in Exhibits XXI and XXII, and to the usual course of business when Government surveys are carried out, and looking also to the negotiations that took place between the Collector and the Thirumalapad when this and other land was being acquired by Government for plantations, and looking also to the fact that other blocks acquired for the same purpose from the Tirumalapad were demarcated and surveyed, (Exhibits Q to I) at the same time, and under the same order of Government, we have no doubt that the Tirumalapad had notice of the survey of this land.

The matter is, however, of little importance, for the plan Exhibit XXIII does not carry the matter further than Exhibit IV. It is the recital in Exhibit IV and the proofs already referred to that the plaintiff after full inquiry deliberately accepted that recital as correct, that is important as showing that the land lying to the north of the "Government Erambadam Forest" is the *jenm* property of the Devasom. It will be observed that one of the parcels of land leased to Government *viz.*, No. 30 in Exhibit IV is called "Muthappan Mala" and the northern boundary is said to be "the southern slope of Muthappan Mala." So the western boundary is said to be the eastern slope of Vellimuttan Mala. The plaintiff's case is that what are shown as boundaries are included in the leased area. In other words, that the eastern slope of Vellimuttan Mala and the southern slope of Muthappan Mala are part of the land leased. We find no ground for this construction of Exhibit IV. If the southern slope of Muthappan Mala were included in the lease there would be no point in describing it as the *jenm* of the Devasom since all the land leased were the *jenm* of the Devasom. The evidence also clearly establishes that the Vellimuthan Mala on the west of the leased land is the property of the plaintiff. The plain meaning of Exhibit IV is that part of the Muthappan Mala was leased and part was outside the leased land and formed its northern boundary.

The Devasom appears to have made but little use of the land until 1896, and afterwards, when it granted felling leases Exhibits I to LI to certain persons; but certain tenants of the Devasom (the defendants' 2nd and 5th witnesses) who formerly cultivated the paddy flats in the Erambadam Forest leased to Government by the Devasom, have

been called and have given evidence that they used to gather leaves and cut timber for their cultivation in this land belonging to the Devasom and lying to the north of the Government forest where they were not allowed these privileges. This evidence is probably true enough but it is indefinite as to the extent of the Devasom land.

Neither Exhibit IV nor the plan Exhibit XXIII give any indication as to how far the land for the Devasom extended in a northerly direction from the northern limit of the Government forest. The 4th defendant was himself examined as witness but could give no information. He could produce no *jenm* deeds or *pymash* accounts and the small amount of oral evidence adduced to show that the Devasom land extended to the north so as to include all the land shown as A to A (7) and B, was indefinite and untrustworthy. The felling leases, Exhibits I to III, may be regarded as indicating what he, or rather his *kariastan* claimed to be the extent of the Devasom's land in this direction. As pointed out by the Subordinate Judge, the extent and the boundaries shown in the earliest of these, Exhibit I, dated the 10th July 1896 would indicate that this land comprised the plots shown as A, A (1) and A (2) only. It will be remembered that the northern boundary of the Erambadam Forest lease to Government is stated in Exhibit IV to be the southern slope of "Muthappan Mala," and the northern boundary of the land in Exhibit I is stated to be in a line with the summit of the Muthappan Mala and Poolapatam. The 4th defendant contends that "Poolapatam" is the land shown as E (1) in the plan Exhibit O and that the northern boundary in Exhibit I should be a line due east from the southern corner of E (1). The Commissioner who made the local investigation and drew up the plan Exhibit O has reported that the ridge of Muthappan Mala runs along the allotted line which separates A from A (5) in the plan. He was not cross-examined as to this and the evidence called before the Subordinate Judge to contradict his report is not, in our opinion, entitled to any weight. We agree with the Subordinate Judge that A (6), not E (1), is the "Poolapatam" referred to in Exhibit I, and that the northern boundary of the land specified in Exhibit I runs along the dotted line between A and A (5). The plaintiff's Vakil points out that the plot of land shown as A (2) in plan Exhibit O slopes towards the north and, therefore, could not properly be included with A and A (1) in the "southern slope" of Muthappan Mala and he argues that it should, therefore, be excluded from the land decreed to the 4th defendant. If, however, this land, A (2) belonged to plainitff, it is hardly possible that he would not have taken that along with the other objections which he took to the boundaries shown in Exhibit IV. Though narrow it extends along nearly one half of the northern boundary of the land leased to Government and would certainly have been separately mentioned as the Tirumalapad's land if it belonged to him; but, there would be less need to separately mention it if it belonged to the Devasom to whom also the southern slope of Muthappan Mala belonged, and which alone was mentioned as being the main northern boundary. So also the boundaries shown in Exhibits IV and I negative the 4th defendant's contention that the land shown as D, in the plan, Exhibit O, is included in either. In Exhibit IV, the western boundary of the land leased to Government is stated to be the "eastern slope of Velliamutham Mala." If D which runs along a large part of the western boundary were really the *jenm* land of the Devasom, we should certainly expect this to be so stated, just as the lands which form the northern and southern boundaries are stated to be the *jenm* of the Devasom. In Exhibits II and III, no doubt, the 4th defendant gave permission to fell timber, over a much larger area; but there is nothing to show that he had any title to do so, and they are too recent in date to form the basis of a title by prescription even if they were acted upon by the lessees. Our conclusion, with regard to the evidence for the 4th defendant, is that Exhibit IV and the proceedings connected therewith show that he had title to the land to the north of the Government forest that there is nothing to show that his land extended further north than the ridge of Muthappan Mala, while Exhibit I makes it probable that the ridge was the northern boundary of his land, and that his land in fact comprised the land shown as A, A (1) and A (2) in the plan Exhibit O and no more.

We turn now to the evidence for the plaintiff The only document of title which he produce

is a *Kuttikanak* (Exhibit RRRR) which professes to be a statement of Malas and other lands comprised in the Thirumalapad Stanam. It is written on Cadjan leaves. It is neither dated nor signed nor is there any evidence regarding its origin. It was not referred to by the Thirumalapad's *kariastan* when examined by the Collector's Sheristadar, nor was it produced before the Collector, during the protracted inquiry in 1844 and afterwards reguarding the lands which Government was taking up on lease for the teak plantations, though it is hardly possible that it would not have been then produced with the other documents produced by the Thirumalapad, if it had then been in existence. It is a document which any zealous *kariastan* could manufacture and place among the records for future use. We can place no reliance whatever on it. But there is a large body of oral and documentary evidence to show that for many years past, and more especially since 1889, the plaintiff has been exercising acts of ownership over the greater part of the disputed land. The *pymash* accounts, Exhibits T (1) of 1862 and T (12) of 1870, show that he had small plots of fugitive cultivation somewhere in the lands shown as B and A series, respectively, in the plan Exhibit O, but there is nothing to show that they are in the lands A to A (2).

The earliest felling lease given by the plaintiff is Exhibit L in 1868. It is a registered document; but there is nothing to show that it was ever acted on, and the reference to Iyya Thedu as the southern boundary makes it doubtful whether it included the lands A to A (2). The next lease is Exhibit B in 1889 and this is followed by Exhibit C in May 1896 and Exhibit D in November 1897, and by others subsequently. These leases are, no doubt, registered documents. Their boundaries include the disputed lands and there is sufficient proof that they were acted upon, but the evidence in connection with them, and the general oral evidence adduced by the plaintiff, does not satisfy us that the plaintiff had adverse possession of the lands A to A (2) which we have found to belong to the 4th defendant's Devasom. The leases include extraordinarily wide limits when copmared with the number of trees to be cut, and thus suggest that they were given more with a view to make evidence of possession against Devasom or other rival claimants than as business transactions in regard to land really owned by and in possession of the lessor. Thus, the extent shown in Exhibit B is four miles by two miles, that is, eight square miles of forest wherein to cut 50 logs of timber, while the southern boundary is stated with suspicious detail to clearly show that it included all the land now in dispute. Almost all the witnesses called by the plaintiff to prove acts of possession on his behalf give evidence in general terms, and are indefinite either as to the place or the year in which the acts were done. Thus the Menon (the plaintiff's 5th witness), though he speaks of certain persons cutting timber under lessees from the plaintiff in the disputed land on the north and west of the Government leased forest, was unable to say when they worked. So the plaintiff's 26th witness, a *kariastan* of plaintiff, says that he saw Moosakeya felling trees in 1874 on the plaint property but he does not fix the locality as within the limits of A (2). The 7th witness for the plaintiff says that he collected hill produce from the whole of the northern boundary of the land leased to Government; but this was in 1898 and 1899 (under Exhibits F and H), when both claimants were actively asserting their possession. Kuthissa (the plaintiff's 14th witness), the lessee under Exhibit B (1889) and Unnithari (the plaintiff's 9th witness) the sub-lessee under him, say that they felled trees under that lease from all the lands comprised in it, but as already stated that lease gave the right to cut 50 trees within an area of 8 square miles and these witnesses do not say that they felled trees within the land shown as A to A (2). The 16th witness for the plaintiff, who was plaintiff's *kariastan*, does no doubt say that he caused trees to be felled on the south as far as the boundary stones of the Government leased forest between 1885 and 1894, and he also says that he kept the plaintiff's elephants in 1887, 1889 and 1890 in the land A now in dispute; but we are not prepared to say that this is sufficient, even if true, to show that the plaintiff was in adverse possession of this land for the statutory period so as to defeat the Devasom's title which we have found to be proved to A to A (2). We think, however, that the evidence of possession giving by the plaintiff himself and adduced on his behalf is sufficient to justify a decree in his favour for the other lands claimed by him and in regard to which

applies, and that the suit is barred as it was brought more than three years after the defendants realised the decree amount. We do not think that Article 62 applies. For that Article to be applicable the money realised by the defendants must have been actually or constructively received by the defendants for the plaintiff's use. But seeing that at the time money was realised the plaintiff was debarred from collecting the money himself by reason of the dismissal of the suit, we do not think the money can in any sense be said to have been received by the defendants for the plaintiff's use. See *Narayana* v. *Narayana* (7). We do not think that either Article 29 or Article 49 applies to a case like the present and no other Article is suggested. In these circumstances we have to fall back upon Article 120, and under that Article the suit is in time. We, therefore, reverse the decree of the Subordinate Judge and restore the decree of the District Munsif with costs in this and the lower Appellate Court.

Appeal allowed.

(s c. 2 M. W. N. 223; 21 M. L. J. 240; 9 M. L. T. 421).

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1734 OF 1908.

February 8, 1911.

Present:—Mr. Justice Wallis and Mr. Justice Sankaran Nair.

THANDAYUTHAPANI KANGIAR AND ANOTHER—DEFENDANTS—APPELLANTS

versus

RAGUNATHA KANGIAR AND OTHERS—PLAINTIFFS—RESPONDENTS.

Hindu Law—Decree for partition—Appeal pending—Doctrine of survivorship—Subsequent change in the family—Decree unaltered.

Where a decree for partition effects a severance of the joint family, this severance is not affected by the subsequent filing of an appeal from the decree unless and until it is reversed. Births or deaths afterwards supervening in the family cannot alter the decree.

Ordinarily, decrees which were right at the time they were passed are not varied by reason of events which subsequently happen.

Sakharam Mahadev Dange v. *Hari Krishna Dange*, 6 B. 113, dissented from.

Joy Narain Giri v. *Grish Chunder Myti*, 4 C. 434; 5 I. A. 28; *Appovier* v. *Rama Subba Aiyan*, 11 M. I. A. 75; 8 W. R. 1; *Chidambaram Chettiar* v. *Gauri Nachiar*, 2 M. 83, referred to.

Gorakala Kanakayya v. *Janardana Padhi*, 1 M. W. N. 841 at p. 844; 9 M. L. T. 64; 21 M. L. J. 31; 8 Ind. Cas. 736; *Sangili* v. *Mookan*, 16 M. 350, distinguished.

Subbaraya Mudali v. *Manika Mudali*, 19 M. 345, followed.

Second appeal against the decree of the District Court of Tanjore in Appeals Suits Nos. 109 and 131 of 1907, presented against the decree of the Court of the Subordinate Judge of Tanjore in Original Suit No. 27 of 1904.

Mr. *S. Srinivasa Iyengar*, for the Appellants.

Mr. *T. R. Ramachandra Iyer*, for the Respondents.

JUDGMENT.

WALLIS, J.—The plaintiff obtained a preliminary decree for partition which was confirmed with modifications on appeal, and died while a second appeal was pending. His legal representatives have petitioned to be brought on record and the petition is opposed on the ground that the plaintiff's share passed on his death by survivorship and that there is nothing for the representatives to succeed to. Whether this be so or not, is a question to be decided in the appeal itself after hearing both sides. The legal representatives deny that the plaintiff's share passed by survivorship on his death, and they are entitled to be brought on the record for the purpose of contesting the point. We, therefore, overrule the objection and direct the legal representatives to be brought on the record.

On the main question it was held by this Court in *Subbaraya Mudali* v. *Manicka Mudali* (1), differing from *Sakharam Mahadev Dange* v *Hari Krishna Dange* (2), that a decree for partition effects a severance of the joint family, that this severance is not affected by the subsequent filing of an appeal from the decree. Our attention was, however, called to certain observations in *Gorakala Kanakayya* v. *Janardana Padhi* (3), where the point did not arise for decision in which *Sakharam Mahadeo Dange* v. *Hari Krishana Dange* (2) was referred to with approval. We have accordingly reconsidered the question, but after listening to the able and exhaustive argument addressed to us by Mr. S. Srinivasa Iyengar, I see no reason to differ from the previous decision of this Court. Partition

(1) 19 M. 345.

(2) 6 B. 113.

(3) 1 M. W. N. 841; 9 M. L. T. 64; 21 M. L J. 31; 8 Ind. Cas. 736.

may be effected by consent and in proper cases, by decree. When it is effected by decree, I can see no reason why the decree should not hold good as other decrees do, unless and until it is reversed. It is not a feature of our law or any other legal system, so far as I know, that the filing of an appeal should effect the operation of a decree; and unless the Court intervenes to stay proceedings, the property may be partitioned and distributed in the shares fixed by the decree before the appeal is finally determined, possibly years before, in cases where there are a series of appeals. Where a decree for partition has been properly made and has directed the division of the property in appropriate shares I can see no reason for altering this portion of the decree on appeal by reason of births or deaths afterwards supervening in the family. A partition by consent in certain shares when once made is not affected by subsequent birth or deaths in the family, and there does not appear to be any reason why it should be otherwise when it is made by decree.

The ordinary rule admittedly is that decrees which were right at the time they were passed are not varied by reason of events which subsequently happen, and I can see no reason why an exception should be made in the case of decrees for partition, or why partitions by decree should be put on such an unfavourable footing, as compared to partitions effected by consent. Assuming alienees would not be prejudicially affected, it would still be a hardship to the parties themselves to make their rights on partition to depend on their surviving the appeal proceedings.

In *Joy Narain Giri* v. *Grish Chander Myti* (4), their Lordships of the Judicial Committee, after construing a decree of the District Court not then under appeal, as a decree for partition, observe,—"That being so, their Lordships are of opinion that although the suit is not actually in terms for partition, yet that the decree does effect a partition, at all events, of rights which is effectual to destroy the joint estate under the doctrine laid down in the case, which has been quoted, of *Appovier* v. *Rama Subba Aiyar* (5)" where it was held that a mere agreement to divide effects a severance of the joint family without waiting for a partition by metes and bounds. What their Lordships appear to lay down in the passage cited is that a decree directing partition has the same effect as an agreement to divide. In the particular case the decree-holder, who had obtained the decree above referred to, died while an appeal was pending to the Privy Council but the decree was nevertheless confirmed by their Lordships in a judgment which is not reported. The report deals with two consolidated appeals, one against an order in execution of the previous decree, and another against the dismissal by the High Court of an appeal from a decree of the District Court dismissing a fresh suit filed by the defendant in the previous suit on the ground that the previous decree had not severed the joint family, and that consequently the property passed to him by survivorship on the death of the plaintiff in the previous suit. It does not appear to have occurred to any one in this hotly contested litigation that, assuming the first decree effected a severance, the subsequent death of the plaintiff pending an appeal made any difference. And, assuming the law to be correctly laid down by their Lordships, that the decree of the Court of first instance effected a severance, there does not appear to be any reason why the subsequent filing of an appeal should be held to effect re-union and justify the Appellate Court in making a fersh distribution of shares according to the condition of the family at the date of the decision of the appeal, and so depriving parties or their representatives of the shares originally allotted to them. In *Chidambaram Chetti* v. *Gauri Nachiar* (6) which also came before the Privy Council, the District Judge tried the 1st issue as to whether the *zemindari* was partible first and in his judgment held that it was, and that this being so the plaintiff was anmittedly entitled to partition. It was not clear if any decree or order had been drawn upon this judgment; but on appeal from the decree of the High Court affirmirg the final decree of the District Court, their Lordships held that the judgment of the District Judge on the 1st issue was equivalent to a declaratory decree and rendered the parties separate in estate

(4) 4 C. 434; 5 I. A. 28.
(5) 11 M. I. A. 75; 8 W. R. 1.
(6) 2 M. 83.

if they had not already been so, and that the subsequent death of the plaintiff before the final decree of the District Court did not make any difference or cause the suit to abate. Their Lordships no doubt observed that the defendant had not appealed from the judgment of the District Court on the first issue and appeared to have acquiesced in it; but these remarks were probably due to the fact already mentioned that no decree or order directing partition was forthcoming, and it does not appear that the result would have been different if these features of the case had been absent. The ruling in *Sangli* v. *Mookan* (7), that the plaintiff's share must be determined with reference to the condition at the date of the final decree in the suit, is opposed to both of the Privy Council decisions above-mentioned although the actual decision may possibly be supported on other grounds as in that case the only decree passed by the lower Court was set aside. As regards *Sakharam Mahadeo Dange* v. *Hari Krishna* (2) the decision rests on the proposition that the decree of the Subordinate Judge in that case did not operate a severance so long as it remained under appeal. For the reasons already given I prefer to follow the decision of this Court in *Subbaraya Mudali* v. *Manicka Mudali* (1) and dismiss the second appeal with costs.

SANKARAN Nair, J.—I agree, and I have only to add that I believe the practice in this Presidency has always been in accordance with the law, as laid down in *Subbaraya Mudali* v. *Manicka Mudali* (1).

Appeal dismissed.

(7) 16 M. 350.

(s. c. 2 M. W. N. 228; 9 M. L. T. 378; 21 M. L. J. 236).

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 72 OF 1908.

February 2, 1911.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Sundara Aiyar.

MUTHIA CHETTY—DEFENDANT—APPELLANT

versus

SINNA VELLIAM CHETTY—PLAINTIFF—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 55—Conditional decree for possession—Vendor's lien—Interest on purchase-money.

Section 55, clause (4) (*b*), of the Transfer of Property Act does not give the vendor an absolute right to interest on the purchase-money irrespective of the equities and circumstances of each case.

Leggatt v. *Metropolitan Railway Co.*, (1870) 5 Ch. A. 716; 18 W. R. 1060, distinguished.

The object of the clause is only to give the vendor a lien on the property for unpaid purchase-money, which will enure also for interest if any interest is payable.

It is obviously inequitable in the absence of express and distinct stipulation that either party to the contract should at one and the same time enjoy the benefits flowing from possession of the property and those flowing from possession of the purchase-money; the estate and purchase-money being things mutually exclusive.

Quære:

Whether a decree for possession in favour of a vendee conditional on his paying the purchase-money can be made in the case of registered sale-deeds according to the provisions of the Transfer of Property Act.

Velayutha Chetty v *Govindaswami Naiken*, 1 M. W. N. 637; 9 M. L. T. 108, 8 Ind. Cas. 364, *Subbramania Aiyar* v. *Pooran*, 27 M. 28, referred to.

Appeal against the decree of the Subordinate Judge's Court of Madura, East, in Original Suit No. 62 of 1908, dated 8th November 1907.

Mr. *S. Srinivasa Iyengar*, for the Appellant.

Mr. *K. Srinivasa Iyengar*, for the Respondent.

JUDGMENT.—In this appeal the first defendant is the appellant. The plaintiff sued to recover possession of a *tope* half of which was sold to him by the first defendant with the profits thereof from the 4th July 1903, the date of the conveyance, Exhibit C. The plaintiff's case is that as the defendant failed to execute a conveyance according to the agreement, Exhibit A dated the 28th April 1903 within the time fixed, the plaintiff demanded performance of the agreement, and after some negotiations between the parties it was agreed that the plaintiff should pay the purchase-money, Rs. 2,600, before the Registrar of Assurances at the time of the registration of the conveyance after the defendant made an endorsement of discharge on a *hundi* for the amount which the plaintiff had previously executed in the defendant's favour and deposited with one Muthia Chetty. The plaintiff alleges that as the defendant refused to register the deed he applied for compulsory registration of Exhibit C which had been previously executed by the defendant and handed over to the plaintiff. Before the Registrar the execution of Exhibit C was admitted by the defendant, but he stated that the sale could not be completed as the plaintiff had failed to pay the purchase-

money. The defendant contended in this suit that the understanding between the parties was that the property should not pass to the plaintiff and Exhibit C should not have any legal operation until the plaintiff paid the purchase-money which he was bound to do at the Registration Office before the registration of Exhibit C. He repudiated all obligation under Exhibit C, and if he was held bound by it, he claimed payment of not only the sum of Rs. 2,600, the amount of the purchase-money, but also interest on it at 2 per cent.; at the same time he disclaimed any liability for the payment to the plaintiff of the profits of the land until the payment of the purchase-money.

The lower Court found that the defendant was not to blame in the matter of the non-payment of the purchase-money and that the plaintiff, if he was entitled to have payment endorsed on the *hundi*, ought to have had it produced at the Registrar's office. It, therefore, refused to award to the plaintiff the profits claimed. With regard to the defendant's claim for interest the Subordinate Judge held that he was not entitled to it, as he remained in possession of the land and got the income accruing therefrom.

It is contended before us by the appellant that he is entitled to interest from the date of Exhibit C, when according to him the ownership of the property vested in him. The respondent contended before us that according to the agreement between the parties, the ownership had not passed to the plaintiff as he failed to pay the purchase-money. We do not consider it necessary to go into this question as we agree with the learned Vakil for the respondent that the appellant is not entitled to interest in this case. For the same reason, we do not deal with the contention that the plaintiff is entitled to an unconditional decree for possession and that the lower Court was not justified in making its decree in the plaintiff's favour conditional on his paying the purchase money to the defendant; but we may point out that the case of *Velayutha Chetty* v. *Govindaswami Naicken* (1) relied on in support of this position appears to be in conflict with *Subramania Aiyar* v. *Poovan* (2) which does not seem to have been brought to the notice of the learned Judges who decided *Velayutha Chetty* v. *Govindaswami Naicken* (1).

The claim for interest is based by the learned Pleader for the appellant on section 55, clause 4 (*b*), of the Transfer of Property Act. That clause, in our opinion, does not give the vendor an absolute right to interest on the purchase-money irrespective of the equities and circumstances of each case. The object of the clause is to give the vendors a lien on the property for unpaid purchase-money and it declares that the lien will enure for the interest as well as for the principal of the purchase-money, assuming that interest is payable. It does not enact that the vendor is entitled to interest in every case. The only case relied on by the appellant [*Leggatt* v. *Metropolitan Railway Co.* (3)] does not support his contention. In that case the agreement between the parties expressly provided for payment of interest by the vendee and of an occupation rent by the vendor till delivery of possession which was to take place on a certain day. The vendor was obliged to remain in possession against his Will after the time fixed for delivery and he had to sue for specific performance. The question raised was whether the vendee was entitled to occupation rent till delivery of possession, and no question was raised as to the vendor's right to interest on the purchase-money, which was conceded, the parties having expressly provided for it. In it James, L. J., held that vendee was not entitled to occupation-rent, as the vendor continued in occupation of the premises "under a pressure arising from the purchaser's default." As observed in Fry on Specific Performance page 591, 4th Edition, it is obviously inequitable in the absence of express and distinct stipulation that Either party to the contract should at one and the same time enjoy the benefits flowing from possession of the property and those flowing from possession of the purchase-money. The estate and purchase-money are things mutually exclusive. "You cannot", said Knight Bruce, V. C., in a case arising out of the sale of some slate lands in Chichester harbour, "have both money and mud." It is not alleged that there was any such express stipulation in this case. On the other hand, we think that the parties must have intended

(1) 1 M. W. N. 637; 9 M. L. T. 108; 8 Ind. Cas. 364.

(2) 27 M. 28.

(3) (1870, 5 Ch. A. 716; 18 W. R 1060.

that the payment of purchase-money and the delivery of possession of the property should be carried out contemporaneously and that interest on the money would not be payable so long as the defendant was in possession of the land.

We confirm the lower Court's decision and dismiss the appeal with costs.

Appeal dismissed.

(s. c. 21 M. L. J. 125; 9 M. L. T. 501).

MADRAS HIGH COURT.

SECOND CIVIL APPEALS NOS. 1, 2, 3 AND 28 OF 1887.

August 2, 1887.

Present:—Sir Arthur J. H. Collins, KT., Chief Justice and Mr. Justice Parker.

SRINIVASAIENGAR *alias* SESHAIENGAR—APPELLANT

versus

SIVASUBRAMANIAM PILLAI, MINOR, BY HIS MOTHER AND GUARDIAN VALLIMAYILAMMAL AND ANOTHER—RESPONDENT.

Inam—Tirva—*Right to share in produce granted in* inam—*Government receiving money payment*—*Whether* inamdar *bound by commutation*—*Agreement to receive revenue at* olungu *rates*—*Fixity*—*Reversion to division of produce.*

Where an *inamdar* is entitled, in respect of the *inam*, to receive the *tirva* which the Government would be entitled to receive, it does not necessarily follow that because the Government has for a long term of years commuted its right to a share in the produce for a money payment, the *inamdar* is bound to do the same.

Even where the *inamdar* agrees to the commutation of his share in produce at the *olungu* rate of the village, this rate must not be looked upon as fixed for all time, it is open to the *inamdar* to revert either to division of produce or to commutation at an altered rate.

Second appeal from the decree of the Subordinate Judge's Court at Tinnevelly in A. S. Nos. 68, 70, and 21 of 1885, presented against the decrees of the Court of the District Munsif of Tinnevelly, in O. S. Nos. 55, 57 and 56 of 1883.

Messrs. *S. Subramaniam* and *R. Sadagopa Chariar*, for the Appellant in S. A. Nos. 1, 2 & 3 of 1887.

Mr. *C. Ramachandra Rao Sahib*, for the Respondent in S. A. Nos. 1, 2 & 3 of 1887.

Mr. *C. Ramachandra Rao Sahib*, for the Appellant in S. A. Nos. 28 of 1887.

Messrs. *S. Subramaniam* and *R. Sadagopa Chariar*, for the Respondent in S. A. No. 28 of 1887.

ORDER.—(*20th February* 1888).—The three ladies sold the land but reserved the *Inam*, and the plaintiff is the present *Inamdar*. The Subordinate Judge has treated the plaintiff's claim as if he only succeeded as the heir to the ladies, but has not considered the further question as to whether he is not entitled to succeed to the full right of the *Inamdar*. The *Inam* was not enfranchised at the date of sale. The plaintiff is entitled to receive from the defendants the *tirva* which the Government would be entitled to receive, but it does not necessarily follow because the Government has for a long term of years commuted its right to a share in the produce for a money-payment that the *Inamdar* is bound to do the same. (See Special Appeals 201—214 of 1877 from Regular Appeals 151—157 of 1876 on the file of the Subordinate Court of Tinnevelly). It is clear from Exhibit I itself that the *Inam* originally was the right to receive a share in the produce and the vendors agreed to the commutation of this at the *olungu* rate of the village. But the *olungu* rate may itself be liable to vary according to fluctuation in the price of grain, and that the *olungu* rate of 1863 was not looked upon as fixed for all time is shown by the succeeding clause relating to *taram* rates.

The plaintiff does not object to tendering a *patta* with rate payable in money provided that market rates are entered, but if the *olungu* rates are still binding on the parties, it is possible that the value of the grain has so much risen since 1863 as to entitle plaintiff to revert either to a division of the produce or to commutation at an altered rate. We must set aside the decrees and ask the present Subordinate Judge to determine the proper terms of the *patta* with reference to the above observations.

JUDGMENT.—In Second Appeals Nos. 1, 2 and 28 of 1887:—The memorandum of objections is not pressed.

The defendant will accept the *patta* in accordance with the terms found by the Subordinate Judge. Each party will pay his own costs in these appeals.

In Second Appeal No. 3 of 1887:—Exhibit G shows that the memorandum of objections is not sustainable, as it is provided that if an excess crop is raised on single crop land besides the single crop, the *tirva* thereof shall be paid to the *circar*.

The defendant will accept the *patta* as decreed by the Subordinate Judge. Each party to bear his own costs.

(s. c. 2 M. W. N. 233).

MADRAS HIGH COURT.

SECOND CIVIL APPEAL No. 1494 OF 1909.

January 19, 1911.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Sundara Aiyar.

GANAPATHI BHATTA AND ANOTHER—DEFENDANTS—APPELLANTS—

versus

MANI ANANTHA BHATTA—PLAINTIFF—RESPONDENT.

Transfer of Property Act (IV of 1882), s. 6—Right to receive Moggu*—Assignment thereof—Validity.*

Moggu is an allowance received by a *wargdar* from *walawargdars* who hold lands within the *warg* for which he holds the *patta*. It is the concession paid to the *wargdar* for his trouble in collecting the revenue and paying it over to Government. The right to the *Moggu* allowance is transferable and section 6 of the Transfer of Property Act is not opposed to such transfer. The assignee can only claim payment of the *Moggu* if the *wargdar* has fulfilled his obligation to receive the revenue from the *walawargdar* and pay it to Government.

Second appeal against the decree of the Temporary Subordinate Judge's Court of South Canara at Mangalore in Appeal Suit No. 420 of 1907, presented against the decree of the Court of the District Munsif of Puttur in Original Suit No. 196 of 1907.

Mr. *K. P. Madhava Row*, for the Appellants.

Mr. *K. Naraina Row*, for the Respondent.

JUDGMENT.—The plaintiff is the assignee of the right of a *wargdar* in South Canara to receive certain dues known as *Moggu*, *i. e.*, an allowance received by a *wargdar* from *walawargdars* holding lands within the *warg* for which he holds the *patta*. He receives the Government assessment from the *walawargdars* and pays it over to the Government. The *Moggu* is stated on behalf of the appellants to be the consideration paid to the *wargdar* for his trouble in collecting revenue and paying it over to Government. Mr. Naraina Row draws attention to his client's allegation that there was also other consideration for the *Moggu*. But as the lower Courts have not gone into the question of any other consideration, we deal with the case on the footing that the collection of the revenue and payment of it over to Government formed the only consideration for it. The plaintiff claims the arrears of *Moggu* due for three years. Between the expiry of the second year and the third year the *patta* of the land in question was transferred to the name of the defendant, the *walawargdar*; but this was done with the express consent of the *wargdar*, which was given by him in consideration of the defendant agreeing to continue to pay in future the *Moggu* allowance paid till then. Two points have to be dealt with in this appeal. It is contended first that the right to the *Moggu* allowance cannot be transferred in law, and the plaintiff, therefore, obtained no right under the assignment, and section 6 of the Transfer of Property Act is relied on, the contention being that the right was one restricted personally to the *wargdar*. We cannot agree with this contention. No doubt the assignee could claim payment of the *Moggu* only if the *wargdar* fulfilled his obligation to receive the revenue from the *walawargdar* and pay it to Government, but that would not render the transfer invalid The second contention is that the transfer of *patta* to the defendant's name was made after the expiration of the second year, that the *wargdar's* right to the *Moggu* then came to an end, and the plaintiff is, therefore, not entitled to recover for the third year. But it is clear that the right did not come to an end, as the defendant expressly agreed to continue the payment in consideration of the *wargdar's* consenting to the transfer of *patta*. The right to the *Moggu* continued to subsist and the plaintiff is, therefore, entitled to payment for the third year also.

We dismiss the second appeal with costs.

Appeal dismissed.

(s. c. 2 M. W. N. 249).

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 790 OF 1909.

February, 24, 1911.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Ayling.

K. P. A. D'CONTHA AND ANOTHER—DEFENDANTS—PETITIONERS

versus

J. P. A SAN KUNHU—PLAINTIFF—RESPONDENT.

Jurisdiction—Private International law—Kuri *chit conducted in British India—Foreigner a chit holder—*

D'CONTHA *v.* ASSAN KUNHU.

Pledge of receipt in foreign territory—Sale of pledged interest by foreign Court—Valid.

A debt contracted and payable in British India was pledged in Travancore with its receipt. A decree for sale was obtained on the pledge and the debt was sold by auction by the Travancore Court in pursuance of the decree:

Held, that the sale was valid.

Petition, under section 115 of Act V of 1908, praying the High Court to revise the decree of the Court of the District Judge of South Malabar, dated the 16th of August 1909 in Appeal No. 307 of 1909 presented against the decree of the Court of the District Munsif of Tangaseri in Original Suit No. 10 of 1908.

FACTS.—One *G. J.* started a *kuri* (chit fund) in a place called Tangasseri in British territory. The monies due under the *kuri* were payable at Tangasseri. A Travancorean, *K. M.*, joined the *kuri*, paid some instalments and got a receipt therefor. Pledging this receipt and also hypothecating certain immoveable properties in Travancore, he borrowed some money from another Travancorean. The latter sued *K. M.* to enforce payment of the money by sale of the hypotheca in Quilon and obtained a decree. In pursuance of the decree the debt evidenced by the receipt was sold in Court auction and purchased by the plaintiff. He sued the defendants (representatives of *G. J.*) in Quilon to recover this debt. That suit was dismissed on the ground of want of jurisdiction, and thereupon the present suit was brought in Tangasseri. It was contended that the sale to the plaintiff was invalid, but both the lower Courts decided it was valid. Hence the revision petition.

Mr. *P. Kundu Panicker*, for the Petitioners:—

On the main question whether the Quilon Court acted without jurisdiction in selling the plaint debt, it was argued for the appellant that the *situs* of the debt was in British India, both because the debtor resided there (Dicey 2nd edition page 310) and also because the debt arose and was payable there. Such a debt could not be sold in execution by a foreign Court [*Ghansham Lal* v. *Bhansali* (1); *Mathusami Naidu* v. *Prince Alagia Vanavala* (2)]. Even when Courts of British territory alone are concerned, one Court cannot attach or sell property outside the limits of its jurisdiction [*Prem Chand Dev* v. *Mokhada Debi* (3); *Dakhina Churn* v. *Bilesh Chunder Roy* (4); *Sayad Khan* v. *B. S. Davis* (5); *Krishna Ramini* v. *Abdur Jubbar* (6)]. The Travancore High Court also has decided that its Courts cannot execute their decrees in respect of property outside their jurisdiction. A distinction must be drawn between the powers of a Court to sell property and the powers of an owner [*Ram Chand* v. *Fitam Mal* (7), per Mahmud, J.]. The owner can pledge or sell he may even be compelled by the Court to pledge or sell. Still it does not follow that the Court has the power to do so directly (Dicey 332). The Sovereignty of a State is strictly territorial and a Sovereign or a Court representing him is acting *ultra vires* when its force is extended to property outside its territory (Dicey page 28). The case cited as illustration in Dicey, page 524, may be distinguished from the present case as there it was the case of a bill of exchange. The bill was situated in Norway, and unlike a receipt it represents the debt completely. A bill of exchange is an incorporated debt while a receipt is mere evidence of a debt.

Mr. *V. Visvanatha Sastri*, for the Respondent.

The case of *North Western Bank* v. *Poynter* (8) is in point.

JUDGMENT.—What happened in this case was that the respondent, a subject of the Travancore Government, to whom one Matheru also a subject of the Travancore Government had mortgaged his rights under a *kuri* chit which he held against the petitioner, an inhabitant of this Presidency; enforced his mortgage and bought his judgment-debtor's interest in the chit in a sale held by the Travancore Court in pursuance of the mortgage-decree. It is contended that the sale by the Travancore Court of Matheru's interest in the chit was opposed to the principles of Private International law and, therefore, void. For this position *Ganshamlal* v. *Bhansali* (1) is cited as an authority. There the learned Judges held

(1) 5 B. 249.
(2) 26 M. 423.
(3) 17 C. 699.
(4) 18 C. 526.
(5) 28 B. 198.
(6) 30 C. 155 at p. 173.
(7) 10 A. 506 at p. 515.
(8) (1895) A. C. 56; 64 L. J. P. C. 27, 11 R. 125; 72 L. T. 93.

that a Court of British India had no jurisdiction to attach, in execution of a decree of a British Indian Court, a debt which was due from a person, a subject of a Native State, to the judgment-debtor, a subject of British India. That case may be distinguished from this case on the ground that here there is no question of realising in execution of a decree property which is situate in a foreign territory. The plaintiff in the present case instituted his suit in the very territory where, according to the petitioner himself the property is situate, *i. e.*, in the Malabar District. No doubt Sargent, J., bases his decision on a general proposition which, if understood in its widest application, might cover this case *viz.*, that "an attachment of a debt due from a subject of a foreign territory would be virtually an attempt to interfere in the interest of a third person in the jural relations arising out of a cause of action over which *ex hypothesi* no Court in British India has or even claims jurisdiction." But the observation must be understood with reference to the nature of the process provided by particular sections of the Civil Procedure Code for attachment of a debt. However that may be, we fail to understand why, if, as it is conceded, there is no principle of International law which prevents a pledge of moveable property or of a debt, supposing it is allowed by the law of the territory where the transaction took place, the Court of that territory should be unable to sell the property in execution of its decree so as to pass a valid title to it, if the property is situate out of its jurisdiction We may observe that the *kuri* receipt was in Travancore at the time of its pledge. The case cited in Dicey's Conflict of Laws, p. 524 (2nd Edition), seems to us to be clearly in support of the view we have suggested. [See also *North Western Bank* v. *Poynter* (8).] The objection taken by the petitioner to the judgment of the lower Court fails and the petition is dismissed with costs.

Petition dismissed.

(s. c. 2 M. W. N. 231; 9 M. L. T. 414).

MADRAS HIGH COURT.

CRIMINAL APPEAL No. 441 OF 1910.

February 7, 1911.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Ayling.

THE PUBLIC PROSECUTOR—APPELLANT

versus

KUPPA KAVUNDAN AND OTHERS—ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 4 (p)—Officer in charge of Polic Station—Constable.

Section 4 (*p*) of the Criminal Procedure Code enacts that "Officer in charge of a police station" includes, when the officer in such charge is absent at the station-house, the police Officer present at the station who is next in rank to such officer and is above the rank of a constable, or, when the Local Government so directs, any other police Officer so present. Under the powers conferred by section 6, the Local Government has directed that the senior constable present at any such station shall be deemed to be the Officer in charge of the police station for the time being during the absence of the Officer in charge.

Appeal, under section 417 of the Code of Criminal Procedure, against the acquittal passed on the accused in Criminal Appeal No. 68 of 1909 by the Sessions Judge of Trichinopoly in C. C. No. 394 of 1909 on the file of the Deputy First Class Magistrate of Musiri.

FACTS.—The accused were convicted by the 1st Class Magistrate of Musiri under sections 332 and 147, Indian Penal Code, of being an unlawful assembly whose common object was to assault the police constables P. Ws. Nos. 1 to 3, who had conducted a search in one of the accused's house. They appealed to the District Judge who reversed the conviction under section 332, Indian Penal Code.

P. Ws. Nos. 1 and 2 are constables of Muraiyar station and the search was made within the limits of Pulivalam station. The facts appear sufficiently from the following judgment of the Sessions Judge—

"I am unable to accept the Public Prosecutor's contention that section 155 (1), Criminal Procedure Code, read with section 551, Criminal Procedure Code, authorise a Police Constable deputed to make an investigation by the Inspector, to search beyond the limits of the station to which he is attached, provided the place searched is within the local area to which the Inspector is appointed: nor do I think the presence of P. W. No. 3 a constable of Puli

valam station brings the search under section 165 (1) for the 3rd P. W. was not an Officer in charge of a police station as defined in section 4 (*p*), Criminal Procedure Code, on the day the search was made. The Pulivalam S. H. O. left the station on 22nd September 1909 and handed over charge according to the station diary to Police Constable No. 209. An Officer in charge of a police station is defined in section 4 (*p*), Criminal Procedure Code, as including when the S. H. O. is absent, the Police Officer at the station next in rank to the S. H. O. above the rank of Constable, or "*when the Local Government so directs any other police Officer so present.*" Order XXI (*e*) of the Madras police orders which are issued by the Local Government, directs that when the S. H. O. leaves his station he should appoint a constable to take charge in his absence. When the Pulivalam S. H. O. left the station on the September 22nd, therefore, Police Constable No. 209 became the Officer in charge of that station. He did not become a Station House Officer and the Local Government has not directed that a constable appointed to take charge of a station by the S. H. O. shall appoint some other constable to take charge if he should leave the station. Exhibit W shows that Police Constable No. 209 handed over charge to Police Constable No. 637 that Police Constable No. 637 gave charge to Police Constable No. 299 and that Police Constable 299 re-delivered charge to Police Constable No. 637. The 3rd P. W. is Police Constable No. 637, and though no doubt he was actually in charge of the station building when P. Ws. Nos. 1 and 2 asked him to accompany them to search in the 1st appellant's house he was not the Officer in charge of the Police station as defined in section 4 (*p*), Criminal Procedure Code, and had no authority under section 165, Criminal Procedure Code, to make a search without a written order in writing from Police Constable No. 299 who became Officer in charge of the station when the S. H. O. left.

For the reason set out in the preceding paragraph I am of opinion the search conducted by P. Ws. Nos. 1, 2 and 3 in the 1st appellant's house was illegal, and had the charge against the appellants been one of resisting the search I should have been inclined to hold they were protected by section 96, Indian Penal Code, for the case seems to be governed by the observations of their Lordships in *Queen-Empress* v. *Kallan* (1) and though as observed in *Queen-Empress* v. *Poomalai Udayan* (2), the actual finding in that case related only to an escape from lawful custody the observations of the Judges are entitled to full weight.

The Government preferred an appeal against this judgment to the High Court.

Mr. *C. F Napier*, for the Crown.

JUDGMENT.—The question raised by this and the connected Appeal No. 410 of 1910 is whether the Sessions Judge was right in holding that Constable No. 637 (Prosecution Witness No. 3) was not an Officer in charge of a police station within the meaning of section 4, sub-section (*p*), of the Criminal Procedure Code. What happened was the Station House Officer left on the day in question leaving Police Constable No. 209 in charge, then this constable handed over charge to Constable No. 637 who gave charge to Constable No. 299 and Constable No. 299 re-delivered charge of the station to Constable No. 637 before the latter conducted the search. Section 4, sub-section (*p*), says that Officer in charge of a police station' shall include when the Officer in such charge is absent from the Station-house . . . . . the police officer present at the Station-house who is next in rank to such Officer and is above the rank of a constable or when the Local Government so directs any other Police Officer so present.

Under the powers conferred by this section, the Local Government by Judicial Notification No. 3, dated the 31st January 1883 (Local Rules and Orders made under enactments applying to the Madras Presidency Volume I, part II, page 165) has directed that the senior constable present at any such station shall be deemed to be the Officer in charge of the police station for the time being during the absence of the Officer in charge as defined in the said section. By this notification, which was apparently not brought to the notice of the learned Sessions Judge, Constable No. 637 who was the senior constable present became Officer in charge of the station. The result, therefore, is that the acquittal of accused Nos. 1 to 6, 8, 10, 11 of the charge under section 332, Indian Penal Code, will be set aside.

(1) 19 M. 310.
(2) 21 M. 296 at p. 298.

The sentence requires no modification.

Acquittal set aside.

(s. c. 9 M. L. T. 281).

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 104 OF 1908.

January 26, 1911.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Sundara Aiyar.

CHINNAPPA PILLAI AND OTHERS
PLAINTIFFS APPELLANTS

versus

M. R. C. MUTHURAMAN CHETTIAR
DEFENDANT—RESPONDENT.

Pro-note—Suit on unstamped pro-note—Construction of the word "Than"*—No cause of action as for money lent.*

Where a loan and the execution of a pro-note are contemporaneous and constitute one transaction, a suit based on the original consideration, if the pro-note is inadmissible for insufficiency of stamp, is not maintainable.

Pothi Reddi v. *Velayuda Sivan*, 10 M. 94, referred to and followed.

Held, on a construction of the document in this case, that the word '*Than*' meant 'you' and that that document was a pro-note.

Appeal against the decree of the Court of the Subordinate Judge at Nagapatam in Original Suit No. 5 of 1907, dated the 8th February 1908.

Messrs. *H. Lubeck* and *B. Govindan Nambiar*, for the 2nd Appellant.

The Hon'ble Mr. *P. S. Sivaswami Aiyar*, for the Respondent.

JUDGMENT.—The appeal contends that the document sued on is not a pro-note and that the lower Court is wrong in dismissing the suit on the ground that it is not properly stamped. The ground on which this contention is rested is that the promise to pay is to Lakshmanan Pillai described in the third person by the word * * (*than*). There can be no doubt that the word is used in the sense of *you*. The word * * makes this quite clear.

The next contention is that the suit may be maintained as one to recover money lent, based on the original consideration. But the plaint states clearly that the loan and the execution of the pro-note were contemporaneous and constituted one transaction. A suit based on the original consideration would not, therefore, be maintainable [See *Pothi Reddi* v. *Velayudu Sivan* (1).]

It is contended further that the defendants

(1) 10 M. 94.

having admitted the debt in their written statement, the plaintiff is entitled to a decree without reference to the pro-note. It is enough to say in answer that we can find no such admission.

The appeal must be dismissed with costs.

Appeal dismissed.

(s. c. 9 M. L. T. 293).

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NOS. 679 TO 682 OF 1906.

October 1, 1909.

Present: Sir Ralph Benson, Offg. Chief Justice, and Mr. Justice Wallis.

SUBBARAYA REDDI AND OTHERS
DEFENDANTS—APPELLANTS

versus

THIAGARAYA CHETTY, MINOR BY HIS MOTHER AND NEXT FRIEND LAKSHMI AMMAL—PLAINTIFF—RESPONDENT.

Madras Rent Recovery Act (VIII of 1865), *s.* 11—Shrotriemdar, *right of—Rent—Rate.*

Where a right of occupancy is in the *mirasidars*, Shrotriemdars are entitled to charge rent only; and the rate of rent is governed by the provisions of section 11, cls. (*i*) to (*iii*), of the Madras Rent Recovery Act.

Second appeals against the decrees of the District Court of Chingleput in Appeal Suits Nos. 125 and 130, 126 and 131, 127 and 133 and 128 and 434 of 1905 presented against the decisions of the Court of the Head Assistant Collector of Chingleput in Summary Suits Nos. 236, 237, 239 and 240 of 1905.

ORDER.—The District Judge has proceeded on the assumption that under section 11 of the Rent Recovery Act the plaintiff as Shrotriemdar is entitled to make any charge that he thinks fit in respect of the waste lands in the village. But he has failed to notice the proviso to clause (*iv*) of the section which states that "nothing in this rule shall be held to effect any special rights which by law, or usage having the force of law, are held by any class or person in such wastes or unoccupied lands." The defendants claim that the right to occupy these waste lands was in the *mirasidars*. If this is so the Shrotriemdar is only entitled to charge rent at a rate to be ascertained in accordance with the provisions of clauses (*i*), (*ii*) and (*iii*), of the section. The defendants rely on Exhibit 1 and other evidence in support of their plea.

RAGHAVA CHETTY *v.* THOYAMMAL.

The District Judge states that Exhibit I seems to be irrelevant as there is nothing in it to show that it refers to the lands in dispute. The evidence, however, of the 1st and 2nd witnesses for the plaintiff, though not altogether clear on the point, seems to show that Exhibit I does refer to the lands now in dispute. It was executed by the father of the present plaintiff, who was then the *Shrotriemdar*, and it acknowledged the right of the parties thereto (the plaintiff and one of the present defendants and the father of another) to divide among themselves the lands included in the document.

We must, therefore, call upon the District Judge to submit a finding on the following issues, *viz.*, "Whether the defendants are entitled to occupy the lands in dispute at a fixed rate of rent, and, if so, what the rate is."

Further evidence on both sides may be adduced. The finding should be returned in six weeks. Ten days will be allowed for objections.

In compliance with the above order, the District Judge submitted his finding.

The second appeals came on for final hearing after the return of the finding of the lower Appellate Court upon the issue referred by this Court for trial and the Court delivered the following

JUDGMENT.—We accept the findings. The *pattahs* will be modified by inserting a money rent of 7 annas per *cawni* in lieu of *waram* in respect of the *vemba* or sandy *poramboke* lands in the defendants' possession. The appellants will have costs in this Court.

(s. c. 9 M. L. T. 296).

MADRAS HIGH COURT.

[ORIGINAL CIVIL JURISDICTION]

CIVIL SUIT No. 161 OF 1909.

September 8, 1910.

Present:— Mr. Justice Wallis.

A. RAGHAVA CHETTY—PLAINTIFF

versus

A. THOYAMMAL— DEFENDANT.

Hind Law—Widow managing her husband's estate—Removal—Grant of Letters of Administration—Liability to account.

A Hindu widow is liable to removal from the management of her husband's estate if her conduct and management is such as to endanger the estate; where she has obtained Letters of Administration to her husband's estate, she becomes bound to the Court, apart from her position as widow, to account for failure to get in the estate.

JUDGMENT.—This is the suit by the plaintiff who is the brother of the deceased Agasti Munisamy Chetty against Agasti Thoyammal, his widow, asking that the defendant be restrained by an injunction from alienating her husband's properties; that she be directed to account for them, and that she be removed from possession and a Receiver be appointed on grounds generally of mismanagement.

Now it has been held in Original Side Appeal No. 54 of 1906 that a widow will be removed from management if it be shown that her conduct and management have been such as to endanger the reversioner's estate and I do not think it necessary or desirable to go behind that authority. But there is a further feature in the present case which is also material and that is this. The plaint states that the defendant at the time of the institution of this suit had applied for Letters of Administration of the estate of her deceased husband and such letters had been ordered to issue to her and subsequent to the institution of the suit and before the trial such letters were issued to her. And, apart from the duties which she may have as a widow, she has now imposed upon her the further duty as administratrix the duty to the Court of getting in the estate of the deceased and she is most certainly accountable for failure to get in the estate by reason of her having taken administration. When she has got in the estat she is, of course, entitled to deal with it as a widow. But, in my opinion, by taking out administration she incurs the same degree of liability as any other person taking out administration to property and get in the estate of the deceased.

Before I proceed to deal with the charges which have been made against the management of the widow in this case it will be convenient to say a word about the position of her husband. He appears to have been a petty trader. He had dealt in fuel and had one of those depôts on the banks of one of the canals and he also did money-lending business, one branch being loans on promisssory-notes as to which he had a special book and the other giving loans on pledges of jewels as to which also he had a book, but this book has

not been produced. It is also material in this case in judging of the conduct of the widow and of those in whose hands she is that the account books which he must have had – as to which there is plenty of evidence that he had in the course of his business, ledgers, cash-books and day-books for the purpose of dealing in—wood have not been produced and, in my opinion, have been clearly suppressed.

He not only sold wood on commission at this wood depôt but he also purchased a plantation in the Chingleput District to the north of Madras. Sometime after he purchased this, the Government revenue was allowed to fall into arrears and it was put up for sale. Not only the lands he had purchased on which valuable trees were standing but also some other lands belonging to other people on which there may have been no trees at all were sold. Now this land which, according to the evidence, is worth about many thousands of rupees was purchased at a revenue sale in the name of his son-in-law Kanniappa Chetty for Rs. 147.

The case for the plaintiff in this suit is that that purchase was *benami* for the deceased Munisamy Chetty. The case of Kanniappa Chetty, who was a witness for the defendant in this case, is that behind the back of his father-in-law without his father-in-law knowing anything about it he went and purchased this estate worth many thousands of rupees for Rs. 147 and has been in possession and enjoyment of it ever since. Although his father-in-law lived for some years after that there was no objection on his part, and that his father in-law recognised his purchase and took wood from that plantation and sold it on commission for Kanniappa Chetty. It is only necessary to state this story of Kanniappa, to see that it is manifest falsehood. Whatever be the truth about this plantation, that certainly is not the way in which it came to be purchased in his name. The evidence in this case is that subsequently to the purchase it continued to be in the enjoyment and possession of the deceased Munisamy until his death, that he began to cut in December 1907, he died in April 1908 and at the time of his death he had removed 160 tons which may roughly be said to have been of the value of Rs. 1,600 and that there were 350 tons of wood cut which would roughly be of the value Rs. 3,500 lying there, but not removed at the time of his death. There are three letters written shortly before his death showing that he was dealing with the property. He admittedly found the money for the cutting. But Kanniappa Chetty says that the 160 tons removed in Munisami's life-time were removed on his account, yet he admits that he never made any claim whatever to the sale-proceeds from that day to this and, as I say, his story is utterly unworthy of any belief or attention.

One of the charges against the defendant in this case is that she has not asserted the right of the estate to this plantation or to the wood which was lying there cut at the time of Munisami's death, but has connived at the action of Kanniappa Chetty who was the husband of her own daughter now dead and has since her death become the husband of her sister's daughter. Her case, however, is somewhat different to this. She says, that at the time when the plantation was put up for sale for arrears of revenue the deceased had a granddaughter—a daughter of Kanniappa Chetty—and that he was anxious that the plantation should go to his granddaughter rather than that it should go to his brothers—to the reversioners—and of whom is his brother the plaintiff and that the reason why it was purchased at the revenue sale in Kanniappa Chetty's name and not in his own name by the deceased was to give effect to this design, and as evidence that this was the intention of the deceased they have put in one document which is admittedly in the hand writing of the deceased and which is called a '*ravana*', that is to say a consignment note but which is not a consignment note as it was not a consignment of wood prepared at the plantation under which wood was consigned to Madras but appears to be a memorandum in writing prepared by the deceased; I am not in a position now to decide as between the estate and Kanniappa Chetty as to the title to this plantation. It may be that this was an attempt on the part of the deceased to create evidence in favour of his granddaughter that the property was hers. As a matter of fact, she died before he did. But in order that such a case might be made out it would be necessary to show that there was a complete gift to his grand-daughter in his life-time. The accounts of the deceased, if available, would, no doubt, throw much light on the question

but they have been suppressed. And, therefore, all I am prepared to say on this matter now is that it is certainly a matter which needs investigation by the Receiver who will have to be appointed and that it could not safely be left in the hands of the defendant. As I have said, there is not only a question of this Casuarina plantation but also of a large quantity of wood which was lying there cut at the time of Munisami's death and which undoubtedly belonged to his estate unless there had been a completed gift by the deceased of the plantation to his granddaughter before his death.

The defendant, as I have said, has made absolutely no effort to assert any title to this. She says she acted on the advice of her Vakil Thangavelu Chetty who is now dead. I am not prepared to accept that statement in view of the unreliable character of her statements. It is not necessary to consider whether her—the widow's—unsatisfactory conduct in this respect, would standing by itself have justified the Court in removing her from the management and appointing a Receiver because there are a large number of other matters. But before I leave this question I feel bound to comment upon the evidence which has been given on the other side, because it appears to me that there has been undoubtedly gross subordination of perjury on the part of the other side. A witness was put into the box here who was made to say that Kanniappa Chetty had come to his shop and had written a letter to the deceased in which he renounced all claim to his property. But it is not clear that there was any earthly reason for his doing so and, in my opinion, that is one of the clearest pieces of concoction I have ever seen. Further than that, we have had the evidence of the clerk of Mr. Thangavelu Chetty the defendant's Vakil in this case, who was put into the box to say that notice had been sent by the deceased Vakil, Thangavelu Chetty, to this Kanniappa Chetty, protesting against his claim to the plantation. No attempt was made to produce the press copy letter books of the deceased Vakil although the witness said that the press copy letter books were in another Court. If there was such a notice, it is perfectly clear that they could have been produced. I attach no importance to the evidence of this witness who, I think, ought not to have been put before the Court. However, the fact of evidence like this having been called in answer to the case of the other side cannot affect my opinion on the general question which is that the widow has not satisfactorily accounted for her conduct with reference to this matter.

Then there are other matters in which her conduct has been equally unsatisfactory. She filed an affidavit of the assets for the purpose of obtaining Letters of Administration in which she admittedly suppressed the fact that she had already collected between Rs. 2,000 and Rs. 3,000 since her husband's death. She tries to explain that by saying that she thought she had to make a return of debts, still outstanding. Although the contents of the affidavit were explained to her and althongh it was prepared under the advice of one Vakil Thangavelu Chetty of whom I shall assume to have done nothing improper in the matter and she had the advice of another Vakil as well.

Further than that, there was a decree for Rs. 1,582 obtained by her husband against one V. Gurunatham Chetty which, according to the uncontradicted evidence of the plaintiff, had been transferred for execution to Nellore at the time of the death of Munisami. In the cross-examination of the plaintiff it was suggested on behalf of the defendant that this decree had become barred. When the defendant came into the box she, however, told a very different story. She said that in turning out a bureau she put her hand on an account which showed that this debt had been cleared off or satisfied in the life-time of Munisami. She has not produced his accounts and her evidence is unworthy of any credence, especially when it appears from another part of the evidence that this Gurunatham Chetty is aiding and abetting Kanniappa Chetty in looking after the Casuarina plantation in dispute. Then there were also other debts which were not mentioned at all. There was a debt of Rs. 250 from the Leper Hospital. She gives no satisfactory reason for not returning it in the affidavit of assets. There were also three items 15, 16, and 17 in Schedule E as to which she says, I think, they were cleared off in her husband's lifetime and I am unable to accept her explanation as satisfactory. There is, further, the fact

that although in her affidavit of assets Exhibit A, she returned the funeral expenses of the deceased at Rs. 750 in an account which she subsequently filed in this Court after the institution of this suit she showed the expenses from his death up to the end of Karmanthram at Rs. 1,200 and her story in the box is that she handed Rs. 1,200 over to the plaintiff, and he promised to account for that but never did.

I have no hesitation in saying that this story is absolutely false. Similarly an account subsequently furnished shows an expenditure of Rs. 500 for the annual ceremony of the deceased. Kanniappa Chetty says he once had accounts and vouchers but he has destroyed them. The plaintiff swears that only Rs. 100 was spent on this occasion and in view of the conduct of the defendant, I prefer to accept his evidence in this respect. The plaintiff also gives evidence that there were far more jewels under pledge to the deceased at the time of his death than have been accounted for by the defendant. The fact that the jewel-book kept by the deceased relating to these transactions has not been produced is certainly a strong ground of suspicion against the defendant.

There is also another matter of which complaint is made by the plaintiff, *viz.*, that the affidavit of assets contains no mention of any jewels having been left by the deceased and that the defendant has claimed as her own all the jewels which undoubtedly were made by the deceased both for her and for his daughter. The question of property in those jewels, I mean as to whether property in them passed to the wife and the daughter, is one which it is not very easy for me to decide in the present state of the evidence and I say nothing about these jewels. But, on the whole, I think that the evidence discloses abundant and substantial reason for refusing to leave the widow any further in charge of the property. I think she is an ignorant woman. She says she cannot read or write herself. Admittedly, such of the accounts as have been put in have been entirely prepared by Kanniappa Chetty. She and Kanniappa Chetty have largely suppressed the materials upon which they have been prepared and I think she cannot clearly be trusted to preserve the state and it is necessary for the preservation of the estate that a Receiver should be appointed. In the other case the widow consented to be appointed a Receiver, but I do not think, having regard to the evidence in this case, that the widow could be appointed a Receiver. I should prefer to ask the Administrator-General to act as a Receiver in this case.

With reference to the question that an account should be taken in every case where the Court grants administration, it is open to the Court on proof of mismanagement by the Administrator to take the administration into its own hands and direct the Administrator to account for his past administration, and I think that is the proper course to be taken in this case. I, therefore, hold that she is accountable in respect of the collection of the estate which it was her duty to collect and adjourn the case to Chambers for the purpose of taking the account. I decide nothing, of course, as to the lines on which the account is to be taken.

(s. c. 9 M. L. T. 300).

MADRAS HIGH COURT.

ORIGINAL CIVIL JURISDICTION.

CIVIL SUIT No. 164 OF 1909.

November 1, 1906.

Present:—Mr. Justice Wallis.

ADMINISTRATOR-GENERAL OF MADRAS—PLAINTIFF

versus

DASAI GOUNDEN—DEFENDANT

B. HANUMANTHA RAO—APPLICANT.

Receiver—Leave to sue Receiver—Application.

It is not necessary in every case to sue a Receiver as such but where any right is established by a decree in the suit to the property in the hands of a Receiver, then the Court may, on an application by the party in whose favour the right is established, make an order directing the Receiver to satisfy the decree.

ORDER.—This is an application for leave to institute a suit against a Receiver who has been appointed in a suit for a dissolution of partnership. The proposed suit is to be against others as well as the Receiver, and among others against the person filing the office of Receiver as such and in his personal capacity.

Now the only point which I have to consider is whether leave should be given to institute the suit as against the Receiver *qua* Receiver. It seems to me a perfectly proper

case in which to allow the plaintiff to proceed against every body except against the Receiver *qua* Receiver. But I find it has been held in *Kumar Suttya Ghosal* v. *Rani Golap Mani Debi* (1), that if there is any question between the parties entitled to property in the hands of a Receiver, a decree in a suit between the parties can always be carried out against such property or any share therein without making the Receiver a party to the suit. See also Kerr on Receivers, 165, 4th Edition and *Smith* v. *The Earl of Ettingham* (2). Although the case has not been very fully argued before me, yet on these authorities it seems to me it is neither necessary nor desirable to allow the Receiver to be sued as Receiver, because the other suit can go on and if, in the course of that suit, it appears that the plaintiff establishes any right to the property which is in the hands of the Receiver, then it is open to him to apply to this Court in the suit in which the Receiver is appointed when the Court upon a consideration of the whole facts will make such order as is proper and may direct the Receiver to satisfy the decree which may be passed in the case. The application to sue the Receiver as Receiver is dismissed. Applicant will pay the Receiver's costs.

Application dismissed.

(1) 5 C. W. N. 27.
(2) 7 Beav. 357 at p. 374.

(s. c. 9 M. L. T. 314).

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 91 OF 1908.

January 20, 1911.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Ayling.

VENNAM PITCHAYYA AND OTHERS—DEFENDANTS—APPELLANTS

versus

GOGINENNI RAMAKRISHNAYYA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Promissory note—Partial discharge—Burden of proof.

The *onus* of proving partial discharge of the amount due under a promissory note is on the person pleading such partial discharge.

Appeal against the decree of the District Court of Guntur, dated the 8th February 1908, in Original Suit No. 42 of 1908.

JUDGMENT.—The only question in this appeal is whether the defendants have proved the payment of Rs. 1,850 on the 25th May 1903, in partial discharge of amount due on pro-note. The learned Vakil for the defendants has placed before us all the evidence oral and documentary which was adduced in support of his client's case. But we have no hesitation in saying that the learned District Judge was right in not accepting such evidence. The story told is somewhat peculiar. The plaintiffs' father is alleged to have come, in answer to the fifth defendant's invitation, to attend the marriage of the fifth defendant's son at a village which is about midway between the plaintiff's and the 5th defendant's villages being about four miles from the plaintiff's village. The plaintiff further stayed there for the five days the marriage lasted and then when the marriage was over he was asked to stay on for two or three days more in the fifth defendant's house, as the fifth defendant wanted to make a payment to him. At the fifth defendant's village the sum of Rs. 1,850 was paid on the 25th May 1903. In support of his story an entry of the payment in the fifth defendant's day-book (Exhibit II) and his ledger [Exhibit II (a)], the former of which purports to be signed by the plaintiff's father, and a receipt (Exhibit I) also said to be signed by the plaintiff's father have been produced. The receipt, Exhibit I, is said to have been written by Defence Witness No. 2 and attested by Defence Witnesses Nos. 3 and 4. As regards the entry in the day-book, it appears that the fifth defendant when he gave evidence in another case in 1903 denied that he had a day-book. The entry in the ledger was copied from day-book. It appears that the fifth defendant had to borrow Rs. 1,000 on the 15th May 1903, and Rs. 400 on the 20th May 1903 to meet the expenses of the mariage, and it is not satisfactorily explained how he came to have cash balance of Rs. 1,850 or more on the 28th May 1903.

It is also difficult to understand that, if the fifth defendant was going to make such a large payment and the plaintiff's father had to wait two or three days for it, why the pro-note was not sent for and the payment duly endorsed thereon, especially as the parties appear to have been very cautious in their previous dealings, nor is there any explanation why the receipt was not registered. The fifth defendant has given evidence in

support of his case and also examined the attestors of the receipt, Defence Witnesses Nos. 3 and 4 and the writer Defence Witness No. 2. We cannot say that the evidence of these witnesses is satisfactory. As remarked by the District Judge, a number of relations of the fifth defendant are said to have been present at the time of the payment and yet none of them attested Exhibit I, nor was any friend of the plaintiff's father asked to attest Exhibit I. Defence Witnesses Nos. 3 and 4, we may observe, are causal witnesses and not of such a character as to inspire confidence in them. Defence Witness No. 2 was a *gumasta* of the fifth defendant and is under obligation to his family. Having regard, therefore, to the inherent improbability of the defendant's story, we are unable to say that the onus which lay on the defendants had been discharged. We dismiss the appeal with costs.

Appeal dismissed.

(s. c. 9 M. L. T. 317).

MADRAS HIGH COURT.

APPEAL AGAINST APPELLATE ORDER No. 82 OF 1910.

February 6, 1911.

Present:—Mr. Justice Abdur Rahim and Mr. Justice Ayling.

M. R. M. S. VELLAYAPPA CHETTY AND OTHERS—DEFENDANTS—APPELLANTS

versus

R. NELLAYA PILLAY AND ANOTHER—PLAINTIFF AND DEFENDANT—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XLI, r. 23—Civil Procedure Code (Act XIV of 1882), s. 568—Fresh evidence—Appellate Court, powers of—Unstamped document endorsed as stamped by Collector subsequent to decision of suit—Admissibility in appeal.

Section 568 of the Civil Procedure Code (Act XIV of 1882) does not prevent an Appellate Court from admitting a document originally insufficiently stamped but endorsed by the Collector as sufficiently stamped subsequent to the disposal of suit by the lower Court. In such a case, the Appellate Court does not admit additional evidence but simply declares that the objection to the admissibility of the document on the ground of insufficiency of stamp has been removed by the endorsement of the Collector.

Kessowji Issur v. *G. I. P. Railway Co.*, 31 B. 381 at p. 390; 11 C. W. N. 721; 6 C. L. J. 5; 4 A. L. J. 461; 2 M. L. T. 435; 9 Bom. L. R. 671; 17 M. L. J. 347, referred to.

When the ground on which such evidence is admitted by the Appellate Court has arisen subsequently to the disposal of the suit by the lower Court, such evidence may be admitted under rule 23 or rule 33 of Order XLI of the new Civil Procedure Code.

Appeal against the order of the Court of the Subordinate Judge of Madura (West) in A. S. No. 307 of 1909, presented against the decree of the Court of the District Munsif of Sivaganga in O. S. No. 456 of 1908.

JUDGMENT.—The first question argued before us is whether the lower Appellate Court was right in setting aside the decree of the District Munsif and remanding the suit for disposal according to law on the ground that the document on which the plaintiff based his suit became admissible by reason of the endorsement of the Collector made after the disposal of the suit by the District Munsif, to the effect that the document had been sufficiently stamped. The argument is that section 568, Civil Procedure Code, prevented the Appellate Court from admitting the document in evidence inasmuch as that would be taking additional evidence which is only permitted under the conditions specified in the section and none of which hold good in this case. The section, however, contemplates a case in which the Appellate Court wishes or is asked to admit additional evidence for the purpose of disposing of the appeal on the merits. But here the Appellate Court has not admitted the document in question and does not purport to dispose of the case on the merits. It has simply declared that the objection to the admissibility of the document on the ground of insufficiency of stamp has been removed by the endorsement of the Collector and has asked the District Munsif to deal with the case on the merits. We have been referred to the decision of the Privy Council in *Kessowji Issur* v. *G. I. P. Railway Co.* (1) but there is nothing in that decision which is inconsistent with the view we have expressed. On the other hand, there are words in the judgment of their Lordships which support our view of section 568, Civil Procedure Code.

The next question is whether the Appellate Court was entitled to set aside the decree of the District Munsif and to remand the case to him for disposal on a ground which arose subsequently to the passing of the decree by the District Munsif. This question, which is

(1) 31 B. 381 at p. 390; 11 C. W. N. 721; 6 C. L. J. 5; 4 A. L. J. 461; 2 M. L. T. 435; 9 Bom. L. R. 671; 17 M. L. J. 347.

not free from difficulty, has not been fully argued before us but we are inclined to hold that either rule 23, or 33, Order XLI, of the new Code is wide enough to cover such a case as this.

The appeal is dismissed with costs.

Appeal dismissed.

(s. c. 9 M. L. T. 310).

MADRAS HIGH COURT.

CIVIL REVISION PETITION No. 455 OF 1908.

February 16, 1911.

Present:—Mr. Justice Wallis.

G. NARAYANASAWMI NAIDU GARU

RECEIVER NIDADAVOLE ESTATE OF ELLORE—PLAINTIFF—PETITIONER

versus

ARETI TIRAPATIRAYUDU—DEFENDANT—RESPONDENT.

Madras Revenue Recovery Act (II of 1864)—Landlord and tenant—Tenant using Government water.

Under Madras Act VII of 1865 it is the land that is subject to the payment of cess to Government.

Petition, under section 25 of Act IX of 1887, praying the High Court to revise the decree of the District Munsif of Tanuku dated the 23rd December 1907, in Small Cause Suit No. 758 of 1907.

JUDGMENT.—I cannot interfere. The plaintiff failed to prove his case. He did not show to the satisfaction of the District Munsif that the rate paid by him was such as he was bound to pay. With regard to the suggestion that the tenant of a *zemindar* taking Government water may be regarded as a land-holder within the meaning of the Revenue Recovery Act, 1864, on which reliance was placed, the decision in *Nynappan Servai* v. *The Secretary of State for India in Council* (1) appears to overlook the fact that under Act VII of 1865 section 1, the cess is to to be levied "on the land," that is to say, that the land is subject to payment of it to Government. Further, that decision does not apply to the facts of the present case.

The petition is dismissed.

Petition dismissed.

(1) 8 M. L. T. 186: 1 M. W. N. 322; 7 Ind. Cas. 403.

(s. c. 9 M. L. T. 307; 2 M. W. N. 267).

MADRAS HIGH COURT.

FIRST CIVIL APPEAL No. 182 OF 1905.

December 7, 1910.

Present:—Mr. Justice Krishnasawmi Aiyar and Mr. Justice Ayling.

KANCHANAPALLI APPAJEE PANTHULU *alias* RAMASAMY AND OTHERS—PLAINTIFFS—APPELLANTS

versus

ALUR RAMACHARLU AND OTHERS—DEFENDANTS—RESPONDENTS.

Hindu Law—Widow—Alienation of family property—Suit by reversioners to set aside—Purchaser—Burden of proof—Future necessity.

Where a Hindu widow sells her husband's property to a stranger, the burden of proving that the sale is binding on the reversioners rests on the purchaser and on his failure to discharge such burden the property reverts to the estate.

A widow is not entitled to mortgage her husband's property and raise a loan not for her present use but to be kept in deposit with the lender, to be given to her from time to time so long as the amount may last and she may have legitimate occasion for expenditure in future.

Appeal against the decree of the District Court of Cuddapha in Original Suit No. 13 of 1903.

JUDGMENT.—This is a suit by reversioners on the death of a Hindu widow to recover certain proporties which belonged to her husband's estate with mesne profits. The widow who died in the year 1893 had executed a mortgage by conditional sale in favour of the 1st defendant for the sum of Rs. 1,350 of the properties sued for. The District Judge has given a decree to the plaintiffs for possession conditional on their paying the sum of Rs. 1,350 to the 1st defendant the mortgagee. Exhibit XII is the mortgage-document.

The question for consideration is whether the mortgage was for purposes binding on the reversioners. The 1st defendant, the mortgagee, is a second grade Pleader. The amount of the mortgage is not advanced by him to the widow, but he undertakes to pay off certain decree debts alleged to be due by her to one Narasi Reddi and he executes a bond (Exhibit XV) for the sum of Rs. 650 which is part of the consideration for the mortgage. The 1st defendant executes a bond Exhibit V to Narasi Reddi for a sum of Rs. 652. The total amount under the two documents, Exhibits V and XV, comes only to Rs. 1,302. There is a deficiency of Rs. 48 in the amount of

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consideration for the mortgage bond Exhibit XII. We have now got to consider whether the balance of the consideration is made up of Rs. 652 under the bond executed to Narasi Reddi Exhibit V and the sum of Rs. 650 under the bond executed to the widow. Exhibit XV is shown to have been given for purposes binding on the Estate. Before considering the question as to whether these two sums meant real debts we may deal with the question as to the binding character of these debts. Referring to Exhibit XV, we find the amount of this is undertaken to be paid by the 1st defendant to the widow with interest at 12 per cent. per annum. Exhibit 12 recites that the amounts that were received under it by the widow were for the discharge of decrees obtained by Narasi Reddi against her and for the expenses of her pilgrimage. Exhibit V is the bond executed to Narasi Reddi and Exhibit XV is supposed to represent the amount which the 1st defendant undertook to pay for the pilgrimages which the widow proposed to make. Mr. Ranga Chariar who appears for the respondents frankly concedes that he cannot sustain his case with regard to the sum which relates to the expenses of pilgrimages. A widow is not entitled to mortgage her husband's property and to raise a loan not for her present use but to be kept in deposit with the lender to be given to her from time to time as long as the amount may last and she may have legitimate occasion of expenditure. Now what appears with reference to this sum is that small sums are paid under Exhibit XV by the 1st defendant to the widow. The balance due under this document is stated to be Rs. 478 on the date of the Exhibits III and IV which are renewals for that balance. Exhibit III is an instalment bond for Rs. 400 and is dated the 28th September 1885 and Exhibit IV is for the sum of Rs. 78. The two amounts make up the balances then due as Rs. 478. Now, on the 25th February 1891, Exhibit C is executed for the balance due under Exhibit III. We find that a sum of Rs. 158 under Exhibit C has not been paid at all. Assuming that any of the sums paid under Exhibit XV might have gone towards purposes which would legitimately bind the estate in the hands of reversioners, there is nothing shown that the widow was under the necessity of obtaining these sums on the dates on which she obtained them. There is every reason to believe that the payment made by the 1st defendant to the widow under Exhibit XV and afterwards under Exhibits III, IV & C were actually out of the income of the properties which were mortgaged with the 1st defendant.

Turning now to the decrees of Narasi Reddi the evidence of the 2nd and 3rd witnesses for the defendants is directed to show that these decrees were in some way connected with an original debt due by the husband Narayana Rao. These two witnesses pretend to give evidence that Narayana Rao borrowed a sum of Rs. 600 from Narasi Reddi on the occasion of his marriage. That would be samewhere about 20 years before the year 1881 which is the date of the suit bond. Narayana Rao is said to have lived for years after that and these witnesses swear that Narasi Reddi, the creditor, went on demanding Narayana Rao to pay up the loan. Narayana Rao did not comply with the demand and they say that the widow kept on renewing the bond notwithstanding the importunities of the creditor, and that finally Narasi Reddi obtained decree in the year 1876, personally against the widow. Now the fact that these decrees of 1886 are admitted by the 1st defendant in his evidence to be personal decrees against the widow throws very grave doubt upon the evidence of the 2nd and 3rd witnesses for the defence that they were connected in some way with a debt of Narayana Rao. No bond executed by Narayana Rao is forthcoming. None of the supposed renewed bonds is produced. The witnesses themselves are the creatures of the 1st defendant. They are *ryots* cultivating under him. They are also indebted to him and their story as to their knowledge of the original bond of Narayana Rao and its successive renewals is in the highest degree improbable. If, therefore, we reject this evidence as untrustworthy there is nothing whatever on the record to induce us to hold that the decrees of Narasi Reddi which the 1st defendant undertook to discharge and for which he executed Exhibit V were binding upon the reversioners as for debts incurred for proper purposes. Mr. Rangachariar did not make any serious attempt to

show that the transaction was supportable as regards this sum of Rs. 650 on the ground that the creditor had made sufficient inquiry and as a *bona fide* lender on such inquiry he was entitled to a charge binding upon the estate. The 1st defendant knew as he admits that the decrees were personal decrees. *Prima facie*, therefore, they would not be recoverable from the husband's estate. This circumstance put the creditor on inquiry, and he confesses that he made no inquiry to satisfy himself that the proceedings in the suits which resulted in the decrees obtained by Narasi Reddi showed any purpose which would give a binding character to the debts. He did not trouble himself to ascertain anything about the history of the decrees obtained against the widow. All that he says is that he was told by the widow that they were for debts incurred by her husband and for her maintenance. Now this introduction of the story of maintenance is really an after-thought on the part of the 1st defendant. There is no reference to the maintenance of the widow as a purpose in Exhibit XII nor does the 1st defendant in his written statement tell us that the debts were incurred in part at least to meet the maintenance charges of the widow. We must, therefore, hold that this sum of Rs. 652 under the bond Exhibit V executed to Narasi Reddi is not shown to be in any way connected with any debt of Narayana Rao. Nor is it shown that this debt was incurred after inquiry and satisfaction that the purpose was one which would bind the estate of the husband. Now with reference to this bond, Exhibit V, again, it has got to be noticed that the 1st defendant is peculiarly lucky in getting the rate of interest reduced successively from 9 per cent. to 6 per cent. and then $4\frac{1}{2}$ per cent., and lastly, the renewal for the balance is without any interest at all. It is also to be remembered that the sum of Rs. 76 and interest is shown to have been waived by the indulgent creditor Narasi Reddi after the payment of the sum of Rs. 424 under the renewed promissory note Exhibit VII. All these circumstances throw very considerable suspicion upon the *bona fides* of transactions relating to the discharge of Narasi Reddi's debts. We do not think it necessary to express any definite opinion on the question as to whether the decrees of Narasi Reddi were really outstanding on the date of Exhibit V and whether the 1st defendant has paid to Narasi Reddi and his heirs any portion of the sum which he undertook to pay under Exhibit V.

In the view that we have taken that there is nothing to show that the sums undertaken to be paid by the 1st defendant were for purposes binding upon the estate, we must reverse the finding of the District Judge on the 2nd issue and hold that the 1st defendant has not made out the binding character of Exhibit XII. It is to be regretted that the District Judge has disposed of the question raised under this issue in a somewhat perfunctory manner in paragraphs Nos. 13 and 14 of his judgment.

We set aside the decree of the District Judge and direct that the plaintiffs shall have possession of the properties sued for with mesne profits for three years before suit and subsequent mesne profits and costs in this and in the lower Court.

The appellants are willing to accept the figure given by the defendants Nos. 1 to 4 for the amount of the net profits. The appellants will be entitled to Rs. 270 on account of past mesne profits and Rs. 90 each year for subsequent mesne profits until delivery, with interest at 6 per cent. per annum on the several sums.

The memorandum of objections is dismissed with costs.

Decree set aside.

(s. c. 9 M. L. T. 318).

MADRAS HIGH COURT.

SECOND CIVIL APPEAL NO. 1614 OF 1908.

February 1, 1911.

Present:—Mr. Justice Wallis and Mr. Justice Sankaran Nair.

KOTA KRISHNAYYA—DEFENDANT—APPELLANT

versus

MATOORI SUBBRAYA—PLAINTIFF—RESPONDENT.

Specific Relief Act (*I of* 1877), *s.* 14—*Specific performance—Contract to sell land—Sale of land subsequent to contract.*

A. agreed to sell land mentioned in a sale proclamation but before he could do so, a portion of it had been alienated: *Held*, that specific performance of the contract could not be enforced.

Second appeal against the decree of the Subordinate Judge's Court of Masulipatam in Appeal Suits Nos. 248 and 254 of 1906, presented against the decree of the Court of

the District Munsif of Gudivada in Original Suit No. 32 of 1904.

JUDGMENT.—We are unable to agree with the Subordinate Judge in holding that the plaintiff agreed to sell to the defendant for Rs. 650, 4·71 acres in Survey Nos. 21, 22 23, 25 and 69 which were mentioned in a sale proclamation under a decree which the plaintiff as the mortgagee had obtained as against his mortgagor. According to the finding of the District Mnnsif which is not questioned, 84 cents of the whole block had been alienated before the date of Exhibit A and the subsequent Court sale. This, it is agreed, means a reduction of 4·7 in the 4·7 acres and on the 29th July 1901, subsequently to the date of the contract, a further ·75 was alienated. Thus, the plaintiff did not acquire them under the Court sale and was not in a position to convey them to the defendant. There is nothing in Exhibit A, on which the Subordinate Judge relies, to support his finding that the defendant agreed to purchase less 4·71 acres. In the circumstances, the plaintiff is not, we think, entitled to specific performance under section 14 of the Specific Relief Act and the suit must be dismissed with costs throughout.

The memorandum of objections is dismissed with costs.

Appeal allowed.

(s. c. 25 P. W. R. 1911).

PUNJAB CHIEF COURT.

CIVIL REVISION NO. 554 OF 1909.

October 28, 1910.

Present:—Mr. Justice Johnstone and Mr. Justice Shah Din.

DURGA DAS—PLAINTIFF—PETITIONER

versus

AMIR CHAND—DEFENDANT—RESPONDENT.

Res judicata—*Plea finally decided between the parties by a single Judge of Chief Court—Incompetency of Division Bench to question the opinion of the single Judge in revision of the orders on which it was based—Review of order on review not allowed—Civil Procedure Code (Act V of 1908), O. XLVII, r. 9.*

A plea of *res judicata* having been accepted, though erroneously, previously between the parties by a single Judge of the Chief Court, the question cannot be re-opened afterwards by a Division Bench of that Court in an application to revise the orders of the Courts below upon which the judgment of the single Judge was based, as a revision of these orders would not benefit the party against whom the single Judge ruling subsists.

Amir Chand v. *Durga Das*, 211 P. W. R. 1908, cited.

A second review of an order is barred by rule 9 of Order XLVII of Act V of 1908, where it is practically for the review of the order passed on review.

Petition for revision of the order of the Sub-Judge, 1st Class, Lahore, dated the 16th July 1907, discharging respondent from the liability of the plaintiff's claim.

Mr. *Broadway*, for the Petitioner.

Lalas *Lajpat Rai* and *Dharm Das Suri*, for the Respondent.

JUDGMENT.—The history of this case may be stated thus:—

KANHAYA LAL

Diwan Chand, (died 13th December 1903), who is alleged by plaintiff, Durga Das, to have adopted him on 29th June 1902, and by Amir Chand to have adopted Ralia Ram on 10th December 1903.	Fakir Chand who adopted Kishen Chand.

Amir Chand also alleges that Ralia Ram adopted him by a Will.

Durga Das is a minor, his father being his guardian. On 16th January 1904, Ralia Ram applied and received Probate of a Will by Diwan Chand adopting him. Nobody intervened to object and no appeal was instituted against the order granting probate.

Then on 1st March 1905, Durga Das, through his real mother, sued Ralia Ram and two others for possession of certain house property of Diwan Chand's. Ralia Ram alone contested the claim, but before the case was decided, *i. e.*, on 4th July 1905, he died whereupon Kishen Chand (see pedigree above) applied to be impleaded as his representative. Plaintiff, Durga Das, assented and Kishen Chand (also a minor), upon being made a defendant confessed judgment. Amir Chand then appeared on the scene, claiming to be the adopted son (by a Will) of Ralia Ram and so applying to be recognised as his heir and to be made defendant *vice* Ralia Ram. The learned Sub-Judge took notice of this application but did not adjudicate upon the claim made in it: he contented himself on 22nd July 1905, with giving Durga Das a decree against Kishen Chand and his two co-defendants aforesaid; and upon this decree Durga Das appears to have obtained possession of the houses.

But meantime, another suit had been going on. Ralia Ram, as representative of Diwan Chand, had sued on a bond (in favour of Diwan Chand) against Har Bhagwan Das

Kishen Chand and another for Rs. 1,896, and on 24th February 1905 a decree was duly passed. This was appealed against in the Court of the Divisional Judge (Civil Appeal No. 143 of 1905), and the appeal was pending when (4th July 1905)Ralia Ram died. In this case also Amir Chand asked to be put in the shoes of Ralia Ram.

As we have seen above, Amir Chand's application in the other case had been virtually rejected by the Sub-Judge on 22nd July 1905 without adjudication on the claim contained in it, and Amir Chand had not been made a party in that case. He appealed to the Divisional Judge against his exclusion and that officer on 8th April 1907 passed the following order:—

"Appellant should clearly be made a respondent in Civil Appeal No. 143 of 1906, as he has been held by the Chief Court by their order in *Amir Chand* v. *Durga Das* (1) to be the beneficiary under the Will of the deceased Ralia Ram, who was respondent in Civil Appeal No. 143 of 1905 of this Court. Appeal accepted with costs. Pleader's fee Rs. 8."

The reference to the Chief Court judgment in this order relates to the appellate decree of 23rd March 1907, granting to Amir Chand Probate of the Will of Ralia Ram in his favour or rather rejecting the appeal against Probate granted by the Court below. The appeal having been accepted by the Divisional Judge it must be taken that the order of the Sub-Judge refusing to implead Amir Chand under section 368, old Civil Procedure Code, was set aside. No doubt there was some confusion in the reference to Civil Appeal No. 143 of 1905, but the result is actually as here stated. When the file went back to the Sub-Judge, that officer, on the 16th July 1907, after giving a few facts, wrote,—

"Amir Chand preferred an appeal which was accepted. Thus he was made a representative of Ralia Ram by order of the Appellate Court. The plaintiff, however, does not wish to take proceedings against Amir Chand nor does he want any decree against him. He is, therefore, discharged from liability for the plaintiff's claim. Order read out. The file of the case to be consigned to the Record room."

At this time another suit by Durga Das, plaintiff, against Amir Chand was pending. It had been instituted on 2nd April 1907, and was for a declaration that Ralia Ram was not the adopted son of Diwan Chand but that Durga Das was; and this case was being tried in the same Sub-Judge's Court. On 19th August, 1907, this suit was dismissed on the ground that the questions raised were *res judicata* by reason of the order of 16th July 1907. Durga Das appealed to the Divisional Court, which accepted the appeal; but on further appeal to this Court, Robertson, J., holding that the plea of *res judicata* was clearly established, accepted the appeal on 4th November, 1908, and again dismissed that suit. Application for review having been made to the same learned Judge, he adhered to his previous views and on 8th February, 1909, dismissed the application *in limine*.

All these events having come and gone, Durga Das now files in this Court a petition for revision of the order of 16th July, 1907, aforesaid. It having been pointed out that revision of that order only would not get rid of the Divisional Judge's order which preceded it (8th April 1907), Mr. Broadway asked that the petition should be taken to include that order. It is probably within our competence to grant this prayer; but it is unnecessary to decide the point, as, in our opinion, the revision must fail even if the prayer be granted.

We have heard able and learned arguments as to the real meaning and effect of the order of 16th July 1907, and of the Appellate order in which it proceeded. There is, in our opinion, much to be said for the view that these orders do not really operate to render the questions in the declaratory suit *res judicata*, but we cannot ignore or get over the fact that this Court, by its orders of 4th November 1908, and 8th February 1909 aforesaid, has held the contrary, and has finally ruled that the doctrine of *res judicata* bars that suit. We are not asked, and we obviously could not be asked, directly to revise these orders passed by another Judge of this Court, but Durga Das is attempting to get behind these orders by trying to persuade this Division Bench to revise the orders of 1907, upon the effect of which that learned Judge was adjudicating. Such an attempt could only benefit Durga Das if the result of our so revising these orders and of setting them aside would be the victory of Durga Das over Amir Chand, but we are unable to see how such result is possible. Even if we set aside the order of 16th July

(1) 211 P. W. R. 1908.

1907 and its predecessor the order of 8th April 1907, the orders of 4th November 1908 and of 8th February, 1909, would remain standing. It has been suggested that, if we allowed this revision Durga Das, armed with a copy of our judgment, would be able to approach Robertson, J., again with a second petition for review; but on examination of the matter we find that the suggestion is not a sound one. In the *first* place our brother would not be *bound* by our judgment; and, *secondly*, any attempt at second review must fail. Ground No. 2 of the grounds for review laid before the learned Judge practically covers all the arguments of Mr. Broadway before us, and thus the second petition for review would not be really a petition to review the appellate judgment of 4th November 1908—a kind of petition which in certain circumstances might be competent, —*Gobinda Rama Mandal* v. *Bhola Nath Bhatta* (2), but rather a petition to review the order passed in first review and such a petition as that is inadmissible—See Order XLVII, rule 9, Civil Procedure Code.

For these reasons, we dismiss the petition; but in the peculiar circumstances we direct that the parties do bear their own costs.

Petition rejected.

(2) 15 C. 432.

(s. c. 29 P. W. R. 1911).

PUNJAB CHIEF COURT.

CIVIL REVISION No. 666 OF 1910.

July 21, 1910.

Present:—Mr. Justice Ryves.

Musammat FAJJE AND ANOTHER—DEFENDANTS —PETITIONERS

versus

SHER MUHAMMAD—PLAINTIFF— RESPONDENT.

Custom—Succession—Arains *of Nakodar* tahsil, *District Jullandhar—Collaterals exclude daughters from inheriting self-acquired property.*

Among the *Arains* of Nakodar *tahsil* in the District of Jullundur collaterals exclude daughters from inheriting their father's self-acquired landed property.

Petition for revision of the order of the District Judge, Jullundhur, dated the 3rd February 1910, confirming that of the Munsif 2nd Class, Nakodar, dated the 9th July 1909, decreeing plaintiff's claim.

R. S. Pandit *Sheo Narain*, for the Petitioners.

Mr. *Daulat Ram*, for the Respondent.

JUDGMENT.—The material issue before the learned District Judge in this case was "whether among the *Arains* of Nakodar *tahsil*, in the District of Jullundur, collaterals excluded daughters from the self-acquired property of their father."

This issue had been remanded by the lower Appellate Court to the Court of the Munsif for trial. The plaintiff produced 26 witnesses in favour of the right of the collaterals, and 20 instances were proved of mutation proceedings in favour of collaterals to the exclusion of daughters. The learned District Judge considered this evidence. He also considered the *Riwaj-i-am* of the Nakodar *tahsil* and came to the conclusion that these instances, although not contested, were strong corroboration of the entry in the *Riwaj-i-am*.

On the other side a judgment of this Court, *viz.*, No. 31 of 1906, and two judgments of the District Judge's Court at Jullundur were produced. These judgments are, of course, clearly instances, and are merely pieces of evidence to be considered along with the evidence produced in the case. The learned District Judge has considered these judgments and, having regard to the fact that in the judgment of the Chief Court the point was not even argued and that in the previous judgments of the District Court all that was held was that in each case the plaintiff had failed to prove the right he claimed, he came to the conclusion that, on the evidence in the case before him, the plaintiff had discharged the *onus* which lay on him, and dismissed the defendants' appeal.

It will be seen from the above that the only question before the learned District Judge was one of fact. He has weighed the evidence on both sides and he has come to a conclusion which it is difficult for me to disturb on revision. Mr. Sheo Narain argues that before discarding a judgment of this Court to the contrary and the previous judgments of his own Court, the learned District Judge should have sifted the evidence in the case very carefully, before coming to a conclusion that those previous judgments were erroneous. It seems to me, however, that the learned District Judge has given legal reasons for not considering the decisions in the previous judgments of such probative value as that instances proved by the mutation proceedings and the oral evidence in the case. I, therefore, do not

see how I can interfere on revision and reject the application with costs.

Application rejected.

(s. c. 5 P. W. R. 1911 Cr.; 4 P. R. 1911 Cr.; 89 P. L. R. 1911).

PUNJAB CHIEF COURT.

CRIMINAL REVISION No. 1276 OF 1910.

December 9, 1910.

Present:—Sir Arthur Reid, KT., Chief Judge.

DHANPAT AND ANOTHER—CONVICTS—PETITIONERS

versus

EMPEROR—PROSECUTOR—RESPONDENTS.

Excise Act (XII of 1896), ss. 20, 21, 49—Sale of charas *in bond in the hands of the Excise Authorities to an unlicensed person—Sale defined for the purposes of the Act.*

For the purposes of the Excise Act XII of 1896 the sale of an intoxicating drug is not complete until delivery thereof to the purchaser or some one on his behalf; consequently a licensed vendor who holds a "sale-in-bond" *charas* license and sells the *charas*-in-bond in the hands of the Excise Authorities to an unlicensed person, who cannot take delivery until he takes out a license, does not break, under section 21 of the Excise Act, the condition of his license and is not liable to be prosecuted under section 49.

Petition for revision of the order of the Sessions Judge, Hoshiarpur Division, dated the 25th May 1910, varying that of the Magistrate, 1st Class, Hoshiarpur, dated the 9th April 1910, convicting the petitioners.

Lala *Dwarka Das*, for the Petitioners.

Mr. *Broadway*, for the Respondent.

JUDGMENT.—This application and Criminal Revision Nos. 1277, 1278 and 1279 of 1910 can be disposed of together, the points involved being identical.

The applicant, who holds a "sale-in-bond" *charas* license, has been fined under section 49 of the Excise Act, XII of 1896, for selling *charas*-in-bond to one Dassaundhi Mal, who had no license of any kind for purchase or sale of the drug.

It is admitted that the *charas* in question remained in bond in the hands of the Excise Authorities and that the parties understood that Dasaundhi Mal could not obtain delivery and possession without taking a license. Section 49 prescribes a penalty for the sale, in contravention of section 21 of the Act, of a drug and section 21 forbids the sale of a drug except under, and in accordance with, the terms of a license.

The applicant's license was admittedly in Form No. IX, under section 20, printed at pp. 30 and 31 of Turner's Excise Act, Ed. I.

One of the conditions of the license is that

charas shall not be sold to any one not holding one or other of the kinds of license provided for in rule 12 or a permit of one or other of the kinds referred to in rule 4. Having regard to the facts above stated, it cannot, in my opinion, be held that any breach of the license was committed by the applicant.

For the purposes of the Act the sale would not be complete until delivery of the *charas* to the purchaser or some one on his behalf, and to an unlicensed person delivery was not effected by retention in bond in the hands of the Excise Authorities on behalf of a person who could not obtain delivery until he took out a license.

To hold otherwise would, in my opinion, be to strain the law unduly against the subject.

The case is practically on all fours with payment of price on Sunday and delivery on Monday, of liquor, the sale of which on Sunday was illegal. I allow this application and set aside the conviction and sentence.

So much of the fine imposed as has been realised will be refunded forth with.

Application allowed.

(s. c. 7 P. W. R. 1911 Cr.).

PUNJAB CHIEF COURT.

CRIMINAL REVISION No. 350 OF 1910.

September 24, 1911.

Present:—Sir Arthur Reid, KT., Chief Judge.

PHUNDI RAM AND OTHERS—ACCUSED—PETITIONERS

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Defamation—Liability of a party or witness for making defamatory statement in a judicial proceeding—Penal Code (Act XLV of 1860), ss. 499, 500—Revision.

A person making a statement as a party or witness in a judicial proceeding, which is *prima facie* defamatory, is liable to be charged with defamation under section 500, Indian Penal Code, irrespective of his liability to be prosecuted for perjury. Such person would be protected if he could show that any of the exceptions to section 499, Indian Penal Code, apply to him.

Fateh Muhammad v. *Crown*, 34 P. R. 1889 Cr.; and *Maya Das* v. *Crown*, 14 P. R. 1893 Cr., followed.

Petition for revision of the order of the Sessions Judge, Ambala Division, dated the 15th February 1910, reversing that of the Magistrate, 1st Class, Ambala, dated the 29th October 1909, discharging the petitioners, and remanding the case under section 437, Criminal Procedure Code, for further inquiry.

FACTS.—One *P.* as plaintiff, and others as his witnesses stated in a civil case before the Munsif, Jagadhri, that one *M.* was the

illegitimate son of a wandering woman. This question arose from the pleadings of the parties to the civil suit. *P.* sued *S.* for recovering some money. *S.* pleaded *inter alia* that as *M.* his son was a member of a joint Hindu family the suit was not maintainable without impleading *M.* as co-defendant. *P.* replied. *M.* was the illegitimate son of *S.* The Munsif found *M.* was the legitimate son of *S.* Then *S.* brought a complaint under section 500, Indian Penal Code, against the plaintiff and his witnesses. The Magistrate discharged the accused on the ground that their statements were privileged, but the Court of Session took a different view and ordered further inquiry into the complaint.

Mr. *Daulat Ram*, for the Petitioners.

Mr. *Nand Lal*, for the Respondent.

ORDER.—I see no reason for interference. The rule laid down in *Fateh Muhammad* v. *Crown* (1) and *Maya Das* v. *Crown* (2) is clear, and Mr. Justice Kensington did not hold in the order referred to by the Sessions Judge that that rule was erroneous.

The Magistrate will of course, consider before charging the accused persons, whether they made the statements attributed to them and whether those statements were true, and whether they were made in good faith. The case had not reached this point when the accused were discharged.

I dismiss the application.

Application rejected.

(1) 34 P. R. 1889 Cr.
(2) 14 P. R. 1893 Cr.

(s. c. 15 C. W. N. 417; 9 M. L. T. 448; 8 A. L. J. 528; (13 Bom. L. R. 421).

PRIVY COUNCIL.

APPEAL FROM BENGAL.

February 28, 1911.

Present:—Lord Macnaghten, Lord Mersey, Lord Robson, Sir Arthur Wilson and Mr. Ameer Ali.

Sri Sri ISWAR SHYAM CHAND JIU AND OTHERS—PLAINTIFFS—APPELLANTS

versus

RAM KANAI GHOSE AND OTHERS—DEFENDANTS—RESPONDENTS.

Limitation Act (*XV of* 1877), *Sch. II, art.* 134——"*Purchased*", *if includes permanent lessee*—*Privy Council*—*Review.*

The word "purchased" in Article 134 of Schedule II to the Limitation Act of 1877 means the purchase of an absolute title. A permanent lessee is not a purchaser within the meaning of that Article.

That Article, therefore, does not apply to a suit brought by the *shebait* of an idol for possession of immoveabe property let out in permanent lease by a former *shebait* without legal necessity.

Abhiram Goswami v. *Shyama Charan Nandi*, 4 Ind. Cas. 449; 36 I. A. 148; 10 C. L. J. 284; 6 A. L. J. 857; 19 M. L. J. 530; 36 C. 1003; 14 C. W. N. 1; 11 Bom. L. R. 234, followed.

The Privy Council allowed a review of their first judgment which they set aside.

Appeal from the decree of the Calcutta High Court dated July 31st, 1905, reversing that of the Sub-Judge of Manbhum, dated March 4th, 1902.

FACTS.—The plaintiffs are certain idols established by a former Raja of Panchkote. The Raja of Panchkote for the time being is the *shebait* of the idols and manages the endowed properties. In 1872, Nil Moni Singh was the Raja of Panchkote and *shebait* of the idols. He granted a *patni* lease of some of the properties belonging to the idols, to the defendants. Raja Nil Moni Singh died in 1898 and his son Raja Hari Narayan Singh as the *shebait* of the idols brought this suit on April 4th, 1901, for a declaration that the property in suit is *debuttar* property belonging to the idols the plaintiffs, that the *patni* lease to the defendants granted by Raja Nilmoni Singh was invalid being in excess of his powers and for recovery of possession of the properiy. The defence was (1) that the suit was barred by limitation, and (2) that the proporty in suit was not *debuttar* property. The Sub-Judge overruled the defendants on both the points and made a decree in favour of the plaintiffs. On appeal the High Court held that the property was not *debuttar* and so reversed the decree of the first Court without coming to any conclusion on the question of limitation.

The plaintiffs subsequently applied for a review of the judgment of the High Court on the ground of discovery of fresh evidence, and the application was granted.

The High Court (Harington and Mookerjee, JJ.) on July 31st, 1905, on review, held that the suit was barred by limitation and did not come to any conclusion as to whether the property was really *debuttar* or not. Accordingly, a decree was made against dismissing the suit and reversing the decree of the Court of first instance.

The plaintiffs appealed from that decree.

Messrs. *L. DeGruyther*, *K. C.*, and *J. M. Parekh*, for the Appellant.

RASHIDAZZAMAN *v.* EMPEROR.

The Privy Council dismissed the appeal. The plaintiffs applied for review of the judgment of their Lordships. The review was granted and the appeal was re-argued on November 10th 1910.

Messrs. *L. DeGruyther K. C.*, and *Parekh*, for the Appellants.

Their Lordships reserved their judgment. On February 1st, 1911, *Sir Robert Finlay, K. C.*, asked for leave to appear for the Respondents and to argue the case for them. But the leave was refused.

JUDGMENT.

LORD MACNAGHTEN.—This appeal was heard *ex parte*.

This suit was brought by the Raja of Panchkote as *shebait* of some *thakurs* or family idols to recover possession of a *mauzah* alleged to be *debuttar* and dedicated to the service of the idols. It had been alienated more than twelve years before the institution of the suit by the plaintiff's predecessor-in-title who granted a *mokurari* lease of the property in consideration of a fixed rent and the payment of a fine equal to the amount of two years' rent.

The defence was two-fold: (1) that the property was not really *debuttar*; and (2) that the suit was barred by Article 134 of the Limitation Act.

The Subordinate Judge of Manbhum decided both points in favour of the plaintiff.

The case was heard twice on appeal by the High Court. On the first hearing, the learned Judges came to the conclusion that there was not sufficient evidence to prove that the property was really *debuttar*. They dismissed the suit on that ground, saying that it was not necessary to discuss the question of limitation. The appeal was heard again on review upon the discovery of new and important evidence. On that occasion, the learned Judges held that Article 134 was a bar to the suit, and that it was not necessary, therefore, to consider the further evidence offered as to the character of the property.

On considering the additional evidence brought before the High Court on review, their Lordships are satisfied that the property was really *debuttar*.

The only question remaining depends on the law of limitation.

On this point attention has been called to the case of *Abhiram Goswami* v. *Shyama Charan Nandi* (1). It is impossible to distinguish that case from the present.

Whatever might have been the inclination of their opinion if the matter had been *res integra*, it seems to their Lordships that they would not be justified in reviewing on an *ex parte* application the considered judgment of the Board delivered after full argument. They will, therefore, simply follow the decision in *Abhiram Goswami* v. *Shyama Charan Nandi* (1). They do so with the less hesitation because the language of the Article under discussion in that case and in this has been altered by subsequent legislation.

Their Lordships will, therefore, humbly advise His Majesty that the appeal ought to be allowed. There will be no order as to costs either of the hearing of the suit in the Courts below or of this appeal, except that the respondents must re-pay to the appellants the costs paid under the decree of the High Court.

Appeal allowed.

Solicitor for the Appellants: Mr. *E. Dalgado.*

(1) 36 I. A. 148; 14 C. W. N 1; 10 C. L. J. 284; 6 A. L. J. 857: 11 Bom. L. R 234; 36 C. 1003; 19 M. L. J. 530; 4 Ind. Cas. 449.

(s. c. 15 C. W. N. 434).

CALCUTTA HIGH COURT.

CRIMINAL APPEALS NOS. 982 AND 983 OF 1910.

February 14, 1911.

Present:—Mr. Justice Holmwood and Mr. Justice Sharf-ud-Din.

RASHIDAZZAMAN *alias* BARA KAZI AND OTHERS—ACCUSED—APPELLANTS

versus

EMPEROR—RESPONDENT.

Dacoity—Charge against eight persons—Four of whom acquitted—Whether charge sustainable—Penal Code (Act XLV of 1860), s. 396.

When a certain number of persons are charged with having committed a dacoity and half of them are acquitted, the charge of dacoity does not necessarily fail.

The charge need not specify that there were other persons accused of the offence besides those convicted and acquitted.

The mere fact that the evidence is not sufficient to convict all those actually charged would not in any way affect the question of the number of persons engaged.

Appeal against the order of the Additional Sessions Judge of 24-Pergannas, dated September 21st, 1910, convicting the accused of offence under section 395, Indian Penal

Code, and sentencing them to various terms of imprisonment.

Messrs. *Norton*, *Caspersz* and *Pugh* and Babus *Atulya Charan Bose* and *Monmatha Nath Mukherjee*, for the Appellants in No. 982.

Babus *Manindra Nath Banerjee*, for the Complainant in both cases.

Mr. *B. Chakravarti* and Babu *Hemendra Nath Mitra*, for the Crown in both cases.

Babus *Atulya Charan Bose* and *Monmatha Nath Mukherjee*, for the Appellants in No. 983.

JUDGMENT.—These are appeals from the judgment and sentences passed by the learned Additional Sessions Judge of 24-Pergunnahs who, agreeing with the unanimous verdict of the Jury, in the case of Kachimuddin Mandal, and, accepting the verdict of the majority (3 to 2), in the case of Raziduzama *alias* Bara Kazi, Sukur Mandal and Sisir Ahmed, has sentenced Raziduzama to transportation for life and Sukur Mandal and Sisir Ahmed and Kachimuddin to transportation for 10 years under section 396, Indian Penal Code. Four persons who were jointly charged have been acquitted and the point of law is taken that the charge of dacoity fails in consequence of this acquittal.

A further point of law taken is that evidence which the prosecution were bound to produce has not been put forward, and as to misdirection; while it is conceded that the learned Judge's summing up is exceedingly fair and impartial, it is argued that the evidence as to the accused Raziduzama's movements on the night of occurrence was not charged with sufficient precision and was not reviewed as a whole. *Secondly*, that the contradictions between the only witness who identified Raziduzama and other witnesses *viz.*, Yakub, Waris Ali and the Sub-Inspector, as to how she came to reveal what she knew were not sufficiently enforced; and, *thirdly*, that the case for the defence, which was started so early as the 7th of April 1910 in the statement of Raziduzama to the Police, was not put to the Jury as a substantive case and they were not charged to consider his *alibi*. It was further contended that the contradictions between witnesses Nos. 11 and 12 should have been pointed out specifically, and that attention should have been drawn to the fact that no one was mentioned in the first information.

One alleged misdirection of a positive nature is the passage in the charge where it is said that the Sub-Divisional Officer and the Sub-Inspector had both indicated that the Bara Kazi's great influence in the locality had rendered the collection of evidence difficult.

In order to understand the bearing of these various points in the case we will briefly state the facts alleged by the prosecution.

At about 2 A. M. on the morning of Thursday, the 7th April 1910, there was a dacoity in the house of Kazi Waheduzzama *alias* Chota Kazi, who is brother of the principal accused in this case. The occurrence began by the breaking open of the door of the house in which the Chota Kazi was sleeping with his two little daughters aged 8 and 10 years, about. They escaped in the dark but the Chota Kazi was dragged out and seriously beaten and, as far as the evidence goes, this beating was continuous till it resulted in his death. The dacoits then lighted matches and torches and began to search for documents and property. A woman named Fatemunnissa, widow and dependant of Chota Kazi, who had been the first to come on the scene was seized and beaten, and she saw the almirahs and boxes ransacked and some boxes carried away. She now says she recognised Kachimud-din as the man who beat her and she picked him out at a subsequent indentification before the Police. Another woman, Mokimunnessa, informed the authorities on the 30th April that she had seen the Bara Kazi standing under the eaves in the yard during the dacoity and that Sukar and Saru had beaten her. She lives in a house close by the Chota Kazi's and is said to be a dependant more or less of the Bara Kazi. It appears that suspicion fell on the Bara Kazi and his men, because on the 3rd April possession of his house had been given to the Chota Kazi, after hot and protracted litigation, by cutting a piece of his thatch. The Bara Kazi, therefore, gave an account of his movements to the Police on the 9th April and one portion of the prosecution case is put forward to show that he was travelling about between Sealdah, Baraset and his home at Bhastara previous to the occurrence and thereafter, but that he was at Bhastara from 11 P. M. on the Wednesday night till after the occurrence. If the evidence of the Postmaster is believed it is clear that he was there. We are, therefore, confronted in this case with the fact that there is positive evidence that each of the appellant was present at the dacoity.

There is evidence that Raziduzama had a strong motive for vengeance on his brother and that the other accused were his dependants.

The evidence is not, perhaps, such as would strongly commend itself to minds professionally trained to weigh testimony, but for us to express any opinion upon its weight would be to usurp, the functions of the Jury. Rightly or wrongly, the people of this country, as do the people of England, set a high value on trial by Jury as a protection to the liberties of accused persons. We have only to see that there has been no error of law in the proceedings and no misdirection to the Jury by the learned Judge. We have given our most anxious attention to this case because of its extreme importance and because of the rather slender basis of evidence upon which the Jury had to go.

We have listened with earnest attention to three distinguished Counsel and one of our most trusted advisers among the Vakils who practise in this Court, and we find ourselves unable to say that the Jury were misled either by insufficient direction or by misdirection. The learned Judge's charge is as exhaustive as it is impartial and in the written heads before us, we have not got even the whole of what was put, for we find a note at each important point that the evidence *pro* and *con* was put to the Jury as each came up for consideration.

As regards the contention that when eight persons are charged with dacoity and four are acquitted the charge of dacoity fails, or, to put it in another way, that the charge must specify that there were other persons four convicted and the four acquitted, we are unable to accede to any such doctrine.

The English cases of *Queen* v. *Plummer* (1) *Rex* v. *Sudbury* (2) have nothing to do with the questien. *Plummer's case* (1) was a conspiracy of three persons to obtain money by false pretences, and *Sudbury's case* (2) was an alleged riot by three persons. Here the charge alleges docoity and if each accused were charged separately the word dacoity would give him sufficient notice that he was charged with four or more persons and the conviction by the Jury of dacoity would import a finding that there were four or more others engaged with each dacoit.

The mere fact that the evidence was not sufficient to convict four of those actually charged would not in any way affect the question of the number of persons engaged.

Here the Jury had evidence before them that 10 or 12 persons were engaged. The question they had to consider was not whether or not there was a dacoity, but whether it was committed by an ordinary gang of dacoits of whose recent depredations evidence was given in cross-examination for the defence, or by the accused Raziduzama and his partisans out of revenge.

The fact sworn to in examination in chief by more than one witness that there were 10 or 12 persons was not challenged in cross-examination and the Judge mentions the allegation that 10 or 11 men were seen with the Bara Kazi that night, and emphasizes the law, on page 290, that the question is purely academical as if there were less than five, the common object to commit robbery would not fail and on proof of the murder each would be liable to transportation for life under section 394. But in this case the Jury were clearly right, if they believed the evidence, in holding that there were more than five, even if the four men who have been acquitted were not there. Then as to the omission to call certain witnesses, these are the two children aged 8 or 10, who admittedly were asked for by the dacoits and had managed to escape before any light was lighted and only came back after the dacoits had gone.

There would, in our opinion, be no justification for the prosecution to subject these two delicately nurtured little girls to examination in Court on a point upon which they could give no evidence, namely, the identity of the dacoits. Then there are the witnesses Rannak Ali and Kabir, the neighbours whom Chota Kazi is said to have called and who did not come. The evidence of Fatemunessa would go far to show that Rannak was an accomplice and the prosecution repudiated these witnesses.

The others are an Inspector of the C. I. D. and the Alipur Pleader Babu Jagadis, who were witnesses for the defence to whom the Bara Kazi referred the Police.

They certainly could not be called as witnesses for the prosecution, and the Judge gave a full and complete warning to the Jury

(1) (1902) 2 K. B. 339; 71 L. J. K. B. 805; 66 J. P. 647; 86 L. T. 836; 18 T. L. R. 659; 51 W. R. 137; 20 Cox. C. C. 243.

(2) Lord Raym 484; 91 E. R. 1222; 12 Mod. 262.

as to the inferences they were entitled to draw from the keeping back of any witness by the prosecution. As regards the alleged omissions to specifically direct the Jury on the points we adverted to at the beginning of this judgment, we fail to find any misdirection.

There was no evidence of *alibi* to go to the Jury. The accused, Bara Kazi, elected to base his defence on the evidence of the prosecution and the learned Judge analysed this with the most minute and critical comment. Everything which could tell in favour of the accused seems to have been put forward. The statements of the accused to the Police could not be used by the prosecution as evidence. It was elicited in cross-examination, to throw doubt on the case for the prosecution traversing the alleged *alibi*.

This was the evidence that the Jury had to consider both for and against the accused and it was the only evidence before them, and more explicit directions as to the contradictions and discrepancies it contained could not have been given. The complaint that the contradiction between witnesses Nos. 11 and 12 was not duly emphasized has no meaning. There is no contradiction in their evidence as given before the Jury. Witness No. 12 contradicted himself as to his evidence before the Committing Court and this was duly emphasized. The Judge could not say, 'you must reject what he said before you, accept what he said before the Committing Magistrate and consider the contradiction.' This would be the evidence of witness No. 11. Witness No. 12 if disbelieved because he contradicts himself goes out altogether and the Judge left it to the Jury, on his two statements, whether he could be believed. This, in our opinion, was the correct way of dealing with the matter.

The very minuteness of the Judge's charge is urged against it. It is contended that the Jury may have been confused and that the right way of dealing with the case would have been to point out that there were two views of the case, either that it was a gang of dacoity such as had taken place before in the neighbourhood or an act of vengeance, and considering the weakness of the evidence the Jury would be well-advised to incline to the former view. As a matter of fact, the Judge very carefully pointed out to the Jury the evidence the defence had elicited as to previous dacoities and that the nature of this dacoity was one of the points they had most carefully to consider, and that the circumstantial evidence pointing to the Bara Kazi's adherents as the perpetrators should only be relied upon if the Jury considered that the conclusions to which it pointed were inconsistent with any other theory than that of the accused's guilt (pages 292-4).

As regards the witness Mokimunessa, the Jury had the duty of accepting or rejecting her evidence. Her statement of the way she came to give it was a secondary matter and would only arise if they had any doubt after seeing and hearing her whether she was speaking the truth. There might be many reasons to induce the witnesses, Yakub and Waris Ali, to conceal the fact that they had been told something by this old lady earlier than they now say.

But here again the Judge has set on the discrepancies and warned the Jury to give them full consideration.

As regards the first information, it was given by a *duffadar* who knew nothing of the alleged perpetrators of the crime and it was nobody's case that any of these accused were mentioned that night. The Judge was most careful to point out to the Jury the dates and the persons whose statements eventually revealed the culprits.

We find that nothing was kept back from the Jury and the defence was again and again laid before them in a ruthless analysis of the prosecution case.

Finally, we have to consider the alleged misdirection as to the influence of the Bara Kazi.

We think it would have been better if the Judge had not referred to the inference he made from the Sub-Divisional Officer's and the Police Sub-Inspector's evidence in this connection.

Their evidence was that they had had difficulty in collecting evidence. They could not have been allowed to offer any opinion as to the cause. As a matter of fact, the Sub-Divisional Officer drew no such inference. He stated in cross-examination that he knew there was great delay in the investigation and it was very difficult to secure evidence. So, too, the Sub-Inspector in cross-examination said, "I should add that I found the men in the village very unwilling to give evidence and I, therefore, considered it useless to approach the woman direct."

Now, reading the charge in the light of this evidence, we find that what the Judge was dealing with was the allegation of Mokimunnessa that she was afraid to speak before because of the Bara Kazi. The Judge then says: "The Sub-Divisional Officer and the Sub-Inspector had both indicated that the Bara Kazi's great influence in the locality had rendered the collection of evidence difficult, and the Jury (relying on their experience of the country) would consider whether the reason assigned by Mokimunnessa in this regard might not have considerable truth behind it."

The inference from the evidence of the Sub-Divisional Officer and the Sub-Inspector is clearly that of the Judge. The Jury were only asked to draw what inference they pleased from Mokimunnessa's statement and their knowledge of the country, coupled with the indications in the other evidence referred to. He did not say the witnesses had deposed to the Kazi's great influence. We do not think that this was a misdirection or that it could have misled the Jury who had the evidence of the Sub-Inspector, the last witness but one, and the Sub-Divisional Officer, the last but nine, fresh in their memories.

We have now dealt in detail with the objections raised to the Judge's charge and to the law points involved, and we cannot see either that the Judge could have dealt with the matter more minutely than he has on the one hand or less exhaustively on the other.

The case was a difficult one and the Jury a special Jury of intelligent, well educated men, and they gave, the Judge tells us, the most careful consideration to the case. The verdict was certainly not perverse and we cannot say that the Judge had any reason to disagree with it. As to the charge, it seems to us, with the minute exception we have just referred to, to be all that a charge to a Jury should be.

We accordingly dismiss the appeals and uphold the convictions and sentences.

Appeals dismissed.

(s. c. 15 C. W. N. 440).

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 1012 OF 1910.

September 6, 1910.

Present:—Mr. Justice Holmwood and Mr. Justice Doss.

AKHIL NATH DIT—ACCUSED—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Arms Act (*XI of* 1878), *ss.* 14, 15, *and* 19, *cl.* (f)—*Accused made over gun to another a year and a half ago—If accused liable to punishment.*

Where it is proved that a person who kept a gun for some time made it over to another to keep for him, he cannot be convicted of an offence under section 19, clause (*f*), of the Arms Act.

Rule against the order of the Deputy Magistrate of Chaibasa, dated May 24, 1909, covicting the petitioner under section 19 clause (*f*) of the Arms Act and sentencing him to a fine of Rs. 50, an application for the revision of which order was refused by the Sessions Judge of Singhbum on June 22nd, 1910.

FACTS.—On the death of one Abhiram who had several guns, an inquiry was made for them. One was reported to have been given to the petitioner, subsequently the gun was recovered from the house of one Moheshwar Singh who said that the petitioner had left the same with a servant of his some time ago and had not taken it back. The accused said that his son married the daughter of Abhiram, the deceased; that Abhiram gave the gun to the son of the accused as a dowry; that the accused was then living at Seraikella where no license was then required to be taken, that the gun remained in the house of Abhiram where Moheswar Singh's son saw it and wanted to purchase it. The accused was subsequently turned out of the jurisdiction of Seraikella. As the gun was not with him, he did not take any license.

The learned Deputy Magistrate said that the leaving of the gun for custody only did not appear to him to be plausible. He thought that it was made over for sale, and that the accused was in possession for some time without a license and was guilty under section 19 of the Arms Act.

Babu *Birbhushan Dutt*, for the Petitioner.

JUDGMENT.—On the wording of section 19 of the Indian Arms Act, it is clear that the only person who can be punished under clause (*f*) to section 19, is the person

who has in his possession or under his control any arm in contravention of the provisions of sections 14 and 15, that is to say, without a license except in certain tracts or tract. Now, it is clear that if the man has not had a gun for one-and-a-half years, he could not very well have a license, and whether he is liable for any irrgularity which was committed in respect of this gun during the four years previous to its sale to Maheshwar Singh's son cannot be gone into in these proceedings.

The rule is made absolute and the conviction and sentence are set aside.

The fine, if paid, will be refunded.

Rule made absolute.

(s. c. 7 N. L. R. 1.)

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 230 OF 1910.

September 6, 1910.

Present:—Mr. Skinner, A. J. C.

APPAJI— PLAINTIFF—APPELLANT

versus

KHUSHAL—DEFENDANT—RESPONDENT.

Custom - 'Shade right'—Right running with the land cannot be dissociated from the land.

A 'shade-right,' or the customary right of the owner or occupier of land to compensation for the damage done to his crops by the shade of adjacent trees, runs with the land, and cannot be transferred independently of the land.

Second appeal against the decree of the District Judge, West Berar, Akola, dated the 8th December 1909, reversing the decree of the Subordinate Judge, Basim, dated the 3rd July 1909.

Messrs. *S. Ramdas* and *A. C. Roy*, for the Appellant.

Mr. *C. B. Parakh*, for the Respondent.

JUDGMENT.—The right to half the produce of certain mango trees which the plaintiffs-appellants seek to enforce is admittedly a 'shade right,' *i. e.*, it is not a proprietary right in half the trees, as their sale-deed of the 2nd April 1906 (which they should have got translated) would seem to imply, but the customary right of the owner or occupier of adjacent land to compensation for the damage done to his crops by the shade of trees in the form of a share of their produce. This right has been recognized in Berar by Obbard, J. C., in *Kondba*

v. Sonba (1), and in the Central Provinces by my brother Stanyon in *Udesingh v. Ganeram* (2). I do not find in the Berar judgment the expression 'a substantive right running with the land' deduced from it by the learned Subordinate Judge, but I agree with him that this is the nature of the right, and do not understand why, having thus described it, he proceeded to allow it to be dissociated from the land. The plaintiffs claim to have derived it from one Bhagwan, who has admittedly retained the land, and only conveyed to them (under a deed which does not accurately describe it) his recurring right to claim the customary compensation from the owner of the trees. No authority for doing so has been shown me, and the nature of the right, in my opinion, precludes its being thus transferred. I accordingly agree with the view taken by the learned District Judge on this point, and need not decide the question of limitation.

I was asked by the appellants' learned Counsel to give a decree in this suit for restitution by Bhagwan of the price paid to him by the plaintiffs for a consideration which has failed. But that is a relief that was never asked in the Courts below, nor Court-fee paid for it, and which can be sought in a separate suit on a different cause of action.

I am informed that the plaintiffs are Bhagwan's reversionary heirs. If so, the failure of this suit will not prevent their asserting a right to compensation for the shade of the trees in question, when they are occupants of the land now held by Bhagwan, but the appeal fails, and must be dismissed with costs.

Appeal dismissed.

(1) 3 Berar L. J. 72.
(2) 5 N. L. R. 52; 2 Ind. Cas. 230.

(s. c. 7 N. L. R. 2.)

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 418 OF 1910.

October 31, 1910

Present:—Mr. Stanyon, A. J. C.

DEORAO—PLAINTIFF – APPELLANT

versus

Musammat BANAI—DEFENDANT—RESPONDENT.

Berar Land Revenue Code, 1896, *s.* 56—*Forfeiture. sale—Effect of equities—Burden of proof.*

DEORAO *v.* BANAI.

Section 56 of the Berar Land Revenue Code affords absolute protection against incumbrances, created by the ex-occupant of a forfeited holding, to a purchaser thereof in pursuance of a sale made under that section, but where no such sale is made, the effect of the forfeiture and subsequent acquisition of the forfeited property are to be determined with reference to the ordinary law, and are, therefore, subject to the control of equities arising out of the conduct of the parties.

Amolal Banechand v. *Dhondi*, 20 B. 466, 8 Bom. L. R. 360, referred to.

A mortgagee who claims in equity to enforce his mortgage against property not mortgaged to him, in substitution for mortgaged property which has been destroyed, is bound to establish that the destruction of the original security took place under such circumstances as to raise an equity in his favour, so as to fasten his mortgage on property acquired by the mortgagors after the extinction of his security.

Appeal against the decree of the Additional District Judge, East Berar, Amraoti, dated the 22nd February 1910, confirming the decree of the Subordinate Judge, Yeotmal, dated the 11th August 1908.

Mr. *G. P. Dick*, for the Appellant.

Mr. *J. Mitra*, for the Respondents.

JUDGMENT.—It is expedient to shortly state the facts of this case, so far as they are material to this appeal. One Bhasker was the recorded *ijaredar* of the village of Susani in the Yeotmal District of Berar. Living jointly with him were his wife, *Musammat* Banai, and his undivided brother, Dhondba. On the 25th February 1891, Bhasker executed a deed for Rs. 1,000, in favour of Deorao Malhar Deshmukh, whereby he mortgaged, by way of conditional sale, the *ijara* village above-mentioned. Bhasker, however, failed to discharge his revenue obligations, and on the 17th May 1894, his *ijara* lease was forfeited, and the village became *khalsa*, or unalienated land, under the Berar Revenue Code then in force, which contained the same provisions as are to be found in section 56 of the 1896 Code now in force. Thereafter the Collector, acting under powers which have now been repeated in rules under section 216 (1), (*d*) and (*e*), granted a right of occupancy in 13 fields of the said village to Dhondba and *Musammat* Banai. Apparently, Dhondba was found to be in personal cultivation of these fields when the forfeiture of the *ijara* took place; and *Musammat* Banai took the place of her insolvent husband in obtaining a means of future livelihood. Be that as it may, there can be no doubt, as has been found by the Courts below, that the fields were dealt with as unalienated land, and were the subject of an occupancy grant by the Collector after forfeiture of the *ijara* lease. It was not a case of a partial forfeiture which left the fields unforfeited with the *ijaredars*. There is no provision for any such partial forfeiture in the whole of the Berar Revenue Law. No doubt, under the terms of the *ijara* lease the *ijaredar*, on the determination of the lease by afflux of time, could have elected to obtain occupancy rights in his home-farm: but, where forfeiture ensued upon default, the lease was cancelled in its entirety, and no provision contained in it could be made operative thereafter.

On the 19th March 1903, the mortgagee Deorao, lodged the suit out of which this appeal arises, claiming payment of a sum of Rs. 2,000 due on his mortgage-bond of 25th February 1891, and, in default, foreclosure of the occupancy right granted in 1894 in fields Nos. 4, 5, 9, 10, 11, 20, 30, 33, 34, 38, 39, 53 and 54 in Susani, being the 13 fields standing in the names of *Musammat* Banai and Dhondba. The defendants originally impleaded were (1) Bhasker, (2) *Musammat* Banai and (3) Dhondba. Both Bhasker and Dhondba died during the long pendency of the suit in the first Court, and the resulting defendants are (1) *Musammat* Banai and (2) Vasudeo, the minor son of Dhondba, who is represented by his mother and guardian, *Musammat* Laxmi.

The first Court found that Bhasker and Dhondba were members of a joint Hindu family, with equal shares in the *ijara* lease and that Bhasker executed the mortgage in suit as manager of the family property. But the same Court also found that the mortgaged property had been extinguished by forfeiture, and that the subsequent grant by the Collector to *Musammat* Banai and Dhondba raised no equity in favour of the mortgagee so as to fasten the mortgage incumbrance on the said 13 fields. The Subordinate Judge, in a thoughtful and capable judgment, dealt with the law bearing on the case and in accordance with the above findings dismissed the suit on the 12th August 1908, and threw the costs of the defendants, *Musammat* Banai and Vasudeo, on the plaintiff. On appeal by the plaintiff, the District Court confirmed the decree of the first Court. Plaintiff has now made this second appeal.

The main plea urged is that forfeiture had

no legal effect on the mortgage-contract between the mortgagor and mortgagee, and that, although the actual registered *ijaredar* and executant of the mortgage-deed, Bhasker, had collusively kept himself in the back ground to defeat his creditors, and put forward his wife and brother for entry as *khatedars*, the land in suit was the substitute which the whole family received for the *ijara* right given up by them, and was, therefore, liable to the mortgage incumbrance.

Section 56 of the Revenue Code, which reproduces the law on this point in force in 1894 when the forfeiture occurred runs thus:—

"Arrears of land-revenue due on account of land by any landholder shall be a paramount charge on the holding and every part thereof, failure in payment of which shall make the occupancy or alienated holding, together with all rights of the occupant or holder over all trees, crops, buildings and things attached to the land or permanently fastened to anything attached to the land, liable to forfeiture; and on such forfeiture the Deputy Commissioner may levy all sums in arrear by sale of the occupancy or alienated holding, freed from all tenures, incumbrances and rights created by the occupant or holder or any of his predecessors-in-title, or in anywise subsisting as against such occupant or holder, or may otherwise dispose of such occupancy or alienated holding in accordance with any instructions given under section 216."

This section almost exactly follows the language of section 56 of the Bombay Land Revenue Code (Bombay Act V of 1879). That being so, the ruling in *Amdal Banechand* v. *Dhondi* (1) is very much in point. In that case the defendant, Dhondi, was the occupant of a survey number which he had mortgaged to the plaintiff. During the pendency of the mortgage, the mortgagor forfeited his holding to Government under section 56 of the Bombay Code by reason of non-payment of the assessment in arrear. After the forfeiture, the same land was again settled with the defendant upon fresh terms. Subsequently to this re-settlement, the plaintiff sued to enforce his mortgage by a claim for possession of the land. The first Court gave him a decree, but the first Appellate Court reversed that decree and dismissed the suit. On second appeal the High Court (Sir Lawrence Jenkins, C. J., and Batty, J.) ruled that, where the Collector recovers arrears of assessment by a sale under the provisions of section 56 aforesaid, the purchaser at such sale is protected against incumbrances and rights created by the occupant, or any of his predecessors, or in anywise subsisting against the occupant: but that where the Collector otherwise disposes of the occupancy, the section affords no such protection, and the legal relations must be determined by reference to the ordinary law. This view of the scope of section 56 of the Bombay Code, has my entire concurrence. I, therefore, hold that section 56 of the Berar Code, which is to the same effect, affords absolute protection, against incumbrances created by the ex-occupant of a forfeited holding, to a purchaser thereof in pursuance of a sale made under the section: but where no such sale is made, the effects of the forfeiture and subsequent acquisition of the forfeited property are to be determined with reference to the ordinary law, and are, therefore, subject to the control of equities arising out of the conduct of the parties. No rule under section 216 (1) (*d*) of the Berar Land Revenue Code could be legally made in abrogation of such ordinary law.

In the Courts below, and in arguments before me, reference was made to the decisions of this Court in *Harikrishna* v. *Jaideb* (2), *Bhuray Brahmin* v. *Lala Vishwanath* (3) and *Baliram* v. *Ram Rao* (4). But these rulings afford little guidance in the present case. The systems of land-revenue are so widely different in the Central Provinces and Berar, that no safe analogy can be drawn from the case law of the former for the decision of cases in the latter. Moreover, a voluntary extinction of a right, by a voluntary transfer or surrender, is necessarily on a different footing from a forfeiture; for, although a forfeiture may be wilfully brought about, or caused by an amount of negligence which cannot equitably be differentiated from perversity, such cases are exceptional. Legal principles must be based on normality, and forfeiture is generally a result against the desire of the

(1) 30 B. 466; 8 Bom. L. R. 360.

(2) 17 C. P. L. R. 33.

(3) 2 N. L. R. 170.

(4) 4 N. L. R. 57.

person who loses his property thereby. As defined in the above Bombay case, it ordinarily implies the loss of a legal right by reason of some breach of obligation. The conduct of a party who wilfully surrenders, is usually different from that of a person who forfeits estate which he has mortgaged, regarded as a basis for the building up of equities for the mortgagee against the mortgagor.

In the present case, the Collector did not sell the *ijara* rights in pursuance of the power given him by section 56 of the Berar Revenue Code. The village has become unalinated land in the hands of Government. Inasmuch as Government is entitled to sell the same, it is, *a fortiori*, entitled to retain the same free from the plaintiff's incumbrance, and plaintiff has wisely abstained from any attempt to follow the village with his mortgage. What he seeks to follow, as a substitute for his original security, is the right of occupancy given to Dhondba and *Musammat* Banai, under a fresh grant made subsequent to the forfeiture. This claim is governed by the equities arising out of the conduct of the parties to the mortgage. The first Court has found, but it has not yet been finally decided, that Dhondba was a mortgagor. *Musammat* Banai certainly was not a mortgagor. But let it be assumed that both Dhondba and *Musammat* Banai were co-mortgagors, and that the occupancy grant in their names was in fact a grant to all the three mortgagors. Does any equity arise under which the fields now given to them can be made subject to the mortgage? I think not. In the Bombay case the High Court referred back the following issues for determination:—

"(1) Has the defendant, by availing himself of his position as *khatedar*, gained an advantage in derogation of the rights of the plaintiff, or otherwise by his conduct created an equity in favour of the plaintiff?

(2) If so, is the plaintiff entitled to any, and what, relief?"

It is obvious that the first of the above questions, if asked in the present case, would have to be answered in the negative; and the same reply to the second would follow. There is nothing to show that Bhasker, or the members of his family, forfeited thier *ijara* rights wilfully with intent to defeat the plaintiff's claim as mortgagee. I have no doubt that such forfeiture, by whatever misfortune or mismanagement caused, was a result which they would have liked to avoid. At any rate, the plaintiff, who claims in equity to enforce his mortgage against property not mortgaged to him, in substitution for mortgaged property which has been destroyed, was bound to establish that the destruction of the original security took place under such circumstances as to raise an equity in his favour, so as to fasten his mortgage on property acquired by the mortgagors after the extinction of his security. He has done nothing of the kind. On the other hand, he could, by assisting the mortgagors to pay up the arrears, or by taking possession of the village and himself paying up the arrears, have prevented forfeiture and preserved his security. He did nothing of the kind, and the mortgagors lost their property. Such contributory negligence is fatal to any equity in his favour. Subsequently, they made a fresh start to earn a livelihood by the labours of their hands. They may have remained—no doubt they did remain—liable as debtors to pay the mortgage money until the debt, as such, became barred by time, but there seems to be no equity entitling the mortgagee in this particular case, to fasten his incumbrance on the land which his mortgagors now occupy for a livelihood under an entirely fresh grant in no way forming part or residue of the mortgage-interest. The plaintiff cannot say he did not know the conditions of the tenure mortgaged to him, or its liability to forfeiture; and he does not seem to have acted with due diligence in guarding against such forfeiture. He must take the consequences. In my opinion, the case has been rightly decided by the Court below, and this appeal, is, therefore, dismissed with costs.

Appeal dismissed.

(s. c. 7 N. L. R. 8.)

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 354 OF 1910.

December 16, 1910.

Present:—Mr. Batten, O. J. C.

SUNDER—DEFENDANT—APPELLANT

versus

SITARAM—PLAINTIFF—RESPONDENT.

Central Provinces Tenancy Act (*XI of* 1898), *s.* 35—

SUNDER *v.* SITARAM.

Surrender of portion of a holding with consent of landlord, validity of.

The rule referred to in *Sarjuprasad* v. *Muratlal*, 14 C. P. L. R. 33, is clearly to prevent a tenant from giving up portion of a holding without the landlord's consent, but where a landlord has accepted the surrender of a defined portion of a holding and allowed the tenant to continue as tenant of the remainder on a defined rent, the tenant cannot be allowed to resile from the transaction.

Second appeal against the decree of the District Judge, Bhandara, dated the 7th March 1910, reversing the decree of the Munsif, Bhandara, dated the 11th October 1909.

Mr. *S. R. Pandit*, for the Appellant.

Mr. *C. B. Parakh*, for the Respondent.

JUDGMENT.—The facts of this case, as found by the learned District Judge, are that the plaintiffs-respondents in this Court, surrendered to the landlord five out of the seven fields that constituted their occupancy-holding, and that the landlord leased out two of the fields, those in dispute in this suit, to the defendant-appellant in this Court. The history of the fields was not very clearly stated in the District Judge's judgment, but now that all the records have been produced it appears that in the original settlement the two fields in suit formed one holding, and five other fields formed another holding. It is also clear that ever since the subsequent settlement all the seven fields have been held as one holding. The five fields surrendered by the plaintiffs to the landlord comprised the two fields in suit which originally formed one holding, together with three of the five fields which orignally formed the other holding. The finding that all the seven fields at the time of the surrender formed one holding is the only finding that could be arrived at on the records, and the appeal must be decided on the basis that the plaintiffs surrendered five fields forming only a portion, but an ascertained portion, of their holding. The plaintiffs based their suit for possession of the two fields on the allegation that they had not surrendered any fields to the landlord, but had themselves leased the two fields in suit to the defendant, but it has been found that there had been a surrender of the five fields by a written deed of surrender.

The learned District Judge has decreed plaintiffs' claim on the ground that the surrender of portion of a holding is void and not binding on the plaintiffs. In arriving at this view of the law he has relied upon the ruling in *Sarjuprasad* v. *Muratlal* (1). That was a case in which a tenant surrendered an undefined and undefinable three-quarters portion of his holding to one of several co-sharer landlords and it was held that such a surrender did not give that co-sharer a right to sue his co-sharers for *khas* possession of three-fourths of the holding. It was a case in which no surrender had been accepted by the proprietary body as a whole. It is argued in appeal that while a tenant has no right to surrender a portion only of his holding and cannot claim to do so, the landlord, (or body of landlords), may accept such a surrender if it pleases him to do so, the rule against the surrender of portion of a holding being for the advantage of the landlord. It is pointed out for the respondents that clause 26 of the Central Provinces Tenancy Bill of 1880 contained the words: "No tenant shall be entitled to surrender a part only of his holding except.....with the consent of his landlord" but that this provision as to the landlord's consent is omitted from section 33 of the Central Provinces Tenancy Act of 1883 and from section 35 of the existing Tenancy Act. On the other hand, it is pointed out that the express provision against the surrender of portion of a holding contained in section 83 of the North-Western Provinces Tenancy Act II of 1901, in the words: "but he (the tenant) shall not be entitled to surrender a portion only of his holding", is not re-produced in the Central Provinces Tenancy Act. I have no doubt that the view expressed in *Sarjuprasad* v. *Muratlal* (1), that as against the landlord a surrender of a fractional share of a holding is not a legal surrender, is the correct view; but this is a very different thing from holding that a landlord may not accept a surrender of a defined share consisting of certain fields separately assessed with rent in a holding. In the cases cited in *Sarjuprasad* v. *Muratlal* (1) there is no decision that a landlord and tenant may not agree for the tenant to give up a defined portion of a holding with an agreement as to what rent is to be paid for the remainder, and it appears to me that such an arrange-

(1) 14 C. P. L. R. 33.

PYARE LAL *v.* RAMRATAN.

Conditional decree for sale or foreclosure—Interest subsequent to the date fixed—Court rate only allowed.

Interest subsequent to the date fixed for payment by a conditional decree for sale or foreclosure should be allowed at the Court rate on the whole sum due including costs instead of at the contract rate on the mortgage-money.

Second appeal against the decree of the Divisionel Judge, Chhattisgarh Division, dated the 8th September 1909, confirming the decree of the Subordinate Judge, Raipur, dated the 30th September 1908.

Mr. *S. Y. Deshmukh*, for the Appellant.

Mr. *G. P. Dick*, for the Respondent.

JUDGMENT.—The question whether the payment of Rs. 336 was made towards the mortgage-debt in question is one of fact, and no cause has been shown me for reviewing the finding of the lower Appellate Court. Nor is there any valid ground of appeal on the question of tender, for the finding as to the Rs. 336 being against the appellant, more than the amount tendered was due at the date of the alleged tender of Rs. 650. And the appellant was admittedly only willing to pay that amount if it was accepted in full satisfaction, a condition he was not justified in imposing.

There is also no ground for interference with the contract rate of interest up to the date fixed for payment by the first Court; but the question of interest subsequent to that date stands on a different footing, and though the bond in this case expressly provides for interest at the contract rate up to realization. I am constrained by the decisions of their Lordships of the Privy Council in *The Maharaja Bhartpur* v. *Rani Kanno Dei* (1), *Sunder Koer* v. *Rai Sham Krishen* (2) and *Raja Gokuldas* v. *Seth Ghasiram* (3) to hold that interest subsequent to the date fixed for payment by a conditional decree for sale or foreclosure stands on a different footing, and should be allowed at the Court rate on the whole sum due including costs, instead of at the contract rate on the mortgage-money. Those cases are, it is true, all cases in which the conditional decree was one for sale, and there is difference between such cases and a case of foreclosure, which that before me is, as in the former the formalities of sale may, without any express extension of time being granted on the judgment-debtor's application, cause delay in realization of the decretal debt, for which it is only fair that the mortgagee should be compensated by receiving interest, whereas in a foreclosure case the mortgagee's interest can be sufficiently safeguarded by the Court's imposing fair terms as to interest under the provision of section 87 of the Transfer of Property Act, if it grants any extension of the time allowed for payment. But this point has been noticed by their Lordships in their judgment in *The Maharaja of Bhartpur's case* (1), in which they remark (at page 193) " It must be admitted that the language of section 88 is calculated to cause difficulty, and a sort of difficulty, which is a common cause of conflict in judicial interpretations of new statutes. It looks as if the draftsman of the Transfer of Property Act had overlooked the difference between a foreclosure and a sale, and had forgotten that in the former case interest stops because the mortgagee gets the property in lieu of his debt, whereas a sale must be subject to some substantial delay, and in many cases is subject to long delays." The distinction, therefore, must be taken to have been present to their Lordships' minds when in *Sunder Koer* v. *Rai Sham Krishen* (2) they followed their decision in *The Maharaja of Bhartpur's case* (1) and agreed with the High Court of Calcutta in allowing interest after the fixed date at the Court rate and not at the mortgage rate, and, though the case was one of sale, laid down in general terms equally applicable to a foreclosure case, that the scheme and intention of the Transfer of Property Act was that a general account should be taken once for all, and an aggregate amount be stated in the decree for principal, interest and costs due on a fixed day, and that after the expiration of that day if the property, should not be redeemed, the matter should pass form the domaine of contract to that of judgment, and the rights of the mortgagee should thenceforth depend not on the contents of his bond, but on the direction of the decree. This is a dicision binding on me, and which I have followed in a sale case in *Sheoppa* v. *Rukhma* (4) and as I am unable, in view of the passage I have cited from their Lordships' previous decision, and the generality of the expressions used in

(1) 23 A. 181; 28 I. A. 35.

(2) 34 C. 150 at p. 161; 4 A. L. J. 109; 11 C. W. N. 249; 5 C. L. J. 106; 17 M. L. J. 43; 9 Bom. L. R. 304; 2 M. L. T. 75.

(3) 4 N. L. R. 1; 10 Bom. L. R. 144.

(4) 5 N. L. R. 37; 2 Ind. Cas. 27.

the decision in question, to distinguish cases of foreclosure, I must follow it in this case also despite the express provision in the plaintiffs-respondents' bond that "If a suit is filed I will pay interest as above from the date of the institution of the suit to the date of re-payment of the money."

For the reasons I have indicated, the decrees of the Courts below must be modified by omission of the direction that future interest on Rs. 1,668-7-0 is allowed at Rs. 2 per cent. per mensem from the date of suit till relization, and substitution of a direction that simple interest at Rs. 6 per cent. per annum be paid on Rs. 2,456-6-9, being the total amount found due by the first Court including costs, from the 30th March 1909, the date fixed by that Court for payment, to the 30th September next, which will be substituted as the date fixed for payment, and thereafter until realization. If, however, any further extension of the time for payment is granted, it will be open to the Court of first instance to impose such terms as it thinks fit, and, in so doing, to take into consideration the provisions of the mortgage-deed. Costs in this Court, and in the lower Appellate Court will be borne as incurred.

(s. c. 7 N. L. R. 17.)

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 702 OF 1909.

December 17, 1910.

Present:—Mr. Batten, O. J. C.

BHIKAJI—DEFENDANT—APPELLANT

versus

TUKARAM—PLAINTIFF—RESPONDENT.

Central Provinces Tenancy Act (*XI of* 1898), *ss.* 49 *and* 51—*Rent—Private agreement—Superseded by settlement.*

Sections 49 and 51 of the Central Provinces Tenancy Act must be read together, and their united effect is that a private agreement, not inconsistent with the Act, as to the rent payable, may be given effect to until the next settlement, but at the next settlement the agreed upon rate of rent is superseded by the rate fixed by the Settlement Officer.

Second appeal against the decree of the District Judge, Wardha, dated the 16th July 1909, confirming the decree of the Additional Judge to the Court of Munsif, Wardha, dated the 15th March 1909.

Mr. *J. C. Ghose*, for the Appellant.

Mr. *J. Mittra*, for the Respondent.

JUDGMENT.—In 1885 there was an imperfect partition between the parties and the other co-sharers of an 8-anna share in *Kasba* Andori in the Wardha *Tahsil*, and the two fields in suit which were described as *malik wahid* of the defendant-appellant fell into the plaintiff's *khel*. By a mutual agreement between the parties, the fields were retained in tenant-right by the defendant who is thus an ex-proprietary tenant. A similar arrangement was made as regards the plaintiff's fields which fell into the defendant's *khel*. The rent for the fields was agreed upon between the parties, and not fixed by the Deputy Commissioner under section 136-N (2) of the Land Revenue Act. The plaintiff gave a written lease of the fields including the following words: "Our *khel* of 2 annas 8 pies has been separated, your fields as described below have fallen into our *khel*, we will never eject you from the fields and never increase the rent thereof, we have given the fields to you to cultivate for ever on the *jama* now paid as detailed below:—

		Rs.	a.	p.
No. 26	...	14	0	0
No. 21/3	...	17	8	0
		31	8	0

At the subsequent settlement the Settlement Officer fixed the rent of these two fields, classed as occupancy fields, at Rs. 68, and the defendant has been paying that rent without objection until recently. The plaintiff has sued the defendant in this suit for rent for *faslis* 1312, 1313 and 1314 at the usual rate of Rs. 68 a year. The defendant raised the defence that he is liable to pay rent at the contract rate of Rs. 31-8-0 a year, irrespective of the rent fixed at settlement. This defence was overruled by both the lower Courts and a decree for the full amount claimed has been given. The defendant appeals to this Court. The chief argument put forward for the appellant is that section 49 of the Tenancy Act (section 44 of the former Act) does not contain the words "notwithstanding any contract to the contrary", which word, or words to the same effect, occur in sections 15, 16, 17, 34, 45, 52 and 69 of the Act. It is argued that the omission is intentional and significant and shows that contracts should be given effect to. I agree with the learned District Judge that this view cannot be sustained. Section 49 and section 51 must

be read together, and their united effect is that a private agreement, not inconsistent with the Act, as to the rent payable, may be given effect to until the next settlement, but at the next settlement the agreed upon rate of rent is superseded by the rate fixed by the Settlement Officer. The Tenancy Act is exhaustive as regards the various classes of tenants, *vide Durga Patel* v. *Ganpati Patel* (1), whereas if the appellant's contention were upheld he would be holding under a tenure not contemplated by the Act. For it is one of the incidents of an occupancy-tenant's tenure that the rent is fixed by the Settlement Officer at the time of Settlement. The words "notwitstanding any contract to the contrary" are omitted in section 49 because they would be superfluous since the section defines the only way in which the rent of an occupancy-holding is to be fixed at the time of a new Settlement. It is, therefore, quite clear that the defendant is bound to pay rent at the rate fixed by the Settlement Officer, notwithstanding the previous contract to the contrary. For these reasons, the appeal is dismissed with costs.

Appeal dismissed.

(1) 9 C. P. L. R. 27.

(s. c. 7 N. L. R. 19.)

NAGPUR JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL NO. 36 OF 1910.

November 30, 1910.

Present:—Mr. Batten O. J. C.

JAMNDAS—APPELLANT

versus

VINAYAK—RESPONDENT.

Provincial Insolvency Act (*III of* 1907), *ss.* 16 (4), 44 (2) (c) —*Property—Personal earnings—Earnings between adjudication and discharge.*

The word 'property' in section 16 (4) of the Provincial Insolvency Act (III of 1907) is not intended to exclude personal earnings, over and above what is necessary for the debtor's adequate support.

In re Roberts, (1900) 1 Q B. 122; 69 L. J. Q. B. 19; 48 W. R. 132, 81 L. T. 467; 16 T. L. R. 29; 7 Manson 5 and *In the matter of C. M. J. Donaghue*, 19 B. 232, referred to.

Under section 44 (2) (*c*) the Court when giving an order of discharge may make conditions as to future earnings, and *a fortiori* the Court can make an order as to earnings after adjudication but before discharge.

Miscellaneous appeal against the order of the District Judge Wardha, dated the 28th April 1910.

Mr. *M. V. Abhyankar*, for the Appellant.

JUDGMENT.—In this case the respondent has been adjudicated an insolvent under section 16 of Act III of 1907. He is a petition-writer, and one of the scheduled creditiors, the present appellant, applied that the respondent's earnings as a petition-writer should be produced before the Court and that his registers should be produced to show what are his earnings. The application was one to be dealt with under sub-section (4) of section 16 of the Act. The District Judge has dismissed the application saying: "No such application can be entertained. Under section 16 (4) only the insolvent's property acquired by or devolving on the insolvent aftar the date of the adjudication vests in the Receiver or in the Court and not his earnings." This appears to me to state the law too widely. The proper rule appears to be that only such personal earnings shall vest in the Receiver as constitute a margin beyond what has been required for the insolvent's adequate personal support and that of his family [*In re Roberts* (1)]. This view has been taken in *In the matter of C. M. J. Donaghue* (2). The provisions of Act 11 and 12 Vict. C. 21, sections 7 and 27 were in question in that case, but it does not appear to me that the word 'property' in section 16 (4) of Act III of 1907 is intended to exclude personal earnings, over and above what is necessary for the debtor's adequate support. Under section 44 (2) (c) the Court when giving an order of discharge may make conditions as to future earnings, and it seems to me that *a fortiori* the Court can make an order as to earnings after adjudication but before discharge. For these reasons, I set aside the order appealed against, and direct the District Judge to dispose of the application with reference to the above remarks.

(1) (1900) 1 Q. B. 122; 69 L. J. Q. B. 19; 48 W. R. 132; 81 L. T. 467; 16 T. L. R. 29; 7 Manson 5.

(2) 19 B. 232.

(s. c. 7 N. L. R. 20.)

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 397 OF 1909.

November 8, 1909.

Present:—Mr. Skinner, A. J. C.

GANGADHAR RAO—DEFENDANT—APPELLANT

versus

Raja LAXMAN RAO—PLAINTIFF—RESPONDENT.

Central Provinces Tenancy Act (*XI of* 1898), *s.* 41—

GANGADHAR RAO *v.* LAXMAN RAO.

Mortgage—Absolute occupancy-holding along with other property—Court cannot apportion charge.

If an absolute occupancy-holding is mortgaged without notice to the landlord, the fact that other property, moveable or immoveable, is included in the mortgage, does not entitle the mortgagee for the purpose of upholding the mortgage to ask the Court to value such other property, apportion the mortgage-debt between it and the absolute occupancy-holding in proportion to their values, and thus reduce the charge on the absolute occupancy-holding within the limit prescribed by section 41 of the Tenancy Act for a mortgage without notice to the landlord.

Beni Parshad v. *Dharamdas Kalar*, 11 C. P. L. R. 17, distinguished.

Second appeal against the decree of the District Judge, Bhandara, dated the 3rd April 1909, confirming the decree of the Munsif, Sakoli, dated the 4th December 1908.

Mr. *Raghunath Rao*, for the Appellant.

JUDGMENT.—This is a suit by a landlord for a declaration that a mortgage for Rs 199 of two absolute occupancy-holdings in *Mauza* Pohra of the Bhandara District, the rent of one of which is Rs. 11-4-0, and of the other Rs. 11 only, be declared void as having been made without the notice to him required by the second clause of section 41 of the Central Provinces Tenancy Act. The principal amount secured exceeds eight times the rental of the holdings nor is anything gained by apportioning the debt between the two holdings in the manner allowed by Ismay, J. C., in *Beni Parshad* v. *Dharamdas Kalar* (1), as the rent of the two holdings being practically equal, the proportionate excess of the mortgage-money over eight times the rental, would, if the debt were apportioned between the two holdings, remain almost the same as against each separately. But it is contended on the defendant's behalf that a house and various items of moveable property, which have also been included in the mortgage, should be valued, and their value excluded (on the analogy of the apportionment allowed by Ismay, J. C.), and that in this way the absolute occupancy-holdings should be held to have been mortgaged for Rs. 75 only.

The first Court held that the mortgage-debt was indivisible; that if apportionment were allowed the whole debt should be regarded as charged in the first instance on the immoveable property; that the value of the house was difficult to ascertain, but that even if it was Rs. 40 as alleged by the defendant the mortgage-money would still 'according to the plaintiff's calculation' (*i. e.*,) I suppose, including interest for the first five years exceed eight times the annual rent of the holding. It accordingly decreed the mortgage of the absolute occupancy-holding void as against the plaintiff, and gave him costs.

The defendant appealed. His first ground of appeal was 'that the lower Court should have held that the mortgage can be split up for determining whether the transaction required the consent of the landlord or not, as the mortgage-deed included other property than the absolute occupancy fields in respect of which the present suit has been brought.' And the learned District Judge has thereupon observed that reliance was placed on *Beni Prashad* v. *Dharamdas Kalar* (1), and that this proposition was frankly admitted by the learned Pleader for the respondent and is, I think, quite sound [see also *Thandavan* v. *Valliamma* (2)]. The Madras decision referred to [*Thandavan* v. *Valliamma* (2)] deals with very different question of the validity as to matters not requiring registration of a document, which, in so far as it affects immoveable property, is void for want of registration, and I am unable to see its bearing on the connection with which it has been cited. The learned District Judge proceeded to accept the first Court's view that the mortgage was, primarily at any rate, one of immoveable property and to hold that 'that being so, the debt secured by the absolute occupancy-holding with the 5 years, interest would exceed eight times the annual rent' so dismissed the appeal

The defendant has come up in second appeal, and it is contended on his behalf that the Courts below have wrongly excluded the hypothecation of moveables from consideration in apportioning the mortgage-debt, and should, by taking them into account, have reduced the charge on the absolute occupancy-holdings within the limit prescribed by section 41 of the Tenancy Act for a mortgage without notice to the landlord. I am unable to accept this contention. The ruling in *Beni Parshad* v. *Dharamdas Kalar* (1) is one with regard to which I feel a good deal of difficulty, but I am not called upon to decide in this case whether I should follow it, as what the defendant asks in this case,

(1) 11 C. P. L. R. 17.

(2) 15 M. 336.

Court will be dealt with by the lower Appellate Court when finally disposing of the case. If Sakina held to have been the wife of Wahid-din, the plaintiff should be given joint possession with the defendants of so many of the fields in suit as are found to have been Wahid-din's and to have passed from him to his two widows.

(s. c. 7 N. L. R. 26.)

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 51 OF 1910.

November 25, 1910.

Present:—Mr. Stanyon, A. J. C., and Mr. Skinner, A. J. C.

TUKARAM—PLAINTIFF—APPELLANT

versus

SONAJI—DEFENDANT—RESPONDENT.

Stamp Act (II of 1899), ss. 32, 37, 57, rule 16—Collector's certificates—Civil Court's power—Stamp of improper description—Rejection of a document not duly stamped—Valuation—Appeal—Court's duty.

Section 32 of the Indian Stamp Act makes the Collector's certificate final as to the admissibility in evidence of a document, so far as its admissibility depends on its being duly stamped.

A Civil Court has no power to revise the Collector's action under sections 32 and 37 except on reference under section 57 of the Act by the Chief Controlling Revenue Authority.

When the duty payable on an instrument has been fully paid in the form of a Government stamp, whether judicial, postal, forest, or telegraph, the instrument should not be classed as unstamped, simply because the stamp used is not of the description which, under the Indian Stamp Act and Rules, should be used for the instrument in question. Such an instrument bears a stamp of sufficient amount but of improper description within the meaning of rule 16 of the rules under the Stamp Act, and can, as such, be validated by the Collector.

In view of the retrospective effect given to the Collector's validation by section 37 of the Indian Stamp Act, the rejection of a document subsequently validated is a good ground of appeal, notwithstanding the fact that the order of rejection when made was correct.

Where a document forming the basis of a plaintiff's suit is not duly stamped and may be validated under rule 16 so as to make it admissible in evidence, the plaintiff should be given an opportunity of asking the Collector to validate it, before his suit is dismissed on the ground that the document is inadmissible in evidence. If no such opportunity is given, it will form a good ground of appeal.

First appeal against the decree of the Additional District Judge, West Berar, Akola, dated the 24th February 1910.

Sir *B. K. Bose*, for the Appellant.

Messrs. *F. W. Dillon*, *N. M. Bidarkar* and *S. B. Tambe*, for the Respondent.

JUDGMENT.—The plaintiff-appellant sued the defendant-respondent in the Court of the Additional District Judge, West Berar, on a promissory-note for Rs. 10,000 dated the 1st October 1906, stamped with four postage stamps, originally printed as half-annas stamps, but surcharged prior to their issue to the public with the figure $\frac{1}{4}$, indicating that their value was reduced to $\frac{1}{4}$ anna. The note should have exhibited payment of revenue duty to the extent of one anna, and under rule 14 of the rules under the Stamp Act, this duty could have been paid in postage stamps of one anna or $\frac{1}{2}$ anna, but not in postage stamps of $\frac{1}{4}$ anna. This objection to the admissibility of the promissory-note was taken on the defendant's behalf in the lower Court. The plaintiff was badly advised in that Court, and instead of admitting that the document was incorrectly stamped, and taking steps to get it validated, his Pleader raised the untenable plea that the stamps used, though of the value of a $\frac{1}{4}$ anna for postal purposes, still bore the value of $\frac{1}{2}$ anna for the purposes of Government revenue (overlooking the fact the Government had sold them for $\frac{1}{4}$ anna). In the alternative, he pleaded that he should be allowed to fall back on the original cause of action (in satisfaction of which the promissory-note was alleged to have been given). This was opposed by the defendant's Pleader, and the following issues were framed:—

(1) Is the document filed with the plaint unstamped?

(2) What is the nature of the document?

(3) Can it be validated by payment of stamp duty, and admitted in evidence?

(4) If not, can the plaintiff maintain his suit for the sum claimed, and can he prove by oral evidence the circumstances under which the defendant is liable to him for it?

(5) If he can, would it amount to changing the nature of the suit, and cannot plaintiff base his claim on those facts?

The Additional District Judge decided all these points against the plaintiff, and dismissed his suit with costs. And the plaint-

iff appealed to this Court on ground directed against the refusal to allow him to amend his claim. But, during the pendency of the appeal, he got his promissory-note validated by the Collector of Akola, and an additional ground of appeal has been submitted on his behalf to the effect that the note, having now been validated under rule 16 of the Rules issued by the Government of India under Notification No. 786, dated 2nd February 1899, should be taken into consideration.

By agreement of the learned Counsel, who represented the parties before us, this additional ground of appeal was first argued and the heraing of the other grounds of appeal left over pending our decision of it. The position taken up by the respondent's learned Counsel is, that the Collector's validation was *ultra vires*, as the stamps used were not stamps within the meaning of the Stamp Act at all, and the document was, therefore, not one that bore 'a stamp of sufficient amount but of imporper description' within the meaning of rule 16, but must be considered to have been, in the view of the law, 'unstamped'. If, however, the Collector's validation is held correct or binding on us, then he contends that to receive the document in appeal is in fact to take additional evidence, that there is no legal ground for doing this, and that the plaintiff should, after getting the promissory-note validated, have withdrawn his appeal, and applied to the lower Court for a review of its judgment.

We are unable to accept either of these contentions, though the first is supported by the high authority of Full Bench decision of the Allahabad High Court on a *Reference under section* 57 *of Act No. II of* 1899 (1). The appellant's learned Advocate was inclined to admit that, if the Collector's action was in fact *ultra vires*, we are entitled to consider the question, and hold his validation of no effect. But we do not think we have any such authority, nor is the Allahabad ruling in point as to this, for that ruling was given on a reference by the Board of Revenue under section 57 of the Stamp Act *i. e.*, under circumstances under which the Act provides for a judicial decision as to the action that should be taken by a Collector in a case he has referred under section 56 to the Chief Controlling Revenue Authority for its orders, or which has otherwise come under its notice. But, apart from these special provisions, section 32 of the Act makes the Collector's certificate final as to the admissibility in evidence of a document, so far as its admissibility depends on its being duly stamped. And, though the proviso to that section forbids his giving a certificate in respect of an instrument chargeable with a duty of one-anna of a promissory-note, rule 16 allows him to do so, and section 76 enacts that all rules published as thereby required shall have effect as if enacted by the Act. We are, therefore, of opinion that the effect of the Collecter's certificate is, under sections 32 and 37 of the Act, that the promissory-note in question in this case must be deemed to have been duly stamped as from the date of its execution; that we have no power to revise the Collector's action, and that it is for the High Court of Bombay to decide, on a reference being made to it by the Chief Controlling Revenue Authority of these Provinces, whether the ruling of the Allahbabad High Court should be followed by the Collectors of the Central Provinces and Berar.

If we were called upon to decide as to the correctness of the Collector's action, we should, with all respect, feel obliged to dissent from the opinion of the learned Judges of the Allahabad High Court. The word 'stamp' is not defined in the Stamp Act. The object of the Act is not to exclude evidence, or to enable parties to avoid their obligations on technical grounds, but to obtain revenue for the Government of British India, which, for fiscal purposses, is also the Government of Berar. When, therefore, the duty payable on an instrument is one-anna, and one-anna has been paid to the Government by the purchase of a Government stamp of that amount, though not of the description, which under the Act and rules should be used for the instrument in question, then, in our opinion, the instrument "bears a stamp of sufficient amount but of improper description," and should not be classed as unstamped, though the stamp used, instead of being a wrong description of "revenue stamp" (a term not used in the Stamp Act), happens to be a stamp of some other department of the same Government, whether judicial, postal, forest, or telegraph. This view seems to us in accordance with equity and is supported by

(1) 23 A. 213.

the facts, that, not only is there no definition of, the word "stamp" or use of the term "revenue stamp" in the Stamp Act, but that rules that have been made under that Act allow the use of postage stamps in certain cases and of Court-fee stamp in others. And though rule 16, under which the Collector acted in this case, was only expressly extended to Berar by Foreign Department Notification No. 964 of the 19th May 1910, it had been enacted by Notification No. 3632 of the 29th June 1906, (before the extension of the Act to Berar by Notification No. 962, dated 14th May 1909) and having, under section 76 of the Act, the same effect as if thereby enacted, should, we consider, be regarded as having, when the Act was applied to Berar, formed part of it.

We are also clearly of opinion that we should allow the appeal, and remand the case for retrial as having been wrongly decided on a preliminary point, though the plaintiff may also have had a remedy by application for review. No doubt, an Appellate Court will ordinarily deal with a case as it stood before the lower Court, and will not interfere if, on the materials before the lower Court, the case has been rightly decided. The discovery of new evidence is accordingly a ground of review not of appeal. But the improper rejection of evidence is a ground of appeal. And since the promissory-note in question in this case was rejected as unstamped, but is now to be deemed to have been duly stamped as from the date of its execution, the order of the lower Court, though it may have been right when it was passed, is now shown to have been wrong, and should, therefore, be dealt with in appeal. Whatever anomaly there may be in this result is due to the action of the Legislature in giving the Collector's validation retrospective effect. The cases that have been cited by the respondent's learned Counsel are of an entirely different nature, and no discussion of them is necessary. A parallel case would, we think, be that of a marriage rightly held invalid by a Court of first instance, but subsequently, during the pendency of an appeal, validated by the Legislature with retrospective effect, as marriages with deceased wives' sisters recently were in England. The Appellate Court would clearly be bound to deal with the case, as though the marriage had been valid *ab initio*, and if the first Court's decision depended on the invalidity of the marriage, to set it aside though correct when it was passed, and when the appeal was filed.

Moreover, even upon the record as it stood before the note was validated, it seems to us there was room for interference in appeal. The lower Court was asked to decide, as a preliminary point, whether the note was inadmissible in evidence because it was not duly stamped. It further set itself the question whether, if found to be not duly stamped, the note could be validated. Its decision on the first question was correct. Its disposal of the second question was erroneous, because it obviously failed to consider - it clearly overlooked—rule 16 aforesaid. Having held that the document was not duly stamped, it was bound to determine the further question upon an application of rule 16. It was not bound by any published decision of this Court, and was, therefore, at liberty to entertain the view which we have adopted in this judgment; subject, if it found that view to be in conflict with the published decision of some other High Court, to an expression of due respect for the difference. We think that a decision, arrived at in oblivion as to the law governing the question to be decided, is, *ipso facto*, bad in law and open to correction on appeal; and we should have been competent to correct it, and deal with the question of validation in the light of rule 16, even if the document had not yet been validated, assuming, of course, that its rejection by the lower Court was objected to before us. We feel sure that if the District Judge had taken the view that the Collector might validate the note under rule 16 so as to make it admissible in evidence, his proper course, after holding it to be unduly stamped, would have been to give the plaintiff a reasonable opportunity of moving the Collector. Instead of that, the plaintiff did not have his inadmissible note returned to him until after his suit had been dismissed. In our opinion, therefore, there was a *locus standi* for this appeal even irrespective of the validation proceedings which took place after it was filed.

The appeal must be allowed, the decree of the lower Court set aside, and the case remanded to that Court for a fresh decision on the merits. The appellant will receive a

refund of the Court-fee on his memorandum of appeal, and, as we think that the plaintiff should have got his promissory-note validated sooner, other costs of this Court will be borne as incurred. Costs in the lower Court will be dealt with by that Court when finally disposing of the case.

(s. c. 7 N. L. R. 32).

NAGPUR JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 159 OF 1910.

November 23, 1910.

Present:—Mr. Skinner, A. J. C.

MANAKJI—APPLICANT

versus

SURAJMAL—RESPONDENT.

Civil Procedure Code (Act V of 1908), s. 141—Application for setting aside dismissal of suit for default dismissed for default re-admitted.

Where an application to set aside an order dismissing a suit for default is itself dismissed for defualt, an application for its re-admission can be entertained under the provisions of section 141 of the Civil Procedure Code.

Lakhmi Chand v. *Gatto Bai*, 7. A. 542; *Lallubhai Bhajeram* v. *Bai Magangavri*, 18 B. 59, referred to.

Civil revision against the order of the Additional District Judge, West Berar, Akola, dated the 23rd February 1910.

The Hon'ble Mr. *M. B. Dadabhoy*, for the Applicant.

Sir *Bipin Krishna Bose*, for the Respondent.

JUDGMENT.—This is an application for revision of an order of the Additional District Judge, West Berar, re-admitting an application for restoration of a suit to his file, which had itself been dismissed for default. The only ground on which the application is supported, is that when section 141 of the present Code of Civil Procedure (Act V of 1908) says "The procedure provided in this Code in regard to suits shall be followed as far as it can be made applicable, in all proceedings in any Court of civil jurisdiction", it does not mean "in all proceedings" but should be understood to mean "in proceedings not under the Code", such as proceedings under the Divorce and Registration Acts. This contention is supported by Messrs. Woodroffe and Amir Ali's remarks in their Commentary on the Code at page 474. But with all respect for the opinion of these

learned authors I am not prepared to accept it in modification of what seems to me the clear and natural meaning of the words used by the Legislature. The applicant's learned Counsel is unable to cite any judicial decision in support of his restrictive interpretation. And the decisions of Mahmood, J., in *Lakhmi Chand* v. *Gatto Bai* (1), and of Sargent, C. J., and Bayley, J., in *Lallubhai Bhajeram* v. *Bai Magangavri* (2), on the corresponding provisions of section 647 of Act XIV of 1882 are against it. The only change made in these provisions by the new Code is in the direction of widening them by the omission of the words "other than suits and appeals". And by giving section 141 of the new Code an unrestricted interpretation the Courts are enabled to comply with the spirit of sections 151 and 153 of the new Code, and do substantial justice, unfettered by technicalities. No doubt a party who has been guilty of repeated carelessness deserves to suffer for it, but this is a matter for consideration in dealing with an application for restoration on its merits. The suit has so far not been readmitted, but only the application for readmission, and no cause for interference in revision with its restoration having been made out, the application fails, and is dismissed with costs. Counsel's fee Rs. 150.

Application dismissed.

(1) 7 A. 542.
(2) 18 B. 59.

(s. c. 5 L. B. R. 221; 4 Bur. L. T. 58).

LOWER BURMA CHIEF COURT.

FULL BENCH.

CRIMINAL REFERENCE No. 43 OF 1910, ARISING OUT OF CRIMINAL APPEAL No. 345 OF 1910.

September 8, 1910.

Present:—Sir Charles Fox, Kt., Chief Judge,
Mr. Justice Hartnoll and
Mr. Justice Twomey.

PO THAUNG—APPELLANT

versus

EMPEROR—RESPONDENT.

Jurisdiction—Crime committed on High Seas—Territorial waters—Jurisdiction within one marine league of the coasts—Penal Code (Act XLV of 1860), ss. 2 to 4—Limitation on the power of the Indian Legis-

lature—Criminal Procedure Code (Act V of 1898), s. 188—Meaning of the word 'Territory' in the first proviso to section—Whether Indian or English law applicable for the trial and punishment of such offences.

Where a person commits the offence of murder on a British ship anchored opposite the mouth of the Ye river, in the Ahmerst District, and is convicted and sentenced to death by the Sessions Court of the Tenasserim Division:

Held, that the Tenasserim Sessions Judge has jurisdiction over the case, such jurisdiction having been conferred upon him by the Admiralty Offences Act, 1849, section 1, the Admiralty Jurisdiction Act, 1860, section 1, and section 686 of the Merchant Shipping Act, 1894.

A Court of Criminal Justice in British India dealing with a Native Indian subject of His Majesty for an offence alleged to have been committed by him on the high seas is bound to apply the provisions of the Indian Penal Code to the act or acts alleged against him.

The word 'territory' used in the first proviso to section 188, Criminal Procedure Code, refers only to territories of any Native Prince or Chief in India, and it cannot include the high seas since they are not part of the territories of any State.

Appeal from the order of the Sessions Judge of Tenasserim Division, dated the 16th day of June 1910, passed in Sessions Trial No. 8 of 1910, convicting the appellant of the offence under section 302 of the Indian Penal Code.

Mr. *Godfrey*, Assistant Government Advocate, for the Crown.

JUDGMENT.

TWOMEY, J.—The present case is clearly covered by the English Statutes which confer on Indian Courts jurisdiction for dealing with offences committed at sea. The offence was murder, punishable in England as in India with death and was committed on a British ship on the high seas by a Native Indian subject (whether within or without "territorial waters" seems immaterial). The Tenasserim Sessions Court had jurisdiction and authority to try, hear, determine and adjudge the offences as *if it had been committed within the limits of the Amherst District* (Section 1 of 12 and 13 Vict., Chap. 96 read with 23 and 24 Vict., Chap. 88).

Under section 2 of 12 and 13 Vict. Chap. 96 it was provided that offences tried under that Statute should be *punished* as if the offences were committed, inquired into, tried, determined and adjudged in England. But this proviso was rendered ineffectual by the Statute 37 and 38 Vict. Chap. 27, which lays down that the punishment is to be such as might be inflicted if the offence had been committed within the local jurisdiction of the trying Court. Subsequently, section 2 of 12 and 13 Vict. Chap. 96, was repealed altogether by a Superannuated Laws Repeal Act (54 and 55 Vict. Chap. 67).

Criminal law may be considered as consisting of two parts—the law of procedure and the law of penalties. I think it may reasonably be argued that by the Statute 12 and 13 Vict., Chap. 96 and 23 and 24 Vict., Chap. 88, it was intended to apply the Indian law of Procedure including the law of Evidence, to cases like the present, while it was intended by the latter Statute 37 and 38 Vict., Chap. 27, to apply the substantive law of penalties in force in India, *i. e.*, the Penal Code.

This view appears to be in accordance with the Bombay High Court decision in *Queen-Empress* v. *Sheik Abdool Rahiman* (1) and *King-Emperor* v. *The Chief Officer of the S. S. "Mushtari"* (2). The analogous case of *Queen-Empress* v. *Barton* (3) may also be referred to as indicating that in trying persons under Admiralty jurisdiction the ordinary practice of local Courts is to be followed.

At the same time, there is much to be said for the view that the substantive law to be administered under Admiralty jurisdiction is still the law of England and not the law of India. The jurisdiction was formerly exercised under Statutes of Will. III and Geo. III by Special Commissioners appointed for the purpose and the preamble of the Statutes 12 and 13 Vict., Chap. 96, expressly refers to those earlier Statutes. Thus it may be contended that the jurisdiction transferred from the Special Commissioners to the Colonial (and afterwards the Indian) Court was the jurisdiction to try offences which had formerly been triable only by the Special Commissioners. Those offences were offences created by the English law, and [in the words of Mr. J. D. Mayne (4) "if the facts charged constitute no offence punishable in England, or an offence of a different character, the law of England must be looked to and not that of the Colony (or of India). If this view be correct, then it should, no doubt, be held that section 3 of the Statute 37 and 38 Vict., Chap. 27, does not affect the substantive penal law at all

(1) 14 B. 227.
(2) 25 B. 636.
(3) 16 C. 238.
(4) Criminal Law of India p. 312; 3rd Edition, 1904.

but merely applies to the English Penal law the scale of punishments provided by the Indian Penal Code. The point dealt with above is not of vital importance in the present case, for there can be no doubt that the facts charged against the appellant, Po Thaung, constitute the offence of murder at English law as well as murder under the Indian Penal Code. But it is, nevertheless, desirable to have a definite decision as to what substantive law—the Indian Penal Code or the English law—should be applied by the Criminal Courts in trying offences under the Statute 12 and 13 Vict. Chap. 96, or under section 686 of the Merchant Shipping Act, 1894

As regards section 188 of the Code of Criminal Procedure, 1898, it seems doubtful whether this section was intended to apply at all to offences committed on the high seas. I cannot find in any reported case that the section has been so interpreted. It appears probable that all reference to the high seas was advisedly omitted from section 188, because it was recognized that offences committed at sea were already fully provided for under the English Statutes conferring Admiralty jurisdiction on the Indian Court.

The section as it stands, however, is certainly wide enough to cover offences committed on the high seas and, as my learned colleague points out, the Statute 32 and 33 Vict., Chap. 98, expressly empowered the Indian Legislature to make laws and regulations for Native Indian subjects "without and beyond as well as within" British India. It may also be observed that if section 188 is applied to offences committed on high seas it is beyond question that the substantive law to be applied to British Indian subjects is the Indian Penal Code. But it appears to me that no Indian Legislature can derogate from the authority of the already existing Statutes which confer Admiralty jurisdiction on Criminal Courts in British India. Section 188 can at most confer on the Courts a concurrent jurisdiction side by side with the jurisdiction conferred by the Admiralty Statutes.

If it is held that under the Statute 12 and 13 Vict., Chap. 96, the Indian Penal Code cannot be applied even to Native Indian subjects, it will be convenient in future for Courts trying such cases as this to obtain the sanction of the Local Government under section 188 so as to try the case under the Indian Penal Code. But the effect of not obtaining such sanction can, in my opinion, only be to leave the Statute 12 and 13 Vict., Chap. 96, to its operation in the particular case which has to be tried. And I would hold that this is the only effect of the omission to obtain sanction of the Local Government in the present case.

The questions which I would refer to a Full Bench are, therefore, as follows:—

(1) Is the trial in the present case void for want of sanction of the Local Government under section 188 of the Code of Criminal Procedure, 1898?

(2) In trying Native Indian subjects for offences committed on the high seas, is the Indian Penal Code or the law of England to be applied as the substantive law governing the case?

HARTNOLL, J.—Maung Po Thaung has been found guilty of murder under section 302 of the Indian Penal Code for causing the death of one Nga To on the night of the 15th December last, and has been sentenced to death. He appeals against the conviction. The murder is alleged to bave been committed on a three-masted *kattoo* or native sailing vessel, which is said at the time to have been anchored opposite the mouth of Ye river, which is in the Amherst District. Nga Po Thaung appears to be a native of the Tavoy District. The murder, if it took place, was committed at sea, and the first point for consideration seems to be as to the jurisdiction of the Sessions Court of the Tenasserim Division to try the case, and as to the law to be applied to it. The scene where the alleged crime is alleged to have taken place is probably within three miles of low-water mark; but there is no positive evidence on the point, and so it becomes necessary to examine the position not only on the supposition that the scene of the alleged crime was within three miles of low-water mark, but also that it might have been beyond that limit.

As regards the jurisdiction of the Sessions Court of the Tenasserim Division to try the case, there seems to me that there is no doubt that such is conferred on it by the Admiralty Offences Act, 1849 (12 and 13 Vict., Chap. 96), section, 1, the Admiralty Jurisdiction Act, 1860 (23 and 24 Vict., Chap. 88), section 1 and section 686 of the Merchant Shipping

Act, 1894 (57 and 58 Vict., Chap. 60). It seems probable that Maung Po Thaung was first arrested for the offence with which he is charged within the limits of the Moulmein Township, and the thought presented itself to my mind that it might be a question as to whether, if this is so, he ought not to have been tried by jury in view of the Judicial Department Notification No. 20 of the Government of Burma, dated the 29th January 1910, which directs that the trial before the Court of Session for the Tenasserim Sessions Division of all offences alleged to have been committed in the Moulmein Township of the Amherst District shall be by jury; but on consideration I am of opinion that this was not necessary, in that the alleged offence did not occur within the limits of the Moulmein Township and for offences committed outside that township the procedure of the Sessions Court of the Tenasserim Division is to try accused persons with the aid of assessors. Maung Po Thaung, was tried with the aid of assessors, and the Court that tried him was clearly given jurisdiction to do so by section 686 of the Merchant Shipping Act, 1894 (57 and 58 Vict., Chap. 60).

The second point for consideration is as to the law that should have been applied at the trial. Should it have been the Indian Penal Code, or the English law? I will first deal with the alleged crime on the supposition that it occurred at a distance of more than three miles from low-water mark. In the case of *The Queen* v. *Thompson* (5), *Reg.* v. *Elmstone* (6) and *Queen-Empress* v. *Gunning* (7), it was held that in the case of offences committed on the high seas they must be treated as offences against English law; but in the case of *Queen Empress* v. *Sheik Abdool Rahiman* (1) it was held that the Indian Penal Code was applicable to trials in India for offences committed on the high seas. The soundness of the rulings in the cases of *The Queen* v. *Thompson* (5) and *Reg.* v. *Elmstone* (6) was not questioned; but it was held that the Courts (Colonial) Jurisdiction Act, 1874 (37 and 38 Vict., Chap. 27) had altered the law applicable. The case was one of the year 1859. In order to determine whether the English law or Indian Criminal law is applicable in the present case it is necessary to examine both English and Indian Legislation. The accused person in the present case appears to be a Native Indian subject, and the *kattoo* or brig seems to have been owned by a native Indian subject, and so to have been a British ship as distinguished from a foreign ship. The Admiralty Offences Act, 1849, already mentioned, gave the Indian Courts jurisdiction to try the case. The preamble of it is as follows.

After reciting that by an Act, 10 and 11 Will. III, Chap. 7, it is enacted, that all piracies, felonies and robberies committed on the sea, or any haven, river, creek or place where the admiral or admirals have power, authority or jurisdiction, may be examined, inquired of, tried, heard and determined and adjudged in any place at sea or upon the land in any of His Majesty's islands, plantations, colonies, dominions, forts or factories, to be appointed for the purpose by the King's commission, in the manner therein directed, and according to the Civil law and the method and rules of the admiralty; and that by 46 Geo. III, Chap. 54, it is enacted, that all treasons, piracies, felonies, robberies, murders, conspiracies and other offences of what nature or kind so ever, committed upon the sea, or in any haven, river, creek, or place where the admiral or admirals have power, authority, or jurisdiction may be inquired of, tried, heard, determined, and adjudged, according to the common course of the laws of this realm used for offences committed upon the land within this realm, and not otherwise, in any of His Majesty's islands, plantations, colonies, dominions, forts, or factories under and by virtue of the King's commission or commissions under the Great Seal of Great Britain, to be directed to commissioners in the manner and with the powers and authorities therein provided: and that it is expedient to make further and better provision for the apprehension, custody, and trial in Her Majesty's islands, plantations, colonies dominions, forts, and factories of persons charged with the commission of such offences on the sea, or in any such haven, river, creek, or place as aforesaid."

Then follows the first section of the enactment, which is as follows:—

"that if any person within any colony shall be charged with the commission of any

(5) 1 Ben. L. R., O. Cr. 1.
(6) 7 Bom. H. C. R. Cr. 89.
(7) 21 C. 782.

treason, piracy, felony, robbery, murder, conspiracy, or any other offence, of what nature or kind soever, committed upon the sea, or in any haven, river, creek, or place where the admiral or admirals have power, authority, or jurisdiction, or if any person charged with the commission of any such offence upon the sea, or in any such haven, river, creek, or place shall be brought for trial to any colony, then and in every such case all Magistrates, Justices of the Peace, public prosecutors, juries, Judges, Courts, public officers, and other persons in such colony shall have and exercise the same jurisdiction and authorities for inquiring of, trying, hearing, determining and adjudging such offences, and they are hereby respectively authorized, empowered, and required to institute and carry on all such proceedings for the bringing of such person so charged as aforesaid to trial, and for and auxiliary to and consequent upon the trial of any such person for any such offence wherewith he may be charged as aforesaid, as by the law of such colony would and ought to have been had and exercised or instituted and carried on by them respectively if such offence had been committed, and such person had been charged with having committed the same, upon any waters situate within the limits of any such colony, and within the limits of the local jurisdiction of the Courts of Criminal Justice of such colony."

It will be observed that the Statute is one to make further and better provision for the apprehension to custody and trial of persons charged with the commission of offences on the sea. The law applicable to British ships on the high seas is beyond doubt in the absence of special legislation, the English law and it seems to me to be clear that the Statute is one that deals with procedure only and that it provides for the trial of such acts, as are offences according to the law of England, and enacts that the procedure of the British possession to which an offender shall be brought for trial shall be followed. It substitutes for King's Commissioners the ordinary Courts in British possession; but it was never meant, in my opinion, that the penal law of the colony, where the trial takes place, should be the law by which the accused person should be adjudged. When they are on a British ship on the high seas, the law applicable to accused persons, in the absence of special legislation, is clearly that of England, as the ship in law is considered to be a part of England. The Courts (Colonial) Jurisdiction Act, 1874, seems to me to have made no change as the penal law applicable. It is an enactment that merely deals with punishment and sentences. Indeed, in its proviso it assumes that the crime or offence the accused is found guilty of may not be one punishable by the law of the colony in which the trial takes place. I am, therefore, of opinion that the law applicable to the accused in the present case is the English penal law in the absence of express legislation to the contrary, if the crime was committed outside the three-mile limit.

And this brings me to the consideration as to whether such express legislation exists. Section 4 of the Indian Penal Code is to the following effect:—"The provisions of this Code apply also to any offence committed by any Native Indian subject of Her Majesty in any place without and beyond British India." This section repealed a former section and was made law by section 2 of Act IV of 1898 of the Indian Legislature. It is for consideration as to whether it was within the power of the Indian Legislature to legislate for offences committed beyond British India by Native Indian subjects; but the matter seems to have been set at rest by the Indian Councils Act, 1869 (32 and 33 Vict., Chap. 98), an Act of Parliament which enacted in section 1 as follows:—"From and after the passing of this Act the Governor-General of India in Council shall have power at meetings for the purpose of making laws and regulations for all persons being Native Indian subjects of Her Majesty her heirs and successors without and beyond as well as within the Indian territories under the dominion of Her Majesty." This provision of law by the Imperial Parliament seems to be sufficient to authorize the Indian Legislature to provide, as it has done, that the provisions of the Indian Penal Code shall apply to Native Indian subjects of Her Majesty without and beyond British India. It would, therefore, appear that if the crime in the present case took place outside the three-mile limit the law applicable to the accused person, Po Thaung, is the Indian Penal Code. And now I come to section 188 of the Criminal Procedure Code (Act V of 1898), which, among other provisions, enacts as follows:—

"When a Native Indian subject of Her Majesty commits an offence at any place without and beyond the limit of British India he may be dealt with in respect of such offence as if it had been committed at any place within British India at which he may be found provided that . . . the sanction of the Local Government shall be required." This provision of law seems to be authorised by the Indian Councils Act, 1869, already quoted. But there is no sanction to prosecute Maung Po Thaung under section 302 of the Indian Penal Code assuming that the murder alleged took place outside the three-mile limit and so it is for consideration as to whether, in the absence of such sanction, assuming that the murder alleged took place outside the three-mile limit, the proceedings are not null and void. The question seems to be whether, in spite of the provisions of the Admiralty Offences Act, 1849, and section 686 of the Merchant Shipping Act, 1894, the provisions of section 188 of the Code of Criminal Procedure, 1898, must prevail. In that by the Indian Councils Act, 1869, the Imperial Parliament delegated its authority to the Indian Legislature to make laws for its Native Indian subjects beyond British India and empowered that Legislature to so make laws, it seems to me to be a question as to whether the proceedings in the present case are not void in view of the proviso to section 188 of the Code of Criminal Procedure, 1898.

I will now deal with the case assuming that the alleged crime took place within the three-mile limit. If it did, did it take place within Indian territory? The matter was discussed in the case of *Reg.* v. *Kastya Rama* (8) but that was a case decided before the great case of *The Queen* v. *Keyn* (9). That was a case in which the prisoner was indicted at the Central Criminal Court for manslaughter. He was a foreigner and in command of a foreign ship passing within three miles of the shore of England on a voyage to a foreign port and whilst within the distance his ship ran into a British ship and sank her, whereby a passenger on board the latter ship was drowned. The facts of the case were such as to amount to manslaughter by English law. It was held by the majority of the Court that the Central Criminal Court had no jurisdiction to try the prisoner for the offence charged, and the whole of the majority of the Court held that prior to 28 Hen. VIII, Chap. 15, the admiral had no jurisdiction to try offences by foreigners on board foreign ships whether within or without the limit of three miles from the shore of England, that that and the subsequent Statutes only transferred to the Common Law Courts and the Central Criminal Court the jurisdiction formerly possessed by the admiral, and that, therefore, in the absence of statutory enactment the Central Criminal Court had no power to try such an offence. Two learned Judges—Kelly, C., and Sir R. Phillimor—further held that by the principles of international law the power of a nation over the sea within three miles of its coasts is only for certain limited purposes, and that Parliament could not consistently with those principles apply the English criminal law within those limits. The result of that case was the passing of the Territorial Waters Jurisdiction Act, 1878 (41 and 42 Vict., Chap. 73), whereby it was declared that the rightful jurisdiction of Her Majesty extends and has always extended over the open seas adjacent to the coasts of the United Kingdom and of all other parts of Her Majesty's dominions to such a distance as is necessary for the defence and security of such dominions, and it was enacted that within one marine league of the coast measured from low-water mark, an offence committed by a person, whether he is or is not a subject of Her Majesty, is an offence within the jurisdiction of the admiral . . . . and the person who committed such offence may be arrested, tried, and punished accordingly. In view of the discussion and decision in the case of *The Queen* v. *Keyn* (9), it seems to me that in the absence of the express authority of the Imperial Parliament the provisions of the Indian Penal Code cannot be held to extend over the seas adjacent to British India for a distance of three miles from low-water limit on the ground that the seas within such limits are a portion of the territory of British India. Therefore, assuming that the murder alleged to have taken place in the present case did take place within three miles of low-water mark, I am unable to hold that the Indian Penal Code is applicable on the ground that the coast within three miles of low-water mark is a portion of the territory of

(8) 8 Bom. H. C. R. Cr. 63.
(9) (1876) 2 Ex. Dn. 63.

British India. In my opinion the offence, if it took place within the three-mile limit, must be regarded as one that took place on the high seas, and so within the jurisdiction of the admiral, as is declared by the Territorial Waters Jurisdiction Act, 1878. It must be held to have occurred beyond British India, and so the same considerations apply as to the law applicable as if it had occurred beyond the three-mile limit, and the same question arises as to whether the proceedings are not null and void for want of sanction of the Local Government under the provisions of section 188 of the Code of Criminal Procedure.

Since writing the above, my learned colleague has considered the matter and I have had the opportunity of reading the views which he has expressed.

I concur with him in referring to a Full Bench the following questions: —

(1) Is the trial in the present case void for want of sanction of the Local Government under section 188 of the Code of Criminal Procedure, 1898 ?

(2) In trying Native Indian subjects for offences committed on the high seas, is the Indian Penal Code or the law of England to be applied as the substantive law governing the case ?

OPINION OF THE FULL BENCH.

Fox, C. J.—It will be convenient to answer the second of the questions referred first. Section 2 of the Indian Penal Code makes every person within the territories vested in Her late Majesty by the Statute 21 and 22 Vict., Chapter 106, liable to punishment under the Code for every act or omission contrary to its provisions of which he shall be guilty. Section 4 of the Code enacts that its provisions apply also to and offence committed by any Native Indian subject of Her Majesty in any place without and beyond British India.

The terms are the widest; there is no restriction on them: consequently, a Native Indian subject is liable to punishment under the Indian Penal Code for every act contrary to its provisions done or omitted by him on the high seas or elsewhere outside British India.

Section 3 of the Code enacts that any person liable by any law passed by the Governor-General of India in Council to be tried for an offence committed beyond the limits of British India shall be dealt with according to the provisions of the Code for any act committed outside British India in the same manner as if such act had been committed in British India. Section 188 of the Code of Criminal Procedure, 1898, passed by the Governor-General of India in Council enacts that when a Native Indian subject of Her late Majesty commits an offence at any place without and beyond the limits of British India he may be dealt with in respect of such offence as if it had been committed, at any place within British India at which he may be found, provided that if there is a Political Agent for the territory in which the offence is alleged to have been committed, such Agent certifies that in his opinion the charge ought to be inquired into in British India; and where is no Political Agent for the territory, the Local Government gives its sanction. These provisions appear to clearly make it incumbent upon an Indian Court dealing with a Native Indian subject for an offence committed anywhere outside of British India to apply to him the law as to offences laid down in the Indian Penal Code. The high seas are not differentiated from any other part of the world outside of British India.

I would give the following answer to the second question referred: —

A Court of Criminal Justice in British India dealing with a Native Indian subject of His Majesty for an offence alleged to have been committed by him on the high seas is bound to apply the provisions of the Indian Penal Code to the act or acts alleged against him.

The answer to the first question appears to me to depend upon the meaning to be attached to the word "territory" in the first proviso to section 188 of the Code of Criminal Procedure.

In view of the context and of the limitations on the powers of the Indian Legislature, which are fully dealt with in Chapter V of Sir Courtenay Ilbert's "Government of India" it appears to me that the word is used in this proviso in reference only to territories of any Native Prince or Chief in India. The word cannot include the high seas, since they are not part of the territory of any State. Assuming that the offence

alleged against the accused in the present case was committed on the high seas, I would answer the first question referred in the negative.

HARTNOLL, J.--For the reasons given in my order of reference I concur in the answer proposed by the learned Chief Judge to the second question.

The answer to the first question seems to me to be the more difficult one to give. The words of section 188 of the Code of Criminal Procedure, 1898, are wide enough to cover the cases of Native Indian subjects charged with committing offences on the high seas; but it is necessary to look at the intention of the Legislature in enacting that where there is no Political Agent the sanction of the Local Government shall be required before inquiry is made into a charge of an offence alleged to have been committed outside British India. Considering that there were Acts of the Imperial Parliament empowering British Indian Courts to inquire into and try offences committed on the high seas, it would seem to be unlikely that the Government of India would legislate in a manner that may be said to conflict or be inconsistent with such Acts: and taking the first proviso to section 188 as a whole it would seem to be a reasonable construc-toin to put on it that the whole of it must refer to definite territories and not to the high seas. The first part of it only refers to territories, and it is reasonable to assume that the last portion of it only refers to territories where there are no Poltical Agents. I, therefore, concur with the learned Chief Judge in answering the first question in the negative. .

TWOMEY, J.—I concur as to both questions.

(s. c. 14 O. C. 65).

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 86 OF 1910.

December 22, 1910.

Present:— Mr. Chamier, J. C.

IMAMI—DEFENDANT

versus

MOHAMMAD YUSAF AND OTHERS—PLAINTIFFS.

Civil Procedure Code (Act V of 1908), s. 92—Suit against trespasser for possession of trust property, maintainability of.

A suit for possession cannot be maintained under section 92 of Act V of 1908 against a trespasser in possession of trust property.

Budh Singh v. *Niradbaran*, 2. C. L. J. 431; *Budree Dass* v. *Chooni Lal*, 33 C. 789; 10 C. W. N. 681; *Kazi Hassan* v. *Sagun Balkrishna*, 24 B. 170 and *Huseini Begam* v. *Collector of Moradabad*, 20 A. 46, followed.

Ghazaffar Husain Khan v. *Yawar Hossein*, 28 A. 112; 2 A. L. J. 591; A. W. N. (1905) 208, referred to.

Appeal against the decree of the District Judge, Fyzabad, dated the 30th June, 1910.

Mr. *Sami Ullah Beg*, for the Appellants.

Mr. *Mumtaz Husain*, for the Respondents.

JUDGMENT.—This is an appeal in a suit under section 92 of the Code of Civil Procedure. The plaintiffs' case was that a mosque and four shops in the town of Nawabganj were held for many years by one Khuda Baksh the father of the first defendant, as *mutawalli* that two mortgages of two of the shops made by Khuda Baksh in 1901, in favour of the second defendant are invalid; that Khuda Baksh died in 1908, and that his son the first defendant being a minor is unfit to act as *mutawalli*. The second defendant who was appointed guardian *ad litem* of the first defendant put in a defence for both defendants. He pleaded that the suit was not maintainable under section 92 of the Code, there being no trust for purposes of a charitable or religious nature within the meaning of that section, that the mortgages of the two shops were valid and that he was in possession of the mosque and the other two shops as manager on behalf of the first defendant.

The Court below has found that the whole of the property was and is *waqf* and Khuda Baksh was in possession as *mutawalli*; that the suit is maintainable; that the question whether the mortgages were valid could not be decided in the suit, and that the first defendant was at present unfit to be *mutawalli*. The learned Judge has appointed a *Taluqdar* named Chowdhri Rashid-ud-din to be *mutawalli* jointly with the first defendant till the latter comes of age.

The mosque was built about 50 years ago and there is no direct evidence that either the mosque or the shops were ever made *waqf* but Khuda Baksh obtained possession of the mosque and shops in execution of a decree obtained by him in a suit in which he claimed as *mutawalli*. This is strong evidence that they were the *waqf* property for Khuda Baksh was the heir or one of the heirs of the person who built the mosque and shops and his

statement that he was entitled to them as *mutawalli* was against his interest. I agree with the Court below that the mosque and shops are *waqf* property and that Khuda Bakhsh held them as *mutawalli*. The first defendant would, but for his minority, be entitled to possession of the property as *mutawalli*. The suit as against him is clearly maintainable and it is clearly maintainable against the second defendant so far as he claims to be in possession as manager on behalf of the first defendant. The only questions which admit of any doubt are whether the mortgages made by Khuda Bakhsh can and ought to be declared to be invalid in this suit and, if this is answered in the affirmative, whether an order can be made in this suit for the ejectment of the second defendant from the two shops which he holds as mortgagee.

The Calcutta High Court now holds that the suit contemplated by section 92 of the present Code of Civil Procedure (which replaces section 539 of the Code of 1882) is one directed against trustees and that the section does not apply as against strangers. [See *Budh Singh* v. *Niradbaran* (1) and *Budree Das* v. *Chooni Lal* (2)]. The Bombay High Court takes the same view [see *Kazi Hassan* v. *Sagun Balkrishna* (3)]. The same view was taken by the Allahabad High Court in *Huseini Begam* v. *Collector of Moradabad* (4). These authorities make it clear that suits for possession cannot be maintained under section 92 against a trespasser in possession of trust property. There remains the question whether the propriety of alienations of trust property can be discussed in such a suit. In the case of *Ghazoffar Husain Khan* v. *Yawar Hoosein* (5) it was held that it is competent to the Court in such a suit to decide whether alienations of the trust property are valid provided that the necessary parties are before the Court. It is unecessary to decide this question for the Court below has declined to decide whether the mortgages in favour of the second defendant are valid or not and as there is no appeal by the plaintiffs-respondents the question cannot be discussed in this Court.

Following the decisions of the Calcutta, Bombay and Allahabad High Courts mentioned above, I hold that this Court cannot order the dispossession of the second defendant from shops Nos. 181 and 182 which he holds as mortgagee. The order of the Court below is set aside as regards delivery of these two shops, it being declared instead that they are part of the *waqf* property. The defence having substantially failed the order of the Court below as to costs will stand and I make no order as to costs in this Court.

(1) 2 C. L. J. 431.
(2) 33 C. 789; 10 C. W. N. 581.
(3) 24 B. 170.
(4) 20 A. 46
(5) 28 A. 112; 2 A. L. J 591; A. W. N. (1905) 208.

(s. c. 14 O. C. 68).

OUDH JUDICIAL COMMISSIOER'S COURT.

SECOND CIVIL APPEAL No. 121 OF 1910.

January 16, 1911.

Present:- Mr. Chamier, J. C.

SAMPAT - PLAINTIFF

versus

GAURI SHANKAR AND OTHERS— DEFENDANTS.

Chaukidar's *Register of Births and Deaths, admissibility of—Public Record—Evidence Act (I of 1872) s. 35.*

An entry in a *Chaukidar's* Register of Births and Deaths was relied upon as proof of the date of the birth of a person. The entry was admittedly not made by the *Chaukidar* and there was no evidence that it was made by any other public servant or that it was the duty of any public servant to make it:

Held, that the register was not admissible under section 35 of the Evidence Act.

Appeal against the decree of the Subordinate Judge, Barabanki, dated the 3rd February 1910, reversing that of the Munsif, Fatehpur, dated 22nd December 1909.

Pandit *Makhan Lal*, for the Appellant.

Mr. *Wasim*, for the Respondents.

JUDGMENT.—The respondents in execution of a money-decree obtained by them against one Bhagwant, attached a two-anna share in a grove as the property of Bhagwant. Thereupon, the appellant objected that he held a two-anna share as mortgagee from Bhagwant under a deed dated July 3rd, 1908. His objection was thrown out and he then brought the suit out of which this second appeal has arisen.

One of the defences to the suit put forward by the respondents was that at the time of the alleged mortgage Bhagwant was a minor and, therefore, the mortgage was void. The Munsif held that Bhagwant was of full age at the time of the mortgage and he decreed

the claim. On appeal the Subordinate Judge came to the conclusion that Bhagwant must have been a minor at the date of the mortgage, and he consequently allowed the appeal and dismissed the suit.

It is contended on behalf of the appellant that the Subordinate Judge's finding is vitiated by the circumstance that he admitted in evidence and relied upon a *Chaukidar's* Register of Births and Deaths as proof of the date of the birth of Bhagwant; and it is urged that this register is not admissible, and that if the Subordinate Judge had not treated it as evidence he must have decided the question in favour of the present appellant. The entry in question in the *Chaukidar's* Register was admittedly not made by the *Chaukidar* and there is no evidence that it was made by any other public servant or that it was the duty of any other public servant to make it. Even if it be assumed that the register is a public or other official book within the meaning of section 35 of the Evidence Act, the register must be rejected on the ground that it is not shown that the entry in question was made by any public servant in the discharge of his official duty. I hold that the register was not admissible under section 35 of the Evidence Act, and it is not suggested that the entry can be admitted under any other provision of the law. In my opinion the question of the age of Bhagwant should have been determined without reference to this register.

* * * * * *
* * * * * *

Under the present Code of Civil Procedure it is open to this Court in second appeal to determine a disputed question of fact. On the evidence which I hold to be rightly admissible I find that Bhagwant was a minor at the date of the alleged mortgage.

I, therefore, dismiss this appeal with cost.

Appeal dismissed.

(s c. 14 O. C. 70).

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEAL No. 53 OF 1910.

January 20, 1911.

Present:—Mr. Chamier, J. C., and Mr. Evans, A. J. C.

MAHARAJ SINGH—AUCTION-PURCHASER—APPELLANT

versus

JAGAN NATH—DECREE-HOLDER AND ANOTHER—JUDGMENT-DEBTOR—RESPONDENTS.

Execution of decree—Objection by judgment-debtor that the auction-purchaser has taken possession of property to which he was not entitled, maintainability of—Necessity of separate suit—Civil Procedure Code Act (V of 1908), s. 47.

Where a judgment-debtor objected that the auction-purchaser had taken possession of property to which his sale certificate gave him no title: *Held*, that the question in dispute should be decided by a separate suit and could not be decided under section 47, Civil Procedure Code.

Bhagwati v. *Banwari Lal*, 31 A. 82; 6 A. L. J. 71; 5 M. L. T. 185; 1 Ind. Cas 416, followed.

Appeal against the order of the Additional District Judge, Lucknow, dated the 16th July 1910, upholding that of the Subordinate Judge, Hardoi, dated the 31st February 1910.

Babu *Saligram*, for the Appellant.

Pandit *Tara Shankar*, for the Respondents.

ORDER.—This is an appeal against an order of the Additional District Judge of Lucknow, upholding an order of the Subordinate Judge of Hardoi.

Some property was sold in execution of a decree on a mortgage executed by Man Rai on the 15th Spetember 1908, and purchased by the appellant. Objections were taken by Man Rai, judgment-debtor, during and immediately after the sale which were rejected. The auction-purchaser obtained a sale-certificate on the 20th November 1908, and formal possession of the purchased property on the 16th July 1909. The judgment-debtor put in this application saying that the auction-purchaser had dispossessed him of houses Nos. 1686, 1687, 1688 and 1689, contrary to the terms of the decree and asked to be placed in possession of them. It was decided that, although the sale-certificate covered a compound No. 1979 yet that was a mistake for either No. 1980 or No. 1978 and, therefore, the judgment-debtor was entitled to possession of the houses claimed by him which were situate in No. 1979. It was found apparently that No. 1979 was also erroneously entered in the

mortgage-deed on which the decree was based.

The chief contention taken on behalf of the appellant is, that the Court below had no jurisdiction to enterain an application of this kind under section 47 of the Code of Civil Procedure—it being conceded on behalf of the judgment-debtor that this is the only section under which the Courts could deal with this application. It is contended that the dispute between the parties is one entirely of title and if the judgment-debtor thinks that the auction-purchaser has no title to this property he should file a regular suit in which the question of title could be decided. The reply is that the auction-purchaser took possession under colour of the decree under execution and this is a question which arises between the auction-purchaser (as representative of the decree-holder) relating to the execution or satisfaction of the decree and can only be decided on this application and not by a separate suit.

I have considered the numerous rulings which are to be found under section 47 of the Code of Civil Procedure but none of them appear to me to have settled the exact point for decision in this case. The matter is one of considerable importance and as disputes of this kind frequently arise. I certify that this appeal be heard by a Bench of two Judges.

JUDGMENT.

EVANS, A. J. C.—The facts of this case are given in my referring order, dated the 24th November, 1910.

The appellant's Pleader relies on the case of *Bhagwati* v. *Banwari Lal* (1) as supporting his appeal. All the available authorities on this question were cited in the case and the majority of the Full Bench held that section 244 of the Code of Civil Procedure, 1882, corresponding to section 47 of the Code of Civil Procedure, 1908, has no application to a dispute between an auction-purchaser and a judgment-debtor as to possession of the property purchased. The auction-purchaser can, in the first instance, apply under section 318 or 319, Civil Procedure Code, and if limitation has expired for any such application he can institute a suit on his title. The case before the Allahabad High Court was complicated by the fact that the decree-holder was the auction-purchaser and the majority of the Full Bench held that no distinction could be drawn between a decree-holder who purchased the property at auction and a stranger who did the same.

This case is comparatively free from any complications. The judgment-debtor disputes the title of the auction-purchaser to property which he claims under his auction-purchase and this is clearly a dispute between the judgment-debtor and his representatives-in-title and not a dispute between the parties to the decree or their representatives. The following passage from the judgment of Banerji, J., can be applied (*mutatis mutandis*) to this case.

"I am further of opinion that a question between the auction-purchaser or his representative and the judgment-debtor or his representative relating to delivery of possession is not a question 'relating to the execution, discharge or satisfaction of the decree' within the meaning of section 244, clause (*c*). Upon the judgment-debtor's property being sold and the amount due under the decree being realized the decree is fully executed, discharged and satisfied, and no question relating to the execution, discharge or satisfaction of the decree remains to be determined. Whether or not the auction-purchaser obtains possession of the property sold is wholly immaterial for the purposes of the decree and does not in any way affect it."

If the appellant in this case had complained that he had been ejected by his predecessor-in-title, the judgment-debtor, he could either have applied under section 318, Civil Procedure Code, if within limitation, or instituted a suit. Similarly, the judgment-debtor should have instituted a suit if he was of opinion that the appellant had taken possession of property to which his sale-certificate gave him no title. I would follow the ruling of the Allahabad High Court in this case and hold that the dispute between the parties is one which cannot be disposed of under section 47 of the Code of Civil Procedure. The Subordinate Judge should not have dealt with the application made by the judgment-debtor Man Rai on the merits but should have dismissed it as not maintainable. The present appellant should not have appealed to the District Judge, but should have applied in revision to this Court. I would treat this appeal as an application for revision and set

(1) 31 A. 82; 6 A. L. J. 71; 5 M. L. T. 185; 1 Ind. Cas. 416.

aside the order of the lower Court as having been passed without jurisdiction and dismiss the application with costs. I would allow the applicant his costs in the first Court, and in this Court but make him pay costs of the opposite party in the Judge's Court because no appeal should have been made to that Court.

CHAMIER, J. C.—The view taken by the majority of the Full Bench in the case of *Bhagwati* v. *Banwari Lal* (1) agrees with that which has been taken by this Court and is, I think, correct. I agree with order proposed by my learned colleague.

(s. c. 14 O. C. 74).

OUDH JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL NO. 90 OF 1910.

January 24, 1911.

Present:—Mr. Justice Chamier.

JOT SINGH—PLAINTIFF

versus

ASNAD ALI KHAN AND ANOTHER—DEFENDANTS.

Suit for recovery of price paid for property to which the judgment-debtor has no title—Suit for recovery of price paid for property found to be non-existent - Limitation Act (IX of 1908), Sch. I, arts. 62 and 97.

A suit for recovery of the price paid at an execution-sale for property to which the judgment-debtor has no title is governed by either Article 62 or Article 97 of Schedule I of the Indian Limitation Act, 1908.

Where the case is not one of sale of existing property to which the judgment-debtor is found to have either no title or a defective title, but is one of sale of non-existent property, a suit for recovery of the price would be governed by Article 62 of the Limitation Act

Gurshidawa v. *Gangaya*, 22 B. 783; *Hanuman Kamat* v. *Hanuman Mandar*, 19 C. 123; 18 I. A. 158; *Venkatanarasimhulu* v. *Peramma*, 18 M. 173; and *Venkatarama Ayyar* v. *Venkata Subramanian*, 24 M. 27, referred to.

Nilkanta v. *Imamsahib*, 16 M. 361, doubted.

Appeal against the decree of the Additional Judge, Hardoi, dated 1st September, 1910.

Mr. *E. Manuel*, for the Appellant.

Messrs. *Wasim* and *Arabi*, for the Respondent.

JUDGMENT.—The suit out of which this appeal arises was of a somewhat unusual character.

In March, 1882, three deeds of mortgage were executed in favour of the defendant Mohammad Husain. In July 1889, he mortgaged his rights under the three deeds to the defendant Asnad Ali Khan. The latter sued on his mortgage and obtained a decree for sale of Mohammad Husain's interests under the three deeds of 1882. But by some unexplained mistake, the Court put up for sale the rights of Mohammad Husain *as mortgagee under the deed of July* 1889. The plaintiff in this suit who was the purchaser at the auction took possession of the property covered by the deeds of 1882. In a suit brought by Mohammad Husain, it was held by this Court in March 1906, that the present plaintiff had no right to the property in his possession, and in May 1909, he was dispossessed. In the present suit, instituted on February 21st, 1910, he has claimed a decree for recovery of price paid by him at the auction-sale. The Court below has dismissed the suit as barred by limitation under Article 62 of Schedule I to the Limitation Act, 1908. In appeal it is contended that the Article applicable to the case is Article 120. The defendants-respondents contend that the suit is barred either by Article 62 or by Article 97.

The plaintiff relies upon the decision of the Bombay High Court in *Gurshidawa* v. *Gangaya* (1) on which it was held that the cause of action for recovery of the price paid at an execution-sale for property to which the judgment-debtor has no title is not complete till the auction-purchaser is dispossessed. If this ruling is correct, and applicable to the facts of this case, the suit is within time, for the plaintiff was dispossessed less than a year before the suit was brought. The plaintiff relies also on the decision of the Madras High Court in *Nilakanta* v. *Imamsahib* (2) that Article 120 applies to such a case as this. The last mentioned decision stands alone and is inconsistent with several other decisions.

The present case appears to me to be governed by either Article 62 or Article 97. In the case of *Hanuman Kamat* v. *Hanuman Mandar* (3) their Lordships of the Privy Council said,—"Their Lordships are of opinion that the case must fall either within Article 62 or Article 97. If there never was any consideration, then the price paid by the appellant was money had and received to his

(1) 22 B. 783.
(2) 16 M. 361.
(3) 19 C. 123 (P. C.); 18 I. A. 153.

account by Dowlut Mandur. But their Lordships are inclined to think that the sale was not necessarily void, but was only voidable if objection were taken to it by the other members of the joint family. If so, the consideration did not fail at once, but only from the time when the appellant endeavoured to obtain possession of the property and, being opposed, found himself unable to obtain possession. There was then, at all events, a failure of consideration, and he would have had a right to sue at that time to recover back his purchase-money upon a failure of considerationand, therefore, the case appears to them to be within the enactment of Article 97."

In *Venkatanarasimhulu* v. *Peramma* (4) Article 97 was held to apply to a suit for recovery of the price paid by the plaintiff for property to which the vendor was subsequently found to have no title. In *Venkatrama Ayar* v. *Venkata Subrahmanian* (5) also Article 97 was held to apply to such a suit. In none of the last three cases was it necessary to decide whether time begins to run, under Article 97 in such a case as this, from the date of the decision that the vendor has no title or from the date on which the purchaser is dispossessed. In the first of the three cases time was held to run from the date on which the plaintiff attempted to get possession of the property and found himself unable to do so. In the second case the plaintiff sued within three years of the decision which preceded the dispossession; and in the third case the plaintiff, who had not been in pessession at all, sued within three years of the decision that he was not entitled to possession.

The present suit was instituted less than three years after the dispossession of the plaintiff but more than three years after the decision of this Court that he was not entitled to retain possession of the property. If I could hold in the present case that there was originally consideration for the payment made by the plaintiff I should be disposed to hold that it did not fail till the plaintiff was dispossessed but it seems to me that there never was any consideration. It is not, like the cases to which I have referred, a case of existing property being sold to which the judgment-debtor is found to have had no title or a defective title; it is a case of non-existent property being sold. What the Court purported to sell had no existence at all and the plaintiff took possession of preperty which was in no way affected by the sale. I hold, therefore, that the suit is governed by Article 62 and is barred by limitation.

I dismiss the appeal with costs.

Appeal dismissed.

(4) 18 M. 173.
(5) 24 M. 27.

(s. c. 14 O. C 77).

OUDH JUDICIAL COMMISSIONER'S COURT.

MISCELLANEOUS CIVIL APPEAL No. 64 OF 1910.

January 23, 1911.

Present:—Mr. Chamier, J. C.

SHEO GOPAL—APPLICANT

versus

SHEO GHULAM—OPPOSITE PARTY.

Revocation of Letters of Administration—Right of persons standing by though cognizant of proceedings for grant of Letters of Administration—Probate and Administration Act (V *of* 1881), *s.* 50.

A party who is cognizant of proceedings for Letters of Administration or Probate but chooses to stand by and allows the proceedings to be concluded in his absence, cannot be allowed afterwards to come in and have the grant revoked.

In the Goods of Bhaggobutty Dasi, 27 C. 927; 4 C. W. N. 757; and *In the matter of the Will of Pitamber Girdhar Soorji Jivandas*, 5 B. 638, referred to.

Appeal against the order of the District Judge, Lucknow, dated 3rd June 1910.

Babu *Bisheshwar Nath*, for the Applicant.

Babu *Salig Ram*, for the Respondent.

JUDGMENT.—This is an appeal against an order of the District Judge of Lucknow rejecting an application under section 50 of the Probate and Letters of Administration Act of 1881, for the revocation of Letters of Administration granted to one Sheo Ghulam. In the application for Letters of Administration made by Sheo Ghulam it was stated that the applicant's mother *Musammat* Batasa died in April 1902, leaving as her heir her sons, the applicant Sheo Ghulam and his brother Munna Lal; that Munna Lal had been living separate and *Musammat* Batasa had made an oral Will in favour of Sheo Ghulam in respect of a sum of Rs. 1,000 odd deposited in a Bank and Sheo Ghulam prayed that Letters of Administration be granted to him in respect of the sum deposited in the Bank. The

MUNNI *v.* SHYAM BEHARI.

Court issued notice to Munna Lal who appeared and gave evidence on oath in support of his brother's application and ultimately the Court issued Letters of Administration to Sheo Ghulam in the usual form in respect of the estate of *Musammat* Batasa. More than two years later, Munna Lal has applied to have the Letters of Administration revoked. His application is based upon two grounds, namely, that the money in the Bank did not belong to *Musammat* Batasa at all, and *secondly*, that if it did belong to her, it is not true that she made a Will in favour of Sheo Ghulam. The District Judge threw out Munna Lal's application on the ground that it was not maintainable under section 50 of the Probate and Letters of Administration Act and he observed that Munna Lal could file a suit against Sheo Ghulam if he were so advised.

In appeal it is contended that the application was maintainable under the section quoted. It appears to me that the application discloses grounds upon which Letters of Administration may be revoked. It distinctly alleges that the grant was obtained by means of false suggestions. The Court was not justified in throwing out the application on the ground that it was not maintainable; but, in my opinion, the application ought to have been rejected on another ground. There is plenty of authority for the proposition that if a party is cognizant of proceedings or Letters of Administration or Probate and chooses to stand by and allow the proceedings to be concluded in his absence he will not be allowed to come in afterwards and have the grant revoked. See the cases mentioned in *In the goods of Bhaggobutty Dasi* (1) and *In the matter of the Will of Pitamber Girdhar Soorji Jivandas* (2). The present case is far stronger than any of the cases referred to in those decisions. Here Munna Lal actively assisted his brother to obtain Letters of Administration and on oath supported the allegations contained in his brother's application. It is not open to a person who has assisted an applicant to obtain Letters of Administration to come forward and ask to have the Letters of Administration revoked on the ground that the statements which he himself supported were untrue. The appellant's application was, in my opinion, rightly rejected.

(1) 27 C. 927; 4 C. W. N. 757.
(2) 5 B. 638.

I dismiss this appeal with costs.

Appeal dismissed.

(s. c. 14 O. C. 80).

OUDH JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 158 OF 1910.

February 1, 1911.

Present:—Mr. Chamier, J. C.

Musammat MUNNI—PLAINTIFF—APPELLANT

versus

SHYAM BEHARI—DEFENDANT—RESPONDENT.

Registration endorsement—Statement by executant made to the Registering Officer—Certificate of the registering Officer, admissibility of—Registration Act (III of 1877), ss. 52, 58 and 60—Evidence Act (I of 1872), ss. 91 and 92.

The endorsement of a Registrar on an unconditional deed of gift contained the following statement purporting to have been made to him by the executant, "*agar mohub lahu roti kapra denge to hiba jaiz hai warna najaiz samjha jaega*":

Held, that the endorsement could not be said to have been made under section 52 or 58 of the Registration Act and, therefore, the certificate of the Registering Officer could not be admitted under section 60 of the Act.

Held, further, that the record of the statement could not be admitted in evidence under sections 91 and 92 of the Evidence Act.

Appeal against the decree of the Additional District Judge, Lucknow, dated the 25th January 1910, upholding that of the Munsif, North Unao, dated 7th April 1909.

Mr. *Mumtaz Husain*, for the Appellant.

Babu *Ishwari Prasad*, for the Respondent.

JUDGMENT.—This was a suit by the appellant for the cancellation of a deed of gift executed by her in favour of the respondents on September 11th, 1906, and for the recovery of some jewellery made over by her to him at or about the same time. Her case is that the property specified in the deed and the jewellery were made over to the respondents on the condition accepted by him that he would maintain her and that it was agreed that the appellant would be entitled to revoke the gift in case he failed to maintain her. Both the Courts below have held that there is no proof that the gift was made subject to any such condition. In second appeal it is contended that both Courts have overlooked an important statement made to the Registering Officer at the time of the registration of the

document which shows that the gift was made subject to the condition stated above. On the back of the deed of gift the Registering Officer has endorsed the following statement alleged to have been made to him by the appellant. "*Maine yeh hiba-nama likha hai agar mohub lahu roti kapra denge to hiba jaiz hai warna najaiz samjha jaega.*" The respondent contends that it is not proved that the appellant made this statement and that the statement if proved is not admissible for the purpose of proving that the gift was conditional.

No one has been called to prove that the appellant made the statement recorded on the back of the deed. The endorsement cannot be said to have been made under either section 52 or section 58 of the Registration Act and, thorefore, the certificate of the Registering Officer does not prove the statement under section 60 of the Act. Nor, if proved, can the statement be used for the purpose of adding to the terms of the deed of gift. The record of the statement is not part of the deed of gift and cannot be admitted under section 91 of the Evidence Act. Nor can it be used as evidence of an oral statement made by the executant for oral evidence is not admissible for the purpose of adding to the terms of the gift. I agree with the Courts below that the deed of gift is unconditional and that the attempt to prove that it was conditional has failed.

The jewellery is not specified in the deed of gift and it was open to the appellant to prove by oral evidence that she made the jewellery over to the respondent on condition that he would maintain her. The respondent says that it was made over to him in connection with a suit in which the appellant was interested. The Courts below have found that the appellant failed to prove that she made them over to the respondents on the condition alleged by her. This finding must be accepted in second appeal. I, therefore, dismiss this appeal with costs.

Appeal dismissed.

(s. c. 14 O. C. 82).

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEAL No. 37 OF 1910.

February 7, 1911.

Present:— Mr. Chamier, J. C.

MURRAY AND CO., LD.—DECREE-HOLDERS

versus

PRINS, E. G. A. AND ANOTHER—JUDGMENT-DEBTORS.

Execution of decree—Soldier's pay—Liability for attachment—Warrant officers—Assistant Surgeons in the Indian Subordinate Medical Department—Army Act of 1881, *s.* 144.

The question was whether the whole or any portion of the pay of Military Assistant Surgeons in the Indian Subordinate Medical Department was liable to attachment in execution of decree:

Held, that the respondents being Warrant Officers were 'soldiers' as defined by the Army Act and, therefore, their pay was exempt altogether from attachment under the proviso to section 144 of the Act.

Watson v. *Lloyd*, 25 M. 402; and *Calcutta Trades Association* v. *Rayland*, 24 C. 102; 1 C. W. N. 138, distinguished.

Appeal against the order of the Subordinate Judge, Lucknow, dated the 4th May 1910.

Mr. *E. Manuel*, for the Appellants.

JUDGMENT.—The question for decision in this appeal is whether the pay of the respondents who are Assistant Surgeons in the Indian Subordinate Medical Department is liable to be attached in execution of a decree obtained against them by the appellants.

Starting with the presumption that their pay is liable to attachment under the first paragraph of sub-section (1) of section 60 of the Code of Civil Procedure, we have to see whether half of it is exempt from liability to attachment under clause (*i*) of the proviso to that sub-section, or the whole of it is exempt under the Army Act, 1881, and the subsequent Acts amending the same.

The appellants contend that the respondents are Public Officers within the meaning of clause (*i*) of the proviso to sub-section (1) of section 60 of the Code of Civil Procedure. The expression "Public Officer" is defined in section 2 of the Code and includes "every Commissioned or Gazetted Officer in the military or naval force of His Majesty." The respondents were gazetted, *i. e.*, their names were published in the *Gazette of India* on their first appointment to the service, and their names have appeared in the *Gazette of India* on subsequent occa-

sions. There can be no doubt that they are Gazetted Officers and it is, therefore, clear that if their pay is not exempt from attachment altogether under the Army Act half of it is liable to attachment and the other half of it is exempt from attachment under clause (*i*) of the proviso to sub-section (1) of section 60 of the Code of Civil Procedure.

Section 136 of the Army Act, 1881, as amended by the Army Act of 1895, provides that the pay of an officer or soldier of His Majesty's Regular Forces shall be paid without any deduction other than the deductions authorised by this or any other Act or by any Royal Warrant for the time being or by any law passed by the Governor General of India in Council. It has been held by the Calcutta and Madras High Courts that the last 13 words of this section make section 266 of the Code of Civil Procedure, 1882 (section 60 of the present Code), applicable to the pay of Commissioned Officers of the India Army, [See *Watson* v. *Lloyd* (1), and *Calcutta Trades Association* v. *Ryland* (2).] The appellants rely upon these decisions as showing that section 60 of the present Code of Civil Procedure applies to the pay of the respondents. But the presons whose pay was in question in the Calcutta and Madras cases being Commissioned Officers, were Officers, as defined in section 190 of the Army Act, 1881, while the respondents being Warrant Officers are 'soldiers' as defined by that Act. There is no provision in the Army Act exempting the pay of *Officers* as defined in that Act from attachment, but there is special provision (section 144) relating to the pay of *soldiers* which, though worded in a curious manner, seems to me to exempt the pay of *soldiers* from attachent altogether. Section 144 (1) lays down that a soldier shall not be arrested or compelled to appear before a Court except on account of a charge of or conviction for crime or on account of a debt, damages or sum of money exceeding thirty pounds. Sub-section (2) defines a crime for the purposes of the section. Sub-section (3) defines Court for the same puropose. Sub-section (4) shows how the amount of the debt, damages or sum of money shall be proved. Sub-section (5) lays down that all proceedings and documents in or incidental to a process, execution or order, in contravention of the section shall be void. The section then goes on thus, "Provided that – (1) any person having cause of action or suit against a soldier of the regular forces may, notwithstanding anything in this section, after due notice in writting to the soldier or left at his last quarters proceed in such action or suit to judgment and have execution other than against the person, pay, arms, ammunition, equipment, regimental accessaries or clothing of such soldier."

Provisos should be used to qualify or create an exception to a general rule or statement and should not be used to state a general rule. But this rule of statutory drafting is often disregarded or overlooked and it seems to have been overlooked in the present instance. The section, down to the beginning of the so-called proviso, deals with processes, executions or orders whereby a soldier may be taken out of the service or compelled to appear in Court and does not in any way refer to attachment of his pay or other property. The so called proviso deals with execution of all kinds and is not and cannot be treated as a proviso to the earlier part of the section notwithstanding that it is called a proviso. Construed as a proviso it is almost meaningless; but construed as an independent enactment, it distinctly exempts the pay of a soldier from attachment altogether. I hold that it exempts the pay of a soldier from attachment. Section 60 of the Code of Civil Procedure cannot be construed so as to affect the provisions of the Army Act. See sub-section (2) (*b*) of that section. I must, therefore, hold that the pay of the respondents is not liable to attachment. The appeal is dismissed. I make no order as to costs as the respondents have not appeared.

Appeal dismissed.

(1) 25 M. 402.
(2) 24 C. 102; 1 C. W. N. 138.

LATIF-UN-NISSA *v.* ACHAMBHIT LAL.

(s. c. 14 O. C. 85).

OUDH JUDICIAL COMMISSIONER'S COURT.

EXECUTION OF DECREE APPEAL No. 22 OF 1910.

February 7, 1911.

Present:—Mr. Evans, A. J. C., and Mr. Piggott, A. J. C.

Musammat LATIF-UN-NISSA—DECREE-HOLDER

versus

ACHAMBHIT LAL AND ANOTHER JUDGMENT-DEBTORS.

Pre-emption—Decree for pre-emption not providing for payment into Court—Payment of purchase-money out of Court, validity of—Oudh Laws Act (XVIII of 1876), s. 15.

Under section 15 of the Oudh Laws Act a pre-emptor is bound to pay the purchase-money specified in the decree into Court; this obligation is independent of the question whether the decree does or does not expressly provide for payment into Court.

Baiju Singh v. *Madho Singh*, 8 O. C. 57, referred to.

Appeal against the order of the Subordinate Judge, Gonda, dated 10th March 1910.

Mr. *Sami Ullah Beg*, for the Appellant.

Mr. *John Jackson*, Pandit *Gokaran Nath Misra* and Babu *Aditya Prasad*, for the Respondents.

JUDGMENT.

EVANS, A. J. C.—This is an appeal against an order of the Subordinate Judge of Gonda passed in execution of a pre-emption decree held by the appellant against the respondents.

By order of this Court dated the 4th February 1910, the appellant obtained a decree in the following terms:—"This appeal be allowed, and a decree be and it hereby is passed in favour of *Musammat* Latif-un-nisa only on payment of rupees twenty-two thousand nine-hundred and sixty-eight (Rs. 22,968) within one month from this date (4th February 1910). It is further ordered and decreed that out of this sum rupees six thousand four hundred and nineteen and pies six (Rs. 6,419-0-6) are payable to the vendor Mubarak Ali and the balance to the appellant and in default of this payment her claim will stand dismissed". On the 2nd March 1910, Rs. 16,548-15-6 were paid in Court by the decree-holder, and on the same day a receipt signed by the vendor Mubarak Ali for Rs. 6,419-0-6 was filed in Court. The decree-holder applied for delivery of possession on the 4th March 1910, and the Court passed an order directing delivery of possession on the same day. The vendor Achambhit Lal put in an application on the 8th March 1910, to the effect that the decree-holder was not entitled to possession as the terms of the decree of this Court had not been complied with and that the receipt filed by the vendor was a fictitious document, no money having been really paid to him on the 2nd March 1910. It was also contended that the decree having been passed under section 14, Act XVIII of 1876 the entire sum of Rs. 22,968 should have been paid in Court under section 15 of the same Act. The learned Subordinate Judge upheld these objections and decided that the decree had become void under the terms thereof.

When this appeal came up for hearing before this Court on the 3rd June 1910, we considered it advisable to remand the case to the lower Court for a finding on the issue, whether the sum of Rs. 6,419-0-6 had actually been paid by the appellant, and if so, on what date this payment was made? The finding of the Court on remand was that no actual payment had been made by the appellant to the vendor on the 2nd March 1910. I am of opinion that this finding is correct. It is unnecessary to set forth in detail my reasons, because this appeal can be decided against the appellant on the assumption that she did pay this money in cash to the vendor on the 2nd March 1910. The law appears to me to be quite clear. It is conceded that the decree of this Court was passed under the special pre-emption chapter of the Oudh Laws Act, 1876. Section 14 of the Act provides that the decree in a pre-emption suit shall specify, a day on or before which the purchase-money shall be paid. That having been done, section 15 lays upon the pre-emptor the duty of paying the purchase-money into Court on or before the day fixed, and if payment is not made the pre-emptor loses his right of pre-emption. This view of the law was accepted by a Bench of this Court in the case of *Baiju Singh* v. *Madho Singh* (1). It is true that in that case the decree directed payment of the purchase-money into Court, but, nevertheless, this Court held that the law should be strictly enforced and that no payment except a payment made directly into Court should be held valid under section 15 of the Oudh Laws Act. The contention on behalf of th appellant amounts to this. She says the she was misled by the order of this Coat

(1) 8 O. C, 57.

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because the decree did not in specific terms direct the payment of the money into Court and we are referred to Order XX, rule 14, of the Code of Civil Procedure, 1908, where it is laid down that when a pre-emption claim is decreed, the Court shall direct that the pre-emption money be paid into Court. In my judgment section 4 of the Code disposses of this contention. This decree was passed under a special law applicable to Oudh only and the decree having been so passed, it was absolutely necessary for the pre-emptor to pay the money into Court. The provisions of Order XX, rule 14, cannot be applied to this decree. Further than this, there is an application on the record by the appellant, dated the 17th February 1910, in which she asked for extension of time in order to enable her to deposit the money. It is, therefore, proved to demonstration that the appellant was not in any way misled, and that she knew that she had to deposit the whole of the pre-emption money into Court and it is admitted that she did not do this. In my opinion the decree of this Court was in the correct form and it was not necessary to state in specific terms that the money should be paid into Court.

The facts of this case show that there had been very bitter and prolonged litigation about this property and also that, after the appellant had obtained the decree of this Court, she had a great difficulty in raising Rs. 16,548 which she actually deposited in Court. She adopted this device in collusion with the vendor, her brother, in order to show that she had complied with the order of the Court knowing full well that such a device would be challenged by the vendee. If her statement is true that she paid the money in cash to the vendor, there is no reason why she could not have paid that same sum into Court and the present dispute would have been avoided. She elected to adopt a torturous course which has landed her in these difficulties and I wholly fail to find even any equitable ground on which the appeal could be allowed. The decision of the Court below was correct and in accordance with law and I would dismiss the appeal with costs.

PIGGOTT, A. J. C.—I incline to the opinion that the provisions of the Code of Civil Procedure (Act V of 1908) as to the form of decree to be prepared in pre-emption suit, are applicable to decrees passed under the pre-emption clauses of the Oudh Laws Act, and should be observed. Otherwise, I concur with the decision of my learned colleague and the reasoning on which it is based. Under section 15 of the Oudh Laws Act, the appellant was bound to pay into Court the purchase-money as specified in the Court's decree, and this obligation was independent of the question whether the decree did or did not expressly prescribe payment into Court.

Appeal dismissed.

(s. c. 14 O. C. 89).

OUDH JUDICIAL COMMISS.ONER'S COURT.

FIRST CIVIL APPEAL NO. 117 OF 1910.

February 9, 1911.

Present:—Mr. Evans, A. J. C.

CHANDI DAYAL AND ANOTHER—DEFENDANTS

versus

Pandit RATAN LAL—PLAINTIFF.

Mortgage—Sale of mortgaged property in execution of simple money-decree—Purchaser at auction-sale, whether representative of judgment-debtor—Subsequent sale in execution of decree for sale passed on mortgage—Auction-purchasers at the two sales, respective rights of.

The property in suit was mortgaged to the respondent on 4th November 1877, who obtained a decree on foot of the mortgage which was made absolute on the 14th November 1903. On 13th February 1900, the appellants' father obtained a money-decree against the mortgagor and on 30th November 1904 purchased the property in execution of his decree and obtained possession on 4th September 1905. The respondent purchased the property in execution of his mortgage-decree on 20th December 1907, and obtained symbolical possession on 4th February 1909. This was a suit by respondent against appellants for possession:

Held, that as the appellants' title was based upon an auction-sale in execution of a money-decree they represented the judgment-debtor in interest in exactly the same way as if they had purchased the property by private sale, and were as much bound by the respondent's decree as the mortgagor himself was.

Lalji v. *Munnu Lal*, 8 O. C. 330, and *Mangan Lal Mulji* v. *Doshi Mulji Bhaichand*, 25 B. 631, distinguished.

Maharaj Singh v. *Jagannath*, 14 O. C. 70; 9 Ind. Cas. 714 and *Bhagwati* v. *Banwari Lal*, 31 A. 82; 6 A. L. J. 71; 5 M. L. T. 185; 1 Ind. Cas. 416, referred to.

Appeal against the decree of the Additional Judge, Hardoi, dated 24th August 1910.

Mr. *A. P. Sen* and Babu *Hargobind Das*, for the Appellants.

CHANDI DAYAL *v.* RATAN LAL.

Mr. *J. K. Banerji*, for the Respondent.

JUDGMENT.—This is an appeal by the defendants against an order of the Additional Judge of Hardoi granting a decree in favour of the respondent Ratan Lal for possession of 5 *biswas*, 17 *biswansis* in the village of Khwajgipur together with Rs. 71-1-6 mesne profits.

Before dealing with this appeal it is necessary to dispose of an application put in by the appellants on the 20th January 1911. They ask the Court to send for a file of a case decided on the 28th January 1905, between their father Maiku Lal and one Gajraj Singh, judgment-debtor. They produced before the lower Court a certified copy of an order in connection with this case Exhibit A3 and that copy, according to the judgment of the lower Court, did not sufficiently establish certain facts which the appellants wished to prove and they now ask that the whole record be sent for although they could have applied for necessary copies during the pendency of the case. Under Order XLI, rule 27, of the Code of Civil Precedure, 1908, additional evidence cannot be accepted by an Appellate Court unless the Court below has wrongly refused to admit evidence or unless good reasons can be given for allowing additional evidence which was not produced before the lower Court. The reason for asking this Court to accept further evidence is that the father of the appellants had died shortly before this suit was instituted and that the appellants were not aware of all the material facts necessary for the justice of the case. This is merely an excuse because it is clear that the appellants knew all about the record of the case which they now ask the Court to inspect. They have already got a copy of one document on that record but their Pleader apparently did not take the trouble to obtain copies of all necessary papers in that case. The death of the appellants' father has nothing whatever to do with the non production of copies which ought to have been produced before the lower Court and as the present application is strongly opposed by the respondents, I am not able to consider the additional evidence contrary to the express provisions of the Code. The application is, therefore, rejected.

I now deal with the appeal upon the evience before me. The following facts are admitted. On the 4th November 1897, one Gajraj Singh mortgaged the property in suit to the respondent Rattan Lal. On the 13th February 1900, Maiku Lal father of the appellants obtained a money-decree against Gajraj Singh for Rs. 944-15. Certain proceedings were taken by Maiku Lal in execution of this decree the details of which are not clear. The only document on the record in connection with these proceedings is an order Exhibit A3. This order was possibly passed on the 10th September 1903, but this is not clear. The order shows that in execution of some decree which is probably the decree obtained by Maiku Lal on the 13th February 1900, some notice was issued to Ratan Lal, the present respondent, and that it had been returned. The respondent brought a suit on his mortgage in December 1902 and obtained a decree on the 7th February 1903. The decree was made absolute on the 14th November 1903. On the 30th November 1904, Maiku Lal purchased the property in execution of his own decree and obtained possession on the 4th September 1905. The same property was again put up in execution of the respondent's mortgage-decree and he purchased it on the 20th December 1907, and obtained symbolical possession on the 4th February 1903. He prayed for mutation of names but his application was refused on objections taken by Maiku Lal on the 27th April 1909. He, therefore, instituted this suit for possession of the property on the 23rd February 1910.

The principal contention taken on behalf of the appellants is that they are not bound by the decree obtained by the respondent, because the property had been attached by Maiku Lal prior to December 1902, and was actually under attachment while that case was pending and, therefore, Maiku Lal, as an attaching creditor, was interested in the property and should have been made a party to the respondent's suit. The learned Additional Judge has stated in his judgment that he cannot find any proof that the property was under attachment when the respondent instituted his suit. The documents on the record do not show that any property was attached nor does it show on what date any order was passed. I have examined carefully Exhibit A3 referred to above and it is impossible to presume from that document that the property in suit, or indeed any property

at all, had been attached by Maiku Lal prior to December 1902. The only contention taken on behalf of the appellant is that Maiku Lal should have been made a party to the respondent's suit because he was at the time an attaching creditor, but as I do not find that he was an attaching creditor the form of the suit instituted by the respondent was not contrary to the provisions of section 85 of the Transfer of Property Act and in this view of the case it is unnecessary to consider the rulings cited by the Advocate for the appellants to show that an attaching creditor is a person interested in the mortgaged property within the meaning of that section.

The point for decision is, therefore, reduced to this. Maiku Lal purchased the property in 1904 and obtained possession. The respondent Rattan Lal purchased the same property in execution of his mortgage-decree in 1907 and got symbolical possession in 1909. The appellants, represented by Maiku Lal, refused to give up possession and I have only to decide whether their title is better than that of Ratan Lal. The learned Additional Judge decided that Maiku Lal being the auction-purchaser of the mortgagor's interests, is the legal representative of the mortgagor and as such is bound by the respondent's decree just as much as Gajraj Singh himself was. The learned Advocate for the appellants has cited rulings to show that an auction-purchaser is not the legal representative of the judgment-debtor. In support of this contention I am referred to the cases of *Lalji* v. *Munnu* (1) and *Mangan Lal Mulji* v. *Doshi Mulji Bhaichand* (2). The case in *Lalji* v. *Munnu Lal* (1) merely explains what was the meaning of representative of judgment-debtor according to the provisions of section 244 of the Code of Civil Procedure, 1882, and it was decided that that section only applied to persons who represent the parties to the suit upon the record and was not meant to refer to strangers to the decree setting up a title to the property in suit adversely to any of the parties to that suit. If any such dispute arose, it could not be disposed of under section 244 of the Code. The ruling of *Mangan Lal Mulji* v. *Doshi Mulji Bhaichand* (2) also refers to proceedings under section 244 of the Code of Civil Procedure, 1882. I may also refer to the case of *Maharaj Singh* v. *Jagannath* (3). In that case we followed the decision of the majority of the Full Bench in the case of *Bhagwati* v. *Banwari Lal* (4) and held that a dispute between the judgment-debtor and the auction purchaser was not one which could be disposed of under section 47 of the Code of Civil Procedure. All these decisions merely show that the auction-purchaser is not the representative of the judgment-debtor within the meaning of section 47 of the Code; that is to say, he does not represent the judgment-debtor in any controversy which may have arisen between him and the decree-holder in connection with satisfaction of the decree. But the possession of Maiku Lal who purchased the property of Gajraj Singh is quite different from this. There is no dispute before the Court which should be dealt with under section 47 of the Code, but it is a suit for possession of certain property and the plaintiff-respondent says that his title to the property is superior to that of the appellants who are acting illegally in keeping him out of possession. The respondent's title is that of a purchaser under a decree for sale upon a mortgage and that mortgage has now been extinguished. The title of the appellants is based upon an auction-sale in execution of a money-decree and they represent the judgment-debtor in interest exactly in the same way as if they had purchased the propery by a private sale and they are as much bound by the respondent's mortgage-decree as the mortgagor himself was. There is no ground upon which they can resist the respondent's claim. If they had wished to retain possession of the property, they should have paid up the amount due on the respondent's decree before the property was put up for sale. The respondent's title to the property is indivisible and the appellants have no title at all because their property has been purchased by the respondent. In my opinion the decision of the Court below is correct and this appeal is dismissed with costs.

Appeal dismissed.

(1) 8 O. C. 330.
(2) 25 B. 631.
(3) 14 O. C. 70; 9 Ind. Cas. 714.
(4) 31 A. 82; 6 A. L. J. 71; 5 M. L. T. 185; 1 Ind. Cas. 416.

SEWA DAT PERSHAD *v.* KARM CHAND.

(s. c. 35 P. W. R. 1911).

PUNJAB CHIEF COURT.

CIVIL REVISION PETITION No. 2577 OF 1908.

January 3, 1911.

Present:—Mr. Justice Johnstone.

Pandit SEWA DAT PERSHAD—PLAINTIFF—PETITIONER

versus

KARM CHAND—DEFENDANT—RESPONDENT.

Review—Revision—Order rejecting an application for review of judgment—Final—Application of new or old Code of Civil Procedure—Civil Procedure Code (Act XIV of 1882), s. 629—Civil Procedure Code (Act V of 1908), O. XLVII, r. 7—Punjab Courts Act (XVIII of 1884), s. 70 (1)(a).

An order rejecting an application for review is final under section 629 of Act XIV of 1882, and is not open to appeal or revision.

Ram Lal v. *Ratan Lal*, 26 A. 572; and *Kessowji Issur* v. *Great Indian Peninsular Railway Co.*, 31 B. 381; 11 C. W. N. 721; 6 C. L. J. 5; 4 A. L. J. 461; 2 M. L. T. 435; 9 Bom. L. R. 671; 17 M. L. J. 347, followed.

The provisions of the Civil Procedure Code of 1908 cannot be invoked in aid of a petitioner whose application for revision was presented before that Code came into force.

Petition for revision of the order of the Divisional Judge, Lahore, dated the 12th May 1908, rejecting the application of the plaintiff for review of his predecessor's order dated 22nd November 1905.

Lala *Dhanpat Rai*, for the Petitioner.

The Hon'ble Mr. *Shadi Lal*, for the Respondent.

JUDGMENT.—This is a petition for revision of an order rejecting an application for review of judgment. After seeing the files I came to the tentative conclusion that the review by the Court below was admissible and that there was good ground for review, inasmuch as the minor plaintiff had made discovery too late of new and important matter, etc.

Mr. Shadi Lal, for respondent, raises the objection that neither appeal nor revision of an order rejecting a petition for revision is competent. He relies upon section 629, old Civil Procedure Code, which was in force when the order rejecting the review was passed; *Ram Lal* v. *Ratan Lal* (1) and *Kesswji Issur* v. *Great Indian Peninsular Railway Co.* (2). Section 629, Civil Procedure Code (old) runs:—"An order of the Court for rejecting the application, *i. e*, for review shall be final." The rulings quoted support Mr.

(1) 26 A. 572.

(2) 31 B. 381 at p. 388; 11 C. W. N. 721; 6 C. L. J. 5; 4 A L. J. 46 ; 2 M. L. T. 435; 9 Bom. L. R. 671; 17 M. L. J. 347 (P. C.).

BHANA RAM *v.* HAKIM SINGH.

Shadi Lal's interpretation of the word final

For the appellant Mr. Dhanpat Rai retorts that in the new Code, Order XLVII, rule 7, the word is not "final" but "not appealable" and the new Code applies. Also, that in section 70, Punjab Courts Act, there is a provision which allows revision at least in such a case as the present, *viz.*, in sub-section (1), clause (*a*).

I am unable to accede to these propositions. No doubt, in the new Code the law has been altered, but I cannot see how a Code which came into force on 1st January 1909, can possibly be used to render admissible a revision of an appeal filed in July of the previous year. Further, as to section 70 (1) (*a*), Punjab Courts Act, I do not think that a general provision allowing revision on the scope of "material irregularity" or of failure to exercise jurisdiction or of exercise of jurisdiction not vested in the Court, can override a plain provision of law that in such and such case the Judge's order shall be final. Moreover, the Court below, though it did hold itself not capable of reviewing, also ruled that there was no "new and important matter," etc, and thus it can hardly be said it did not exercise any power it may have had to deal with the petition on the merits. For these reasons, I reject the petition with costs.

Petition rejected.

(s. c. 36 P. W. R 1911).

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 433 OF 1910.

December 20, 1910.

Present:—Mr. Justice Kensington.

BHANA RAM AND OTHERS—PLAINTIFFS—APPELLANTS

versus

HAKIM SINGH AND OTHERS - DEFENDANTS—RESPONDENTS.

Custom—Alienation—Sale by childless proprietor—Brahmins of Musapur, Tahsil Nawashahr, District Jullundur—Limitation—Right of distant collaterals to contest alienation—Declaratory decree—Discretion.

Collaterals cannot challenge an alienation of ancestral property in presence of the alienor's sons.

Where a declaratory suit challenging an alienation by a childless male proprietor of ancestral holding is barred, so far as near collaterals are concerned, minor distant collaterals cannot be put forward as a means of bringing the suit within time

A declaratory decree is always a matter of discretion.

BHANA RAM *v.* HAKIM SINGH.

Semble:—Brahmins of *mauza* Musapur, *Tahsil* Nawashahr, District Jullundur, do not follw Hindu Law but probably agricultural custom.

Second appeal from the order of the Divisional Judge, Jullundhar Division, dated the 23rd December 1908, confirming that of the Sub-Judge, 2nd Class, Jullundhur, dated the 3rd June 1908, dismissing plaintiff's claim.

Rai Sahib Lala *Sukh Dayal*, for the Appellant.

Rai Sahib Pandit *Sheo Narain*, for the Respondents.

JUDGMENT.—This is a suit by distant collaterals of one Maya for a declaration to set aside a sale effected by him in 1894. The lower Courts have given no pedigree, though it was obviously material to ascertain the relationship of the parties with some approach to accuracy. The pedigree now stated to me on behalf of plaintiffs, which cannot be attested, shows that these two minors together with the three adults, joined in the suit as defendants, are all descendants of Maya's great grandfather.

The sale appears to have covered about a quarter of Maya's holding of 22 *ghumaos*, but this also cannot be verified with any certainty. It is to be regretted that neither of the lower Courts should have attempted to clear up these elementary points in the case.

The Sub-Judge dismissed the suit on the ground that necessity for sale was established. The learned Divisional Judge dismissed the appeal solely on the ground that the parties being *Brahmans* are governed by Hindu Law and not by custom.

The case accordingly comes before me as an appeal on this latter point. The lower Appellate Court's judgment is very brief and unsatisfactory. It has some sort of support from a Single Bench ruling in *Maya* v. *Gurdit Singh* (1) given long after the case was decided, but that ruling dealt with a particalar section of *Brahmans* elsewhere and cannot be treated as determining anything about agricultural *Brahmans* generally. It is well-known that many *Brahmans*, or partly *Brahman* villages in various parts of the province, follow the ordinary custom of agriculturists, and in the present case the Divisional Judge's own findings that "the ancestor of the parties was one of the founders of the village and their pursuits are wholly agricultural" go far to stultify his decision.

I am not prepared to say more than that the lower Appellate Court's decision as given without adequate inquiry and without any sort of discussion is quite untenable, and must be set aside as not being required for the case. It should not be quoted as authority in the event of the question coming up again in this form. There may be, and probably is, a great deal to be said for the view that these *Brahmans* of the Jullundur District follow custom, but there is no basis or necessity for decision of the point in the present case. The Divisional Judge should have confined himself to points urged in appeal before him.

Under ordinary circumstances, I should set aside the lower Appellate Court's decree and remand the case for fresh decision of the appeal without going into any question of custom as a side issue. But I do not do so, as it is clear to me that plaintiff's suit is bound to fail on the merits and the dispute should not be allowed to drag on any longer merely because the Divisional Judge has erroneously avoided discussion of the essential points.

There is, to begin with, the difficulty in plaintiff's way that Maya certainly has sons by a wife married subsequently to the sale. The legitimacy of these sons cannot be fairly called in question in the present case, and I decline to allow the suit to be treated as in the nature of one for perpetuation of testimony. This question, if it ever arises at all, must be settled by litigation raising the issue definitely. For present purposes, the sons should be regard as legitimate issue and they are a distinct bar to plaintiff's suit.

The difficulty might, no doubt, be got over by specious pleading, but it has then to be considered whether there is any thing wrong in the Sub-Judge's finding as to necessity. The finding appears to me quite correct. That only item of consideration which could at any time have been called in question is the sum of Rs. 3-12 0 received in cash at registration for marriage expenses. Maya has undoubtedly since married and the money may well have been required for the purpose.

This is enough to dispose of plaintiff's belated suit, but it may also be pointed out that the suit is almost certainly time-barred. Two minor plaintiffs have been put forward

(1) 1 P. R. 1910; 128 P. W. R. 1909; 4 Ind. Cas. 947.

as a means of bringing the suit within time, but only because it is clearly long ago time-barred against the other collaterals, who never thought of themselves challenging the alienation.

A declaratory decree is always a matter of discretion, and under these circumstances the Courts would certainly be exercising that discretion wrongly in giving plaintiffs a decree even if the difficulty about limitation could be got over.

The sale was acquiesced in at the time by such responsible collaterals as might possibly have challenged it.

My conclusion being that the sale is a valid transaction, the appeal is dismissed subject to the explanation given above.

The plaintiff will pay the costs of the vendee defendants. Nos. 1 and 2 in this Court also as these defendants should not have been put to further trouble, even though the lower Appellate Court dismissed the original appeal on an improper ground.

Appeal dismissed.

(s. c. 8 A. L. J. 206).

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 332 OF 1907.

January 26, 1911.

Present:—Sir John Stanley, KT., Chief Justice and Mr. Justice Banerji.

MUBARAK-UN-NISSA—DEFENDANT—APPELLANT

versus

MUHAMMAD MUNSUB HASAN KHAN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Muhammadan Law—Arrangement—Widow put in possession of property by husband in lieu of dower—Widow to become absolute owner on husband predeceasing her—Mortgage—Nature of interest created.

A Muhammadan gave his wife possession of his property in lieu of her dower on the condition that if she died before him, the property would revert to him, the balance of the dower becoming extinct; but that if she were to survive him she would become absolute owner of the property. The husband predeceased the wife: *Held*, that on the husband's death the wife became absolute owner of the property.

Musammat Bebee Bachan v. *Sheikh Hamid Hosein*, 14 M. I. A. 377; 17 W. R. 113, referred to.

The interest created was a right to enjoy the usufruct of the property during the life-time of the husband, which was to develop into full ownership on the happening of a contingency, *viz.*, the death of the husband in the life-time of the wife.

First appeal from a decree of the Subordinate Judge of Shahjahanpur.

The Hon'ble Mr. *Sundar Lal* (with him Mr. *Muhammad Ishaq*), for the Appellant.

The Hon'ble Mr. *Motilal Nehru* (with him Messrs. *D.C. Banerjee Ghulam Mujtaba*), for the Respondents.

JUDGMENT.—The suit out of which this appeal has arisen was brought by the plaintiffs-respondents for possession of a share of certain property which originally belonged to their deceased uncle, Masnad Hasan Khan. They claim as his heirs the share to which they are entitled under the Muhammadan Law. They also pray for mesne profits.

Masnad Hasan Khan died on the 1st of March 1903, leaving him surviving as his heirs, the first defendant *Musammat* Mubarak-un-nissa, his widow, and five nephews, two of whom are the plaintiffs. It is common ground that the dower of *Musammat* Mubark-un-nissa was Rs. 1,25,000, and that this amount was due to her. In order to provide for the payment of the dower Masnad Hasan Khan executed a document in her favour on the 22nd of September 1883, by virtue of which she is admittedly in possession of his estate. The construction of this document is the principal question to be determined in this appeal. Whilst it is asserted in the plaint that the instrument was a lease granted to Mubarak-un-nissa for the realization of her dower and that she is bound to surrender the property on her dower being discharged, it is urged on her behalf that she has acquired an absolute interest in the property under the provisions of the document. The plaintiffs allege that she has realized the whole amount of her dower from the usufruct of the property, and they are, therefore, entitled to obtain possession of their share.

On the 7th of April 1892, Mubarak-un-nissa and Masnad Hasan Khan jointly executed a deed of *waqf* in respect of a portion of the property, and by a later deed of the 15th of August 1903, they provided for the management of the *waqf* and appointed the 2nd and 3rd defendants as their successors in the office of *mutwallis*. It is asserted by the plaintiffs that this *waqf* is nominal and fictitious; that Masnad Hasan Khan continued to be the owner of the property till his death, and that the *waqf* is also invalid under the Muhammadan Law.

Upon the death of Masnad Hasan Khan's mother a reference to arbitration was made

by him and Mubarak-un-nissa for the settlement of their claims in regard to the property inherited from the mother, and an award was delivered by the arbitrator on the 10th of October 1898. This was made a rule of Court on the 30th of November 1898. Subsequently, on the 9th of September 1903, Masnad Hasan Khan executed a deed of relinquishment in favour of his wife. These transactions are alleged by the plaintiffs to be fictitious and collusive and made with a view to deprive them of the property.

The Court below has held that under the instrument of the 22nd of September 1883, Masnad Hasan Khan made a usufructuary mortgage in favour of his wife for the amount of her dower; that the transaction was at least analogous to a mortgage; that Mubarak-un-nissa was in possession in lieu of her dower: that the *waqf* is invalid, and that the plaintiffs are entitled to possession on payment of the balance of dower due to Mubarak-un-nissa. It has accordingly made a decree in favour of the plaintiffs for possession of their share of the property (except moveables and house property in respect of which they abandoned their claim), on condition that they do pay to Mubarak-un-nissa their proportionate share of Rs. 43,482 which it has proved to be the balance of dower due to her.

The defendant, Mubarak-un-nissa, has preferred this appeal. The plaintiffs have filed the connected Appeal No. 21 of 1908 in which they question the correctness of the finding of the Court below as to the amount of the dower due to the defendant.

The decision of this appeal hinges mainly on the construction of the instrument, dated the 22nd of September 1883, mentioned above. That document was executed both by Masnad Hasan Khan and Mubarak-un-nissa, and the material portion of it is thus translated:—

"In order to make arrangement for re-payment of the dower-debt and to shake off the liability of the husband both in this and the next world the husband and the wife have made settlement as follows:—That is to say, all the properties detailed below, now possessed by the husband, shall be put in the possession of the wife in lieu of the dower debt, with the conditions that during her life-time she shall collect and enjoy the profits of all the properties in lieu of her dower-debt; that if she dies before the husband, the dower-debt shall be deemed paid up, no matter whatever portion thereof is realized by that time; that the dower-debt being deemed as satisfied, the properties shall revert to the possession of the husband, that in such case the wife's possession shall be deemed to be (one under) a *bil mukta thika* (lease for a fixed sum); that the annulment of this lease and the satisfaction of the debt shall be deemed from that time in the year of the wife's death at which she may make the last collection before her death, of any portion of the profits from any property: and that if the husband dies before the wife, the properties shall be owned by the wife in lieu of the dower-debt remaining due at that time, no matter whatever amount it may be, and the husband's proprietary rights shall become extinct."

The scope of the document is three-fold, (1) the wife is to take possession of the property in lieu of her dower and enjoy the usufruct; (2) the property is to pass to the husband, if the wife predeceases him and the dower-debt is to be deemed to be discharged; and (3) if the husband predeceases the wife, she is to become absolute owner of the property whatever may be the balance of dower due. It is claimed on behalf of the wife that as her husband is dead, she has acquired the absolute ownership of the property. We are unable to agree with the Court below in the view that a mortgage was effected. The property of the husband was not made security for the wife's dower and it was not pledged for the dower. The mere fact that possession was deliverd to the wife did not create an hypothecation of the property for the amount of the dower. This, in our opinion, is the effect of the decision of their Lordships of the Privy Council in the case of *Musammat Bebee Bachan* v. *Sheikh Hamid Hosein* (1), and we do not think the learned Subordinate Judge has correctly apperciated it. Their Lordships observed,—"The claim of *Musammat* Bebee Bachan to hold the property to satisfy her dower cannot be founded upon an original hypothecation of the estate for her dower—for such a right does not arise under the Muhammadan Law as a consequence of the gift of dower, nor was there any agreement on the part of the husband to

(1) 14 M. I. A. 377; 17 W. R. 113.

pledge his estate for the dower." In the document before us we fail to find any provision which may be construed to be a hypothecation or pledge of the property. The learned Advocate for the respondent contends that the document must be deemed to be a Will. We cannot accede to this contention. There was no disposition of the property to take effect only after the husband's death. Nor do we think the transaction was of the nature of what is known in Muhammadan Law as *muhabat*. In our opinion the property was, by the instrument in question, vested in *Musammat* Mubarak-un-nissa *in præsenti* in lieu of her dower subject to the condition that in the event of her predeceasing her husband it should go to her husband alone to the exclusion of her other heirs. It was a conveyance of the property in lieu of dower subject to a contingency which has not happened, and to a condition the validity of which we are not called upon to determine. The interest created was, as Mr. Sundar Lal aptly put it, a right to enjoy the usufruct of the property during the life-time of the husband which was to develop into full ownership on the happening of a contingency, namely, the death of the husband in the life-time of the wife. That contingency having happened and the husband of *Musammat* Mubarak-un-nissa being dead, she has become the absolute owner of the property and the plaintiffs, as some of the heirs of her husband, are not entitled to recover any portion of it from her.

In this view it is unnecessary to consider whether the *waqf* created by her is or is not valid under the Muhammadan Law. Even if it is invalid, the plaintiffs have no right to question it.

Furthermore, by the deed of relinquishment executed by Masnad Hasan Khan on the 9th of September 1903, property of all descriptions was vested in Mubarak-un-nissa. The plaintiffs' suit must, therefore, fail.

We accordingly allow the appeal, set aside the decree of the Court below and dismiss the suit with costs in both Courts.

Appeal allowed.

S. N. DAR, B. A. LL. B.,
Vakil High Court,
SRINAGAR (Kashmir)

(s. c. 8 A. L. J. 297).

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1289 OF 1909.

January 31, 1911.

Present:—Sir John Stanley, KT., Chief Justice, and Mr. Justice Griffin.

CHUNI LAL—DEFENDANT—APPELLANT

versus

SIKISHAN SINGH AND OTHERS—PLAINTIFFS - RESPONDENTS.

Mortgage—Redemption—Breaking up of security by mortgagee—Liability of mortgagor.

A. mortgaged his *sir* to *B* in 1881. At a sale in execution of a simple money-decree in 1888 *B.* purchased the proprietary right in the *sir* leaving *A.* owner of the ex-proprietary right only:

Held, that as *B.* by his own act had broken up the integrity of his security, he was precluded from placing the whole burden of his mortgage-debt upon the ex-proprietary rights

Bisheshur Dayal v. Ram Sarup, 22 A. 284, followed.

Second appeal from a decree of the Additional District Judge of Aligarh, confirming a decree of the Subordinate Judge of Aligarh.

Mr. *B. E. O'Conor* (with him Mr. *Gokul Prasad*), for the Appellant.

Mr. *Gulzari Lal*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit for redemption of a mortgage made in 1881 by the plaintiffs' predecessor-in-interest. By the mortgage in suit certain specified plots, aggregating an area of 191 *bighas*, were mortgaged as security for the loan of Rs 1,300. The lands were described as the *sir* holdings of the mortgagor. In the year 1888 the defendant-appellant in this Court, at an auction-sale in execution of a simple money-decree, purchased the proprietary rights in the property in suit. The plaintiffs in this suit seek to redeem the mortgage of 1881. The Courts below have repelled the contention of the defendant-appellant that the whole burden of the mortgage-debt should be thrown upon the ex-proprietary rights now held by the mortgagor. They held that the mortgagor's ex-proprietary interest was still liable for a share of the mortgage-debt proportionate to the value of the ex-proprietor's rights vested in the mortgagor. The first Court held that the plaintiffs should pay one-fourth of the mortgage-money in order to redeem the ex-proprietary tenures. The lower Appellate Court upon appeal by the defendant has in its decree affirmed the decision of the Court of first instance.

The ground taken in appeal to this Court

is that after the sale in 1888 of the mortgagor's proprietary rights in the property in suit the burden of the mortgage-debt continued upon the rights which still remained to the mortgagor, namely, his ex-proprietary rights in the land formerly held by him in the *sir*. The contention advanced on behalf of the appellant is that there has been merely a substitution of security.

It appears to us that the view taken by the Courts below is a correct one. What was mortgaged in the year 1881 was the mortgagor's right as proprietor in the mortgaged property, and further his rights to occupy the plots specified in the mortgage as *sir* holder. In the year 1888, the defendant-appellant to this Court acquired at auction-sale the proprietary rights of the mortgagor. The defendant-appellant has by his own act broken up the integrity of his security. He cannot now be permitted to cast the whole burden of the mortgage-debt upon the remainder of his security. The principle of the ruling in *Bisheshur Dayal* v. *Ram Sarup* (1) is applicable to the present case. It has not been shown to us that the amount assessed by the Court below as the proportionate share which the ex-proprietary rights should bear of the mortgage debt is erroneous. We dismiss the appeal with costs.

Appeal dismissed.

(1) 22 A. 284.

(s. c. 8 A. L. J. 230).

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 994 OF 1909.

February 6, 1910.

Present:—Sir John Stanley, KT., Chief Justice, and Mr. Justice Griffin.

MAHDI HUSAIN AND ANOTHER—APPELLANTS

versus

SUKH CHAND AND OTHERS—RESPONDENTS.

Right to sue—Quasi-contract—Money deposited in Court in usum jus habentis—*Withdrawn by person not entitled to it—Liability.*

Money deposited in Court *in usum jus habentis* and withdrawn by a person not entitled to it may properly be held to be received for the use of the person entitled to it.

Litt v. *Martendale*, 18 C. B. 314; 4 W. R. 465, referred to.

Second appeal from a decree of the District Judge of Meerut, confirming a decree of the Third Additional Munsif of Meerut.

Mr. *G. W. Dillon* (with him Mr. *Abdul Raoof*), for the Appellants.

Dr. *Satish Chandra Banerji* (with him Mr. *Surrendra Nath Sen*), for the Respondents.

JUDGMENT.—This was a suit for a refund of Rs. 842 paid in satisfaction of a decree under the following circumstances. On the 31st of March 1883, the plaintiffs mortgaged certain property in favour of one Kallu Mal. Kallu Mal died, leaving his widow, *Musammat* Gulab Dei and a minor son Har Saran. On the 4th of December 1897, *Musammat* Gulab Dei, as mother and guardian of her infant son, transferred the mortgagee-rights under the mortgage to *Musammat* Shibia. Subsequently, on the 18th of March 1900, Har Saran, who was still a minor, purported to transfer the mortgagee-rights in the mortgage to the defendants. The defendants, on the 21st of May 1900, instituted a suit for sale on foot of the mortgage of 1883 and obtained a decree which was made absolute on the 14th of September 1901. *Musammat* Shibia was not a party to these proceedings. On the 5th of November 1900, *Musammat* Shibia brought a suit to enforce the mortgage of 1883 which had been transferred to her by *Musammat* Gulab Dei on the 4th of December 1897. She obtained a decree, and in execution of that decree the mortgagee-rights under the mortgage of 1883 were sold and purchased by *Musammat* Shibia. She then sued for sale of the mortgaged property, impleading both the defendants and the plaintiffs, and obtained a decree for sale on the 23rd of December 1903. In order to protect the property from sale under the decree of the 14th of September 1901, the plaintiffs under protest deposited the amount of the mortgage in Court; and they subsequently filed an objection to the execution of the decree of the defendants alleging that no interest in the mortgaged property passed to the defendants under the transfer of the 18th of March 1900. Har Saran being at the date of the execution of that mortgage a minor. The defendants applied to the Munsif, in whose Court the money was deposited, for payment of it and they alleged that the defendant, Nabi Baksh, has already paid off the amount due to *Musammat* Shibia under her decree. We find in the order of the Court, dated the 14th March 1906, the following statement:—"Then it is shown that Nabi Baksh

has already paid off the decretal amount of *Musammat* Shibia." The learned Munsif then observes,—"Under the circumstances, I am of opinion that the present decree is capable of execution and the mortgagors cannot derive any advantage from the decree obtained by *Musammat* Shibia." It is obvious from this that the order for payment of the money was obtained on the faith of the false representation made by Nabi Baksh that Shibia's decree had been paid off. The order of the Munsif was subsequently affirmed on appeal. In the suit brought by *Musammat* Shibia on the basis of the bond of the 4th of December 1897, on appeal to the High Court, it was held on the 27th of June 1906, that the sale executed by Har Saran in favour of the defendants was absolutely void, and that the defendants had no right whatever in the mortgaged property in dispute. Despite this decree, the defendants, in January 1907, withdrew from the Court of the Munsif the sum which had been deposited by the plaintiffs under protest. The Court, however, before making payment, required from the defendants security for the re-payments of the money if it should turn out that the defendants were not entitled to it. A security bond by one Wajah-ud-din was executed for this purpose on the 2nd of January 1907, and by that bond the surety hypothecated certain immoveable property. The decree of *Musammat* Shibia was not paid by Nabi Baksh and has not been satisfied, but is still under execution. The suit out of which this appeal has arisen was brought for the refund of the money improperly drawn from Court by the defendants. Both Courts have decreed the claim.

This appeal was then preferred and the main grounds of appeal are that it is not open to the plaintiff, in view of the decree of the 24th of January 1901, which has never been set aside, to recover back money obtained in execution of it, and that the matter must be deemed to be *res judicata*. There is no force in this contention. The defendants were parties to the suit brought by *Musammat* Shibia, and in that suit it was held that the transfer executed by Har Saran on the 18th of March 1900, was absolutely void. In view of this ruling, the defendants were not justified in making an application for and obtaining payment of the money lodged in Court under protest. They acted improperly in representating to the Court of the Munsif that *Musammat* Shibia's decree had been paid off by one of them. The money was deposited in Court *in usum jus habentis* and before it was withdrawn this Court had declared that the defendants had no right to it. Under these circumstances, the defendants were not justified in their action in withdrawing the money. They improperly withdrew money which in justice and equity belonged to the plaintiffs. Money so obtained may properly be held to be received for the use of the person entitled to it [see *Litt* v. *Martindale* (1)]. We think, therefore, that the decision of the Courts below was perfectly right and dismiss this appeal with costs.

Appeal dismissed.

(1) 18 C. B. 134; 4 W. R. 465.

(s. c. 7 N. L. R. 35).

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 83 OF 1910.

January 6, 1911.

Present:—Mr. Drake Brockman.

DURGAGIR—APPLICANT

versus

KOLLU—OPPOSITE PARTY.

Plaint—Signature by plaintiff essential—Defect in signature, effect of—Appeal—Defect in signature no ground for interference—Amendment—Effect on limitation—Civil Procedure Code (Act V of 1908), s. 99, O. VI, r. 17, O., VII, r. 14—"Jurisdiction", meaning of.

A plaintiff who resides within the jurisdiction of the Court in which he brings a suit must sign the plaint.

Gokul Das v. *Mullu*, 16 C. P. L. R. 103; *Chandramal* v. *Ganpat Rai*, 4 N. L. R. 117, referred to.

The word "jurisdiction" in section 99 of the Civil Procedure Code, judged from the point of view of locality, pecuniary value or the subject-matter of a suit, is equivalent to competency to try.

Matra v. *Hari*, 17 C. 155; *Mohesh* v. *Jamirudain*, 28 C. 324, followed.

Where a suit is in fact filed with the knowledge and by the authority of the plaintiff, a defect in the signature is a mere irregularity which is no ground for interference in appeal.

Basdeo v. *Smidt*, 22 A. 55 and *Rakhal* v. *Secretary of State for India*, 10 C. W. N. 841; *Maharaja of Rewah* v. *Sarmi Saran*, 25 A. 635, followed.

The want of a proper signature is not included in Order VII, rule 11, among the circumstances which necessitate rejection of a plaint; and Order VI, rule 17, enables amendment of a plaint to be effected at any stage of the proceedings. The inference from these provisions is that a plaint cannot be considered as void and inadmissible until the defect in signature is removed.

DURGAGIR *v.* KOLLU.

Basdeo v. *Smidt*, 22 A. 55; *Maharaja of Rewah* v. *Swami Saran*, 25 A. 635, followed.

The date of amendment of a plaint is immaterial for purposes of limitation, unless the time expressly allowed by the Court for amendment has been exceeded.

Maharaja of Rewah v. *Swami Saran*, 25 A. 635, followed.

Civil revision against the decree of the District Judge, Bhandara, dated the 15th December 1909, confirming that of the Munsif, Tirora, dated the 12th October 1909.

Mr. *S. Y. Deshmukh*, for the Applicant.

Mr. *J. Mittra*, for the Opposite Party.

JUDGMENT.—This is an application for revision of a decree passed by the District Judge, Bhandara, dismissing an appeal preferred by present applicant from a decree of the Munsif, Tirora.

The plaintiff, who is the non-applicant here, sued the applicant to recover the money due on a bond and it is admitted that so far as the merits of the case are concerned the claim was rightly decreed by the Munsif. What we are now concerned with is the defendant's plea that the plaint was bad for want of the plaintiff's signature. The plaint was both signed and verified by one Dajiba, an agent of the plaintiff, who also conducted the plaintiff's suit. This agent pleaded that the plaintiff's signature was not essential because the plaintiff, though resident within the jurisdiction, had no personal acquaintance with the facts; whereupon the Munsif put in issue the question whether the plaint was bad in law as not signed by the plaintiff but by his agent. This issue was decided in the negative on the ground that the agent who signed the plaint was cognizant of the facts of the case and had conducted the suit, the Munsif evidently being unaware of this Court's decisions in *Gokal Das* v. *Mullu* (1) and *Chandramal* v. *Ganpat Rao* (2).

In appeal the District Judge, after noticing the Munsif's mistake, held that the irregularity in the plaint did not affect the merits of the case and consequently that he was precluded from interfering by section 99, Code of Civil Procedure.

That section runs as follows :—

> "No decree shall be reversed or substantially varied, nor shall any case be remanded, in appeal on account of any misjoinder of parties or causes of action or any error defect or irregularity in any proceedings in the suit, not affecting the merits of the case or the jurisdiction of the Court."

(1) 16 C. P. L. R. 103.
(2) 4 N. L. R. 117.

It is now contended on the defendants behalf that inasmuch as rule 14, Order VI, Code of Civil Procedure, requires that every plaint shall be signed by the plaintiff the Munsif acted without jurisdiction in admitting a plaint not so signed, and that section 99 of the Code has, therefore, no application. There is no suggestion that the plaintiff's agent in filing and conducting the suit exceeded his authority.

The section in question is for present purposes identical in terms with section 578 of the 1882 Code. With reference to the latter it was held in *Matra* v. *Hari* (3) that the word "jurisdiction" was therein used as equivalent to "competency to try," and in *Mohesh* v. *Jamirudain* (4) that the term meant what it is ordinarily understood to mean when used with reference to the local or pecuniary jurisdiction of a Court or its jurisdiction in respect of the subject-matter of a suit. And *Basdeo* v. *Smidt* (5) and *Rakhal* v. *Secretary of State for India* (6) are clear authorities for the proposition that where a suit was in fact filed with the knowledge and by the authority of the plaintiff a defect in the signature is a mere irregularity which having regard to section 578 of the 1882 Code is no ground for interference in appeal. These decisions and the grounds therefor commend themselves to me. It will be observed that want of a proper signature is not included in rule 11, Order VII, of the present Code, among the circumstances which necessitate rejection of a plaint and that rule 17 of Order VI enables amendment of a plaint to be effected at any stage of the proceedings : the inference is that a plaint is not void and inadmissible until a defect in signature is removed, and the view to this effect in *Basdeo* v. *Smidt* (5) (above cited) was again

(3) 17 C. 155.
(4) 28 C. 324.
(5) 22 A. 55.
(6) 10 C. W. N. 841.

taken in *Maharaja of Rewah* v. *Swami Saran* (7).

It is contended on the defendant's behalf that if the technically correct course of requiring plaints to be amended had been taken in the first Court the claim would have been time-barred before the amendment could have been affected. The case last cited is authority against that contention, and it has long been settled that the date of amendment is immaterial for purposes of limitation, unless indeed the time expressly allowed by the Court has been exceeded.

The merits being admittedly on the plaintiff's side I would in any view be unwilling to exercise the revisional jurisdiction of this Court in the applicant's favour. As it is, I am satisfied that the District Judge's refusal to interfere with the Munsif's decree was justified by section 99, Code of Civil Procedure. The application for revision is accordingly dismissed. But as the signature of the plaint is undoubtedly defective I make no order as to the costs of this application.

(7) 25 A. 635.

(s. c. 7 N. L. R. 36).

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 742 OF 1909.

July 26, 1910.

Present:—Mr. Skinner, A. J. C.

ATAMARAM AND OTHERS—APPELLANTS

versus

LALA—RESPONDENT.

Registration—Release—Formal relinquishment of claim—Central Provinces Tenancy Act (IX of 1883, s. 46—Occupancy holding—Succession, how governed—Hindu Law—Succession—Son remaining joint with father.

A document containing consent to a disposition of property and a formal renunciation of a claim, which the party relinquishing is entitled to put forward, whether legally correct or not, is a release, and when pertaining to immoveable property of the value of Rs. 100 or over requires registration.

Wazir Ali v. *Asaram*, 95 P. R 1894; *Indraj* v. *Mouja*, 97 P. R. 1895 and *Abdool Hoosein* v. *Goolam Hoosein*, 30 B. 304; 7 Bom. L. R. 742, distinguished.

In the case of Hindus, Courts should, in dealing with agricultural land, follow the Hindu Law of inheritance so far as it may be consistent with the principles of a legislative enactment such as the Central Provinces Tenancy Act.

Ghanya v. *Ukund Rao*, 4 N. L. R. 9, relied upon.

When an occupancy-tenant dies, his right in his holding shall devolve as if it were land.

A Hindu son who has remained joint with his father is his heir and succeeds to his separate or self-acquired property, in preference to one who has separated.

Appeal against the decree of the Divisional Judge, Jubbulpore Division, dated the 3rd September 1909, confirming the decree of the District Judge, Seoni, dated the 10th December 1908.

Mr. *J. C. Ghose*, for the Appellants.

Mr. *J. Mittra*, for the Respondent.

JUDGMENT.—The so-called '*kabuliat-nama*,' Exhibit D-1, whereby the plaintiff-respondent recognized the validity of the partition of the occupancy land in question alleged by the defendants-appellants, was, in my opinion, clearly a release, and as such required a five-rupee stamp, and should not have been admitted in evidence on a stamp of one rupee without levy of deficient duty and peralty. Having been admitted, it cannot now on that account be excluded, but is it admittedly a document relating to property, the value of which is over Rs. 100, and if it was a release required registration. The appellant's learned Advocate contends that it is mere recital of facts, and not a release, and cites *Wazir Ali* v. *Asaram* (1), *Indraj* v. *Mouja* (2) and *Abdool Hoosein* v. *Goolam Hoosein* (3). But in both the Punjab cases the document in question was a petition addressed to a Court. In the earlier of them there was a sentence at the end of the petition, which stated that the parties had 'written this mutual decision that it may be a *sanad*' and the learned Judges observed "These words do to a certain extent favour the defendant's contention that the document was intended to be an operative instrument; but the words are too vague to suffice to give the document another interpretation from that which is gathered from a consideration of it as a whole." The Bombay case was a peculiar one—what was renounced was a mere *spes successionis* under Muhammadan Law, and Chandavarkar, J., held that this was not property either present or future, and that the document was not a release, but a mere agreement to release the right of heirship hereafter, giving a right to demand a release of

(1) 95 P. R. 1894.
(2) 97 P. R. 1895.
(3) 30 B. 304; 7 Bom. L. R. 742.

the claim of heirship on the latter's coming into existence. This is clearly distinguishable from the present case, for when the document (D-1) was executed the plaintiff's father was dead, and the right or claim he thereby relinquished was one that he was entitled to put forward, and whether it was legally correct or not, to obtain a decision on. If a formal renunciation of claim under such circumstances, and consent to a disposition of property is not a release, I do not know what is. A release is defined in Article 55 of Schedule of the Stamp Act as an instrument whereby a person renounces a claim upon another person or against any specific property. The document in question is clearly within this definition, and inasmuch as it declared rights in immoveable property of a value admittedly exceeding Rs. 100, I hold that it required registration, and being unregistered, cannot be admitted as evidence of the transactions with regard to the said immoveable property recorded in it.

Apart from the '*kabuliat*', to which it was said the Courts below had not given due weight and effect, no valid ground has been shown for interfering with the finding of the lower Appellate Court that the unequal partition of the occupancy-holding of the plaintiff's father alleged by the defendants-appellants has not been proved. And on that finding the plaintiff is at least entitled to the decree for joint possession that has been given him, and was, I think, probably entitled to more, *viz.*, to exclusive instead of joint possession. My brother Stanyon has held in *Ghanya* v. *Ukund Rao* (4) that the Hindu Law of succession by survivorship, as to the vesting of a son's interest by birth, is not applicable to a tenancy governed by the Central Provinces Tenancy Act. But he has also pointed out that 'in the case of Hindus the Courts, in dealing with agricultural holding, will follow the Hindu Law of inheritence so far as it may be consistent with the principles of the Tenancy Act and the law expressly provides in section 46 of the Central Provinces Tenancy Act that when occupancy-tenant dies his right in his holding shall devolve as if it were land'. Now the first Court found that the plaintiff remained joint with his father when his brothers separated: and this finding was not challenged by the memorandum of first appeal. Under Hindu Law a son who has remained joint with his father is his heir, and succeeds to his separate or self-acquired property, in preference to one who has separated (see Mayne's Hindu Law 7th edition, p. 731). And there is nothing in this rule inconsistent with the principles of the Tenancy Act, which, if anything, favour a tenancy's devolving to a single heir rather than to several, and no reason that I can see for departing from the plain provisions of that Act.

As the plaintiff did not appeal against the first Court's decree in so far as it was unfavourable to him, I cannot interfere in his favour, but I am certainly not prepared to interfere with the first Court's exercise of its discretion as to costs, which moreover, as the respondent's learned Counsel has pointed out, are to a great extent the same for joint as for separate possession, so this appeal fails, and is dismissed with costs.

Under the circumstances of the case I do not think it necessary to take action under section 61 of the Stamp Act with regard to the Exhibit D-1, as the plaintiff having admitted execution of it is the person who would be primarily liable to prosecution in respect of its not being duly stamped, and the Courts below have held that he was induced to sign it by fraud.

Appeal dismissed.

(4) 4 N. L. R. 9.

(s. c. 7 N. L. R. 39).

NAGPUR JUDICIAL COMMISSIONER'S COURT.

BERAR JURISDICTION.

CIVIL REVISION NO. 157 OF 1909.

March 8, 1910.

Present:—Mr. Skinner. A. J. C.

SHAIKH IMAM—APPLICANT

versus

ISHAK ALI—NON-APPLICANT.

Promissory note—Subsequent written agreement not to enforce it - Payee bound by agreement—Negotiable Instruments Act (XXVI of 1881), ss. 32, 120.

The payee of a promissory note, if he has made a contract to the contrary with the maker, is not entitled to sue on the note unless he has performed the conditions of the contract. The maker can set up against the payee a subsequent written agreement by the latter not to enforce it.

Somasundaram Chettiar v. *Narasimha Chariar*, 29 M. 212 at p. 216; 16 M. L. J. 103, dissented from.

Thimbleby v. *Barrow*, 7 L. J. Ex. 128; 3 M. and W. 210 and *Ray* v *Jones*, 34 L. J. C. P. 306; 19 C. B. (N. S.) 416; 11 Jur. (N. S.) 812; 12 L. T. 737; 13 W. R. 1018, not applied.

SHAIKH IMAM v. ISHAK ALI.

Revision against the decree of the Judge, Small Cause Court, Akola, dated the 22nd March 1909.

Mr. *G. L. Subhedar*, for the Applicant.

Mr. *M. R. Dixit*, for the Non-Applicant.

JUDGMENT.—The plaintiff applicant sold certain timber to the defendants for Rs. 500, and was paid Rs. 100, and given a promissory-note for the balance of Rs. 400. Subsequently, the plaintiff and the defendant Ishak Ali executed further written agreements, both of which referred to the promissory-note in the following terms:—

The defendant Ishak Ali's agreement "For Rs. 400 on account of the advance you have to receive from us you"—(apparently a clerical error for I)—"and Girrao Ramchandra have executed a promissory-note. After weighment of the wood you should take from us Rs. 400 on account of the promissory-note and return to us the promissory-note. The responsibility for this lies on you." And the plaintiff's agreement "You and Girrao Ramchandra have executed a promissory-note for Rs. 400. You may take back the promissory-note after paying me Rs. 400 when the wood is weighed."

The plaintiff sued on the promissory-note, and the defendents, whilst admitting execution thereof, pleaded that he was debarred by his subsequent agreement from suing on it, whilst the wood remained undelivered. The Small Cause Court has accepted this plea, and dismissed the suit, and the plaintiff has applied for revision. His learned Counsel relies on the unconditional nature of a promissory-note as defined in section 4 of the Negotiable Instruments Act, and on the decision of a Bench of the Madras High Court in *Somasundaram Chet iar* v. *Narasimha Chariar* (1), that a collateral covenant not to sue for the money due under a promissory-note for a limited time does not suspend the right of action on the note, and cannot be pleaded in bar of such an action.

There is an important distinction between the two cases in that in the Madras case the promissory-note had been endorsed to, and was sued on by, a holder for value. And no doubt a subsequent agreement by a payee of a promissory-note would not affect the rights of a holder in due course, who had no notice of such agreement. But in the Madras case the holder was held entitled to sue, even though he had been aware of the payee's having entered into an agreement limiting the right of suit, before the note was endorsed to him. The case is, therefore, an authority in the plaintiff's favour, but, with all respect for the opinion of the learned Judges who decided it, I am unable to accept their dictum on this point, as warranting the inference that the payee of a promissory-note is entitled to sue on it notwithstanding any contract he may have made to the contrary. They base their opinion on two English cases - *Thimbleby* v. *Barrow* (2) and *Ray* v. *Jones* (3). In the first of these cases a covenant not to sue for a limited time upon a simple contract-debt was held not pleadable in bar of an action for such debt. The judgments are very brief, but the notes of the argument show that the question was decided with reference to the technical English rules of pleading, and I do not find anything in the case that affects the question whether there is anything in the law of British India that prevents the plaintiff being bound by his admitted agreement, and this case was followed in *Ray* v. *Jones* (3), in which the question was whether an agreement by certain creditors of a bankrupt not to sue, if certain instalments were not punctually paid, barred their right to sue for their original claims.

On the other hand, section 32 of the Negotiable Instruments Act, XXVI of 1881, which is not referred to in the Madras decision, prescribes that: "In the absence of a contract to the contrary, the maker of a promissory-note is bound to pay the amount thereof at maturity according to the apparent tenor of the note." If the plaintiff's contention is correct, this section should, it seems to me, have said 'notwithstanding any contract to the contrary,' and when instead doing so it says 'in the absence of any contract to the contrary,' I do not see why the plaintiff should not be held bound by the terms of his admitted contract. Similarly, by section 120 of the Act no maker of a promissory-note is permitted to deny the validity of the instrument as originally made; but he is not forbidden to allege subsequent facts invalidating it and subject to the limitations imposed by the Evidence Act on the variation of written by oral agreements. I

(1) 29 M. 212 at p. 216; 16 M. L. J. 103.

(2) 7 L. J. Ex. 128; 3 M. and W. 210.

(3) 34 L. J. C. P. 303; 19 C. B. (N. S.) 416, 14 Jur. (N. S.) 812; 12 L. T. 737; 13 W. R. 1018.

see nothing to prevent his doing so. I am unable, therefore, to accept the plaintiff's contention that the decision of the Small Cause Court was not according to law and dismiss his application with costs.

Application dismissed.

(s. c. 7 N. L. R. 41).

NAGPUR JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEAL No. 66 OF 1910.

December 16, 1910.

Present:—Mr. Stanyon, A. J. C. and Mr. Skinner, A. J. C.

DADNOO—APPELLANT

versus

SOMNATH - RESPONDENT.

Court-fee—Decree absolute for redemption - Appeal on the ground that money deposited too late—Court Fees Act (VII of 1870), Sch. II, art. 17 (vi)—Civil Procedure Code (Act V of 1908), s. 2 (2)—"Decree", meaning of.

An absolute decree for redemption, foreclosure or sale is a final decree within the terms of section 2 (2), Civil Procedure Code, 1908. A memorandum of appeal against a decree absolute for redemption on the ground that the mortgage-money has been desposited by the mortgagor after the period fixed for its payment and should not have been received, requires a stamp of Rs. 10, under Article 17 (vi), Schedule II, of the Court Fees Act, as the relief sought in appeal cannot be exactly valued. Such an appeal does not require a stamp on the amount of the principal mortgage-money.

Onkar v. *Lakmichand*, 5 N. L. R. 130; 3 Ind. Cas. 920; *Dhirajsingh* v. *Rajaram*, 6 N. L. R. 164; 8 Ind. Cas. 1125, referred to.

First appeal against the order of the District Judge, Raipur, dated the 25th June 1910.

Mr. *F. W. Dillon*, for the Appellant.

JUDGMENT.—This is an appeal against an order allowing redemption of a mortgage under a conditional redemption-decree with the alternative of foreclosure, in a case in which the plaintiff-mortgagors have paid in the requisite sum, but the defendant mortgagees contend that the payment has been made too late, and should not have been received. No formal decree has been drawn up by the lower Court, but the effect of the order appealed against by the defendants mortgagees is that of a decree absolute for redemption.

The appeal was originally filed on a two-rupee stamp on the authority of the ruling of Ismay, J. C., in *Balmukand* v. *Haji Husain Ali Bohra* (1), but after carefully considering, that ruling, and hearing the appellant's learned Counsel, we are of opinion that the appeal requires a ten-rupee stamp under clause VI of Article 17. Schedule II, of the Court Fees Act. The correctness of the distinction drawn by that learned Judicial Commissioner between the meaning of the word decree in the Court Fees Act, and of the same word when used in the Code of Civil Procedure has already been doubted by a Bench of this Court in *Amir Ali* v. *Musammat Sujat Begum* (First Appeal No. 14 of 1910), and we prefer an interpretation that gives the same meaning to a technical legal term in two Acts of the Legislature, both of which deal with the procedure of Civil Courts. But we do not think it necessary to overrule Mr. Ismay's decision in the sense of holding that it was incorrect when delivered; as, whether it was then correct or not, an absolute decree for redemption, foreclosure, or sale is, we consider, clearly a final decree within the terms of the definition in clause (2) of section 2 of the present Code of Civil Procedure (Act V of 1908). And an appeal against such a decree must, therefore, be stamped as such, and not as a mere application.

The case is obviously one in which the relief sought by the appeal cannot be exactly valued; and we do not think it one in which the appeal needs to be stamped on the amount of the principal mortgage-money, in accordance with the views taken by Sir Bipin Bose, A. J. C., in *Onkar* v. *Lakmichand* (2), and by one of us in *Dhirajsingh* v. *Rajaram* (3). The mortgagees' right to recover their mortgage-money with interest or obtain foreclosure in default, is not denied, nor is the plaintiffs' right to redeem at the date of their suit. The only question raised is whether, under the circumstances that have arisen since the conditional decree was passed, the defendants are still bound to receive the payment that has been tendered, or are entitled to confine the plaintiffs to the other alternative of the decree they had obtained, *viz.*, extinction of the mortgage debt by foreclosure of the mortgaged property. And in such cases the proper fee is, we consider, one of 10 rupees under the provision cited above.

(1) 14 C. P. L. R. 100.

(2) 5 N. L. R. 130; 3 Ind. Cas. 920.

(3) 6 N. L. R. 164; 8 Ind. Cas. 1125.

BANSIDHAR *v.* RAGHUBIR.

(s. c. 7 N. L. R. 43).

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 492 OF 1910.

November 28, 1910.

Present:—Mr. Skinner, A. J. C.

BANSIDHAR—APPELLANT

versus

RAGHUBIR AND OTHERS – RESPONDENTS.

Multifariousness—Suit not to be dismissed—Amendment—Plaint—Mortgage—Redemption suit—Claim for future harra *on basis of lease cannot be joined with claim for redemption.*

A suit which is bad for multifariousness should not be dismissed without allowing the plaintiff an opportunity of amending his plaint, and so restricting his claim as to avoid the objection of multifariousness.

Varajlal v. *Ramdat*, 26 B. 259; *Ashabai* v. *Haji Tyab Haji*, 6 B. 390; *Kalian Singh* v. *Gur Diyal*, 4 A. 163, relied upon.

Ganeshi Lal v. *Khairati Singh*, 16 A. 279; *Mullick Kefait Hossein* v. *Sheo Pershad Singh*, 23 C. 821; *Smurthwaite* v. *Hannay*, (1894) A. C. 494; 63 L. J. Q. B. 737; 6 R. 293; 71 L. T. 157; 43 W. R. 113; 7 Asp. M. C. 485, considered

A prayer for amendment should not be refused on the ground that another party will have to be joined and as against him the suit would be time-barred.

Shriram Sadasheo Balkrishna Joshi v. *Ganpati Kumbi*, 2 N. L. R. 79, considered.

A claim to future relief in respect of *harra* on the basis of a lease from the mortgagee cannot be joined with a claim for redemption.

Appeal against the decree of the Divisional Judge, Jubbulpore Division, dated the 30th March 1910, reversing the decree of the District Judge, Mandla, dated the 31st March 1909.

Mr. *J. Mittra*, for the Appellant.

Dr. *H. S. Gour*, for the Respondents.

JUDGMENT.—The plaintiff-appellant sued the defendants Beohar Raghubir Singh, Pandu and Malsha, of whom the two latter are transferees of Rughubir Singh's

(1) to redeem a mortgage of the 4th November 1893 of *mauza* Mangroli Chheoli in the Mandla district,

(2) or for 3 years' value of the *harra* of the village, to which he says he was entitled under a 20 years' lease of the 22nd February 1894, and a declaration of his future rights thereunder,

(3) for any other relief the Court might think fit.

The first Court disallowed his claim to redeem, but gave him a decree against the defendant Beohar Raghubir Singh for Rs. 1,150, and against the defendants Pandu and Malsha, an injunction to 'allow the plaintiff to collect and take the *harra* crop of Mangroli Chheoli from the year 1907-08 to 30th June 1925, to which the plaintiff is hereby declared to be entitled.' The rest of the claim was dismissed, and cots were to be paid by both parties in proportion to their failure—the result being a small balance in the plaintiff's favour which might with advantage have been more distinctly stated. A plea of multifariousness was raised by the defendants and put in issue, but overruled as not having been pressed, and because the various reliefs were asked in the alternative.

The defendant Raghubir Singh appealed to the Divisional Judge; the defendants Pandu and Malsha, also appealed, and the plaintiff filed objections to the first Court's refusal of his claim to redeem the mortgage, and to its decision on other points decided against him. The lower Appellate Court held the plaintiff's suit bad for multifariousness, and on this ground allowed the appeals, disallowed the plaintiff's objections, and dismissed his suit with costs in both Courts, without going into the merits of the case and without allowing the plaintiff an opportunity of amending his plaint, and so restricting his claim as to avoid the objection of multifariousness.

The plaintiff has come up in second appeal, and it is admitted by his learned Counsel that the claim to future relief in respect of *harra* cannot be joined with the redemption claim, in connection with which it is only open to him to urge that the mortgagee should be required to account for the profits of *harra* received by him during the period, for which accounts are taken. But I am asked to give the plaintiff an opportunity of thus amending his plaint, and this request must, I consider, be allowed. It is opposed by the respondents' learned Counsel on grounds, most of which are pleas on the merits of the plaintiff's claim; and into these I do not think it necessary to go at present. He admits that as against his clients the claim to redeem was within time, when the suit was filed, but says another party will have to be joined, and that as against him the suit would, if now instituted, be time-barred, and that the proposed amendment should, therefore, not be allowed on the analogy of the ruling of this Court in *Shriram Sadasheo Balkrishna Joshi* v. *Ganpati Kumbi* (1) that, in the absence of

(1) 2 N. L. R. 79.

SAMPAT *v.* CHANGO.

any special circumstances, plaintiff will not be allowed to amend his plaint by claiming a fresh relief, which since the institution of the suit has become barred by time. But this question will, I think, properly arise when such new party is joined. Whether a suit against him is barred or not will then have to be decided. That it would be, is by no means obvious, and I refrain from deciding the point; but, assuming that it would be, the joinder after the period of limitation has expired, of a necessary party to a suit instituted before it expired is not the same thing as asking for a time-barred relief against the original defendant, which the plaintiff had not chosen to ask for when he filed his suit. And in this case the relief of redemption was asked for from the first, though an alternative relief was also asked, which give occasion for the objection of multifariousness.

The respondents' learned Counsel further argued that this Court should not in the exercise of its discretion allow amendment at this stage, as the plaintiff had chosen to take the risk of proceeding with a multifarious suit despite the objection taken to it on this account in the first Court. And in support of this proposition he cited the following rulings as showing that multifariousness is not merely an irregularity, but an illegalty affecting the Court's jurisdiction:—

Varajlal Bhaishanker v. *Ramdat Harikrishna* (2); *Ashebai* v. *Haji Tyab Haji* (3); *Kalian Singh* v. *Gur Dayal* (4); *Ganeshi Lal* v. *Khairaiti Singh* (5); *Mullick Kefait Hossein* v. *Sheo Pershad Singh* (6); *Smurthwaite* v. *Hannay* (7).

The result of a perusal of these cases, however, seems to me not in his favour, but distinctly against him, as in most of them amendment of the plaint was allowed, and in none refused. In *Varajlal* v. *Ramdat* (2) two plaintiffs with separate causes of action were held to have been wrongly joined, but the plaint was allowed to be amended in second appeal by striking out one of them with liberty to him to bring a fresh suit. In *Ashabai* v. *Haji Tyab Haji* (3) one of the two claims found to have been wrongly joined was ordered to be struck out. In *Kalian Singh* v. *Gur Dayal* (4) the lower Appellate Court had dismissed the suit (as the learned Divisional Judge has in this case) on the sole ground of misjoinder, but the High Court held that the misjoinder had not affected the merits of the case or the jurisdiction of the Court, and remanded the case for disposal on its mertis. In *Ganeshi Lal* v *Khairaiti Singh* (5) there was found to have been misjoinder of defendants, but the plaintiff was allowed to withdraw with liberty to file a fresh suit against certain of the defendants, and the decree was upheld against the others. In *Mullick Kefait Hossein* v. *Sheo Pershad Singh* (6) the question was whether time spent in a suit that failed on the ground of misjoinder should be excluded in reckoning limitation in a subsequent suit. In *Smurthwaite* v. *Hannay* (7) misjoinder was, it is true, held by the House of Lords to be more than a mere irregularity, and to that extent the decision is against that of the Allahabad High Court in *Kalian Singh* v. *Gur Dayal* (4) but the order of the Queen's Bench Division which their Lordships (reversing the decision of a majority of the Court of Appeal) restored, required the plaintiffs to "elect as to which claim they would proceed with." So this decision is no authority for dismissing the plaintiff's suit without allowing him the option of electing which of the two claims he would prosecute, nor has any authority for that course been shown me.

I set aside the decree of the lower Appellate Court, and remand the case to that Court for a fresh decision of the defendants' appeals, and of the plaintiff's objections. The plaintiff will receive a refund of the Court-fee on his memorandum of second appeal, and the other costs of this Court will, if the plaintiff ultimately obtains any relief against any of the respondents be paid by such respondents, but if his suit is ultimately dismissed, will be borne as incurred.

Case remanded.

(2) 26 B. 259. (3) 6 B. 390.
(4) 4 A 163. (5) 16 A. 279.
(6) 23 C. 821.
(7) (1894) A. C. 494, 63 L. J. Q. B. 737; 6 R. 299 71 L. T. 157; 43 W. R. 113; 7 Asp. M. C. 485.

(s. c. 7 N. L. R. 46).

NAGPUR JUDICIAL COMMISSIONER'S COURT.

BERAR JURISDICTION.

SECOND CIVIL APPEAL NO. 52 OF 1910.

June 28, 1910.

Present:—Mr. Skinner, A. J. C.

SAMPAT—APPELLANT

versus

CHANGO AND OTHERS—RESPONDENTS.

Contract Act (IX of 1872), s. 74—Penalty—Deb

payable by instalments—Condition that whole debt would be payable at once on default of certain instalments—Future interest payable in lump sum.

When a debt is payable by instalments carrying no interest, a provision that on default in the payment of one or more instalments the whole debt would be payable at once is not one against which relief should be given under section 74 of the Conrtact Act. Such a provision, even if technically a penalty, should be enforced.

A stipulation that future interest shall become payable in a lump sum on a default occurring in the payment of an instalment, can be relieved against under section 74 of the Contract Act, but not when the amount of interest payable in default does not give more than moderate interest on the principal from the date of the bond.

Appeal against the decree of the District Judge, West Berar, Akola, dated the 26th October 1909, confirming that of the Subordinate Judge, Khamgaon, dated the 15th April 1909.

Mr. *P. S. Kotwal*, for the Appellant.

JUDGMENT.—The plaintiff-appellant sues to enforce a mortgage by conditional sale executed by the defendants-respondents on the 23rd April 1904 fora sum of Rs. 1,500 and Rs. 375 future interest, made payable in 15 yearly instalments of Rs. 125 each. In default of payment as arranged the instalments were to bear interest at 1 per cent. per mensem. A house and field were mortgaged as security for this debt; and it was agreed that if four successive instalments should fall due, the whole amount should be payable, and that if it should not be paid the mortgaged property should be foreclosed.

Execution of the mortgage-deed, and the validity of the consideration (a previous mortgage and other debts) were admitted by the defendants before the first Court, and they also admitted having only paid one instalment (the first), and that four instalments were due, but contended that the clause making the whole debt payable at once was penalty, and should not be enforced. And this contention was accepted by the first Court, and as the plaintiff had expressed his unwillingness to take a decree for the four instalments and interest on them, his suit was dismissed as premature. He appealed but without success, and he has now come up in second appeal.

The view taken of the case by the Courts below seems to me clearly incorrect. The consideration may have been made up of old debts, and may, as the learned District Judge has surmised, have included a good deal of interest. But the fairness of the contract, into which they had entered, was not questioned by the defendants, nor any cause for going behind it alleged. It must, I consider, therefore, be assumed that at the date of the mortgage-deed the plaintiff was entitled to receive Rs. 1,500 from the defendants, and that amount must for the purposes of this case be regarded as principal. That being so, the arrangement for its re-payment along with Rs. 375 interest by 15 annual instalments was a very favourable one to the defendants, and so far as the principal sum of Rs. 1,500 is concerned I can see no ground for holding that the provision that on default in four instalments the whole amount should be payable is one against which relief should be given under section 74 of the Contract Act. A creditor, who agrees to accept payment by instalments is entitled to require that the agreement should be adhered to by the debtor; and if he stipulates that default, even in regard to one instalment, shall make the whole debt exigible, he does not thereby demand more than is already due to him. And even if the whole debt thus made payable is technically a 'sum named in the contract as the amount to be paid in case of such breach' within the terms of section 74, and, therefore, a penalty, it seems to me clearly one that should be enforced. There is more reason for doubt with regard to a stipulation that future interest shall become payable in a lump on a default occurring, and there may no doubt be cases in which relief should be given against such a provision. But in this case the result of the default was to make Rs. 350 payable as four years' interest on Rs. 1,400 unpaid principal in addition to interest at 12 per cent. per annum on the three defaulted instalments. And if, omitting these three instalments, the Rs. 350 be regarded as interest on Rs. 1,100, only, is still does not, if divided by 4, give a rate of yearly interest which can be regarded as at all exorbitant.

The learned District Judge refers to the mortgage condition as though that were also a penatly and unconscionable; and from his remark that 'the bond turns into a sale-deed, and all the mortgage pro-

perty is gone past redemption' seems to have thought that the sale was intended to be an out and out one without the usual opportunity of redemption. But whatever may have been the intention of the parties, the law does not allow this. The transaction is one of mortgage by conditional sale. The defendants will have an opportunity to redeem, and it is only if they fail to do so that the mortgagee will, in lieu of his principal and interest, get the mortgaged property, which may or may not 'more than compensate him', but probably not so very much more, or it would be redeemed. And that he should require security when allowing such protracted payment of a debt, which was partly due on account of previous mortgage-deeds and partly of a decree, was clearly reasonable.

I have felt some difficulty as to whether the interest agreed on in the deed should be allowed on the whole debt after default of the fourth instalment, or only on the overdue instalments up to that date. The point is, however, not pressed by the appellant's learned Counsel, and the case is, I think, analogous to that of *Sukhdeo* v. *Sahiblal* (1) and distinguishable from that of *Sheoppa* v. *Rukhma* (2). Interest will, therefore, be allowed at the contract rate of 12 per cent. per annum on the first three overdue instalments from the date of default in each case to that of default in the fourth instalment, and thereafter on the whole amount which then became payable, including interest at the Court rate of 6 per cent. per annum until payment. The decrees of the Courts below will be set aside, and a decree passed for foreclosure of the mortgaged property in default of payment of the amount that will be due to the 3rd January 1911 together with costs in all three Courts. The instalments, which under the deed were payble in Pus, may be taken to have been payable on the 3rd January in each year commencing from 1904.

(1) First Appeal No. 63 of 1909.
(2) 5 N. L. R. 37; 2 Ind. Cas. 27.

(s. c. 8 A. L. J. 237).

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 8 OF 1911.

January 28, 1911.

Present:—Mr. Richards, K. C., Judge.

RAM NIHORE UMAR—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (Act V of 1898), ss. 340, 476—Inquiry—Accused person—Pleader—Right to be heard—Practice—Civil Procedure Code (Act V of 1908), O. III, r. 1.

A Civil Court making a preliminary inquiry under section 476 of the Code of Criminal Procedure is not a Criminal Court and the person against whom the inquiry is made is not an accused person.

Therefore, a Pleader has no right under section 340, Criminal Procedure Code, to appear for such a person.

The general practice is to hear Pleaders on behalf of persons in civil or criminal matters, and to secure their assistance as *amicus curiæ* even where parties have no right to be heard either personally or by Pleader.

Quære:—Whether in an inquiry under section 476, Criminal Procedure Code, by a Civil Court, a Pleader has a right to appear on behalf of the person against whom the inquiry is being made under rule 1, Order III, Civil Procedure Code, 1908.

Revision against the order of the District Judge of Mirzapur.

Mr. *E. A. Howard*, for the Applicant.

Mr. *R. Malcomson*, for the Crown.

JUDGMENT.—The question which is supposed to arise in the present case is whether or not a Pleader is entitled to be heard under the following circumstances: —

A certain decree obtained in the Bombay Presidency was sent for execution to Mirzapur. The judgment-debtor, who is the present applicant, produced a receipt and alleged that the decree had been obtained against him in Bombay by the fraud of the decree-holder. Thereupon, the District Judge issued a notice to the decree-holder to show cause why he should not be prosecuted. The decree-holder then appeared and some evidence was recorded. The Judge was told the next day that the parties had compromised the case. The learned Judge was of opinion that there was ground for thinking the receipt produced by the judgment-debtor to be a forgery and he then proceeded to take action under section 476 of the Code of Criminal Procedure. That section is as follow:—

"When any Civil, Criminal or Revenue Court is of opinion that there is ground for

inquiring into any offence referred to in section 195 and committed before it or brought under its notice in the course of a judicial proceeding, such Court, after making any preliminary inquiry that may be necessary, may send the case for inquiry or trial to the nearest Magistrate of the first class, and may send the accused in custody, or take sufficient security for his appearance before such Magistrate, etc."

Up to the present time the learned District Judge has not either sent the case for inquiry or trial. He has merely proceeded to make the preliminary inquiry which he thinks necessary. Mr. Howard, who appeared as Counsel for Ram Nihore, contended before the learned Judge that under the circumstances of the case he had no jurisdiction to inquire into the case under the provisions of section 476. The Judge's note is as follows:—

"Present—Mr. Howard for Ram Nihore and Ram Nihore in person.

"Mr. Howard represents that his client is thinking of applying to the Hon'ble High Court for transfer, and argues that this Court has no jurisdiction to inquire into the case under section 476 of the Code of Criminal Procedure after the parties filed a compromise.

"ORDER.—I am not sure that Mr. Howard has any *locus standi* at this stage of the case in proceedings under section 476, Criminal Procedure Code. The fact that the parties to the decree filed a compromise in satisfaction of the decree, does not, in my opinion, in any way affect the right of jurisdiction of the Court to proceed with the inquiry under section 476 of the Code of Criminal Procedure."

Mr. Howard says that Mr. Moir refused to hear him, but he admits that he took up the position that he was entitled to be heard as of right. I may mention, in the first place, that it does not definitely appear either in the affidavit filed in support of the application or in the order that Mr. Moir refused to hear Mr. Howard. In support of the right which Mr. Howard says his client had, he quotes section 340 of the Code of Criminal Procedure. That section provides that "every person accused before any Criminal Court may of right be defended by a Pleader." It is quite clear that the applicant was not, at the time the learned Judge was proceeding to make the inquiry, a person accused before Criminal Court. Even if we assume that he was an accused person, the Court that was making the preliminary inquiry was not a Criminal Court, but a Civil Court.

Mr. Howard next quotes Order III, rule 1, of the Code of Civil Procedure. That rule is as follows:—

"Any appearance, application or act in or to any Court, required or authorized by law to be made or done by a party in such Court may, except where otherwise expressly provided by any law for the time being in force, be made or done by the party in person, or by his recognized agent, or by a Pleader duly appointed to act on his behalf: Provided that any such appearance shall, if the Court so directs, be made by the party in person."

It seems to me extremely doubtful that in the facts of the case there was any appearance, application or act in or to any Court within the meaning of this rule. I am, however, extremely reluctant to give a decision upon a question which I do not think has actually arisen and without a very full argument upon the question involved. Apart, however, from the right of a Pleader to be heard, it is, I think, a very general practice to hear Pleaders on behalf of persons in civil or criminal matters. The Court is willing, as a rule, to get the help and assistance of legal gentlemen as *amicus curiæ* if in no other capacity, *e. g*, section 440, Criminal Procedure Code, provides that no party has any right to be heard either personally or by Pleader before any Court when exercising powers of revision. In the High Court the Judges make a practice of hearing Pleaders in revision, but at the same time professional gentlemen ought to be extremely careful that this privilege is not abused. In the present case I am quite certain that Mr. Moir would have been glad to hear Mr. Howard as an *amicus curiæ* if question of right had not been pressed. Under all the circumstances of the case, I do not think that I ought to make any order in revision at this stage of the proceedings. The application is accordingly rejected.

Application rejected.

ZAHURAN *v.* RAHIM.

(s. c. 8 A. L. J. 247).

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 349 OF 1908.

May 5, 1909.

Present:—Mr. Justice Karamat Husain.

ZAHURAN AND OTHERS—DEFENDANTS—APPELLANTS

versus

RAHIM AND OTHERS—PLAINTIFFS—RESPONDENTS.

Adverse possession ripening into ownership—Trespasser—Constructive possession—Presumption—Trespasser of a part not a trespasser of the whole—Burden of proof—Evidence Act (I of 1872), s. 114—Limitation Act (XV of 1877), Sch. II, art. 144.

(1) Adverse possession which ripens into ownership, under the Indian Limitation Act, must be actual, exclusive and continuous for more than 12 years.

(2) No presumption of constructive possession ought to be made in favour of a trespasser.

(3) A trespasser by virtue of being in adverse possession of a part cannot be deemed to be in adverse possession of the whole. A plaintiff who bases his title on adverse possession for more than 12 years must prove that his possession was actual, continuous, exclusive and adverse for more than 12 years.

(4) The law relating to presumptions is not intended to enable a wrong-doer to turn it to his own account. A wrong-doer, therefore, cannot be allowed to call in aid the provisions of section 114 of the Indian Evidence Act to establish his title

Jagjivan Das v. *Bai Amba*, 25 B. 362; *Vithal Das* v. *Secretary of State for India*, 26 B. 410; *Tarubai* v. *Venkatarao*, 27 B. 43; *Secretary of State for India* v. *Krishnamoni Gupta*, 29 C. 518; 29 I. A. 104; *Wali Ahmed Chowdhry* v. *Totameah Chowdhry*, 31 C. 397; *Udit Narain* v. *Golab Chand*, 26 I. A. 236; 27 C. 221; *Rains* v. *Baxton*, 14 Ch. D. 537; 49 L. J. Ch. 473; 43 L. T. 88; 28 W. R. 954, referred to.

Second appeal from the decree of the District Judge of Jhansi, reversing the decree of the Munsif of Jalaun.

Mr. *Surrendra Nath Sen*, for the Appellants.

Mr. *J. N. Mukerji*, for the Respondents.

JUDGMENT.—Umrao and Bhaggu were brothers. The genealogical table showing the relation of the parties is given in the judgment of the learned Munsif on page 24 of the Paper book. Certain descendants of Bhaggu brought an action for declaration of their ownership of 36 *bighas*, 17 *biswas*, $11\frac{3}{4}$ *biswansis* by adverse possession for more than 12 years before the institution of the suit. They based their claim on extinctive prescription. They claimed 3 *bighas*, 19 *biswas*, $8\frac{1}{4}$ *biswansis*, by right of inheritance. The defence was that the plaintiffs had not been in adverse possession of the portion of the property which they claimed by extinctive prescription for more than 12 years before the institution of the suit, and that the defendants were in possession of it. With reference to the plots claimed by inheritance the defence was that the claim was barred by limitation. The Court of first instance dismissed the claim. The lower Appellate Court reversed the decree of the learned Munsif and came to the conclusion that Imami and after him the plaintiff had been in adverse possession as owners, since the 2nd of April 1894, at the latest, of the 33 *bighas*, gifted by *Musammat* Zahuran in 1891 to Nanhe, Wazir and Gulab, and that Imami and his successors had been in possession of 7 *bighas* given to Karim also for more than 12 years before the suit. I may note that the two areas which form the subject matter of two distinct findings do not correspond with the areas claimed under two different titles, *i. e.*, extinctive prescription and inheritance. In order to test the value of the findings of the learned District Judge, I quote the following passages from his judgment:—

"The evidence which plaintiffs have produced to prove their possession is, as the learned Munsif has pointed out, anything but satisfactory.

"It (agreement) shows that they (plaintiffs) were in adverse possession of 33 *bighas*, $9\frac{1}{2}$ *biswas* out of the land now in suit on 11th August 1905. The area, 33 *bighas*, $9\frac{1}{2}$ *biwas*, should evidently be 33 *bighas*, 17 *biswas*, as the deed plainly refers to all the property in suit except that gifted to Karim. I am entitled to hold under section 114 of the Evidence Act that this adverse possession of 1905, dated from early in 1894 and continued up to the date of the institution of this suit, for no definite occurrence has been sworn to which would have marked the commencement or termination of such adverse possession..... .....It is sworn by the Patwari that Imami cultivated the *khudkasht* portion of the land in suit (*i. e.*, the land claimed by inheritance) from 3 years after Umrao's death, *i. e.*, from at the latest, early in 1904 5. The presumption must be, with reference to sections 110 and 114 of the Evidence Act, that this possession of Imami was continued by his representatives, and that the possession of the latter is that of owners."

The above passages from the judgment of learned District Judge clearly show that the findings as to adverse possession at which, he has arrived are not based on the evidence adduced by the plaintiffs: which evidence has

been held by the Court of first instance as well as by the lower Appellate Court to be unsatisfactory. The plaintiffs have, as a matter of fact, been found to be in adverse possession of the portion claimed by extinctive prescription on the 11th of August 1905, and that adverse possession, by the help of section 114 of the Evidence Act, has been extended on both sides. It has been held to date retrospectively from early in 1894 and to continue prospectively to the date of the institution of the suit. With reference to the property claimed by right of inheritance, Imami has been found to be in adverse possession of it in 1894, and this adverse possession by the aid of sections 110 and 114 of the Evidence Act has been held to be adverse possession for more than 12 years. The defendants have preferred a second appeal to this Court. Their learned Vakil contends that if a plaintiff institutes a suit for a declaration that by adverse possession for more than 12 years before the institution of the suit he has become the owner of that land in suit, he ought to prove his actual and continuous possession for a period of more than 12 years before the institution of the suit, and that he may not call in aid sections 110 and 114 of the Indian Evidence Act. This contention is directed to the claim based on extinctive prescription. In support of this contention he relies on *Jagjivan Das* v. *Bai Amba* (1); *Vithal Das* v. *Secretary of State for India* (2); *Tarubai* v. *Venkatarao* (3); *Secretary of State for India* v. *Krishnamoni Gupta* (4) and *Wali Ahmed Chowdhry* v. *Tota Meah Chowdhary* (5).

In *Jagjivan Das* v. *Bai Amba* (1), Ranade, J., at page 366, remarks "possession to be adverse must be shown to be continuous, public and adequate, to the circumstances of the case."

In *Tarubai's case* (3), the remarks on page 66 are, "where there is no allegation of original possession or discontinuance of possession, that the party relying on adverse possession to displace a proved or admitted title must show such adverse possession to have commenced and continued from twelve years prior to suit."

In *Secretary of State for India* v. *Krishnamoni Gupta* (4), their Lordships of the Privy Council say,—"For the purpose of trying the question whether limitation applies, for Government must be regarded as a trespasser and dispossessor of the rightful owner, and in the opinion of their Lordships it would be contrary to principle and authority to imply such constructive possession in favour of a wrong-doer so as to enable him to obtain a title by limitation. In order to sustain a claim to land by limitation under the Indian Limitation Act there must in their opinion be actual possession of a person claiming as of right by himself or by persons deriving title from him. The possession of the Government was in fact determined by the submergence of the land which then became derelict, and so long as it remained in that state, no title could be acquired against the true owner. Sir R. Garth, however, seems to have thought that in such a case the possession of the trespasser would continue, until the true owner resumed possession. Their Lordships cannot agree in this view. On the contrary they think that on the dispossession of the Government by the *vis major* of the floods, the constructive possession of the land was (if anywhere) in the true owners. In the case of the *Trustees, Executors and Agency Company* v. *Short* (6), it was laid down by this Board that if a person enters upon the land of another and holds possession for a time, and then without having acquired a title under the statute abandons possession, the rightful owner on the abandonment is in the same possession in all respects as he was before the intrusion took place." And the opinion of Parke, B., is there quoted that there must be both absence of possession by the person who has the right and actual possession by another to bring the case within the statute. Their Lordships think that for this purpose dispossession by *vis major* has the same effect as voluntary abandonment, and they are of opinion that the case of *Kally Churn Sahoo* v. *The Secretary of State* (7), was wrongly decided and ought to be overruled. In the result, therefore, their Lordships agree with the Court below on this part of the case and the appeal of the Secretary of State fails."

In *Vithal Das's case* (2) it is remarked on page 416, "that to constitute a title by adverse possession, the possession required to be proved must be, as pointed out by the Privy Council

(1) 25 B. 362.
(2) 26 B. 410.
(3) 27 B. 43.
(4) 29 C. 518 at p. 534; 29 I. A. 104.
(5) 31 C. 397.
(6) (1888) 13 A. C. 793; 5 L. J. P. C. 4; 59 L. T. 677; 37 W. R. 433; 53 J. P. 132.
(7) 6 C. 725; 8 C. L. R. 90.

in *Radhamoni Debi* v. *Collector of Khulna*, (8), adequate in continuity, in publicity and in extent, and it is displaced by evidence of partial possession by the party against whom the title by adverse possession is claimed. "In order to constitute possession it must be a complete possession exclusive of the possession of any other person" [*per* Cairns, L. C., in *Laws* v. *Telford* (9)]. "If there are two persons in a field, each asserting that the field is his and each doing some act in the assertion of the right of possession, and if the question is which of those two is in *actual* possession, I answer, the person who has the title is in actual possession and the other person is a trespasser [*per* Lord Selborne in the same case, *Vithal* v. *Secretary of State for India* (2)].

In *Wali Ahmed Chowdhary* v. *Tota Meah Chowdhary* (5), it is remarked,—"He (the Pleader for the appellant) further contends on the authority of the case of *Mohini Mohan Roy* v. *Promoda Nath Roy* (10), that the occupation by a wrong-doer of a portion of the land only cannot he held to constitute constructive possession of the whole; that promiscuous acts at different times by a fluctuating body of persons, as in this case by the Talukdars and neighbouring villagers in grazing their cattle on the waste lands, are not sufficient to amount to adverse possession: *Lutchmeeput Singh* v. *Sadaulla Nushyo* (11), that constructive possession in favour of a wrong doer cannot be implied so as to enable him to obtain thereby a title by limitation. *Secretary of State for India* v. *Krishnamoni Gupta* (5), and lastly, that possession must be adequate in continuity, publicity and extent, to show that it is possession adverse to the competitor. *Radha Moni Debi* v. *Collector of Khulna* (8)."

The above cases are authority for the following propositions:—

(*a*) The adverse possession which under the Indian Limitation Act ripens into ownership must be actual, exclusive and continuous for more than 12 years.

(*b*) A trespasser is not entitled to have constructive possession presumed in his favour.

(*c*) A trespasser by virtue of an adverse possession of a part cannot be deemed to be in adverse possession of the whole.

Besides, it has been laid down in *Udit Narain* v. *Golab Chand* (12), that if plaintiff claims title by adverse possession for 12 years, the burden of proving such possession rests on him. Their Lordships say, "The lands in question were formerly made over to the Maliks of Ganghara, and the plaintiffs do not claim them as part of their old lands; but the propositions on which they rely, are these—*first*, that for a period of 12 years they were in possession of the land and thereby acquired title: and, *secondly*, that they brought this action within 12 years of their dispossession by the defendants. The burden of proving both these propositions rests on the plaintiffs.

The learned author of the Law of Limitation and Prescription in British India, on the authority of their Lordships' ruling in *Udit Narain's case* (12) and of the judgment of Fry, J., in *Rains* v. *Buxton* (13), says:

"When the plaintiff relies on extinctive prescription (under section 34, C. 27, 3 and 4 William IV or section 29, Act IX of 1871, or section 28, Act XV of 1877), he must prove that he has been in possession for the prescribed period, but if the defendant contends that his right is saved by reason of the plaintiff's fraud, or by some other exceptional circumstances, it is for the *defendant* to prove the fraud or the other circumstances. If the position of the parties be reversed, and the party out of possession be the plaintiff, he shall have, of course, to prove that his suit is not barred by limitation by reason of the exceptional circumstances on which he relies." (P. 124, 4th Ed.).

These authorities cited above fully establish that a plaintiff who bases his title on adverse possession for more than twelve years must prove an actual, continuous, exclusive and adverse possession for more than twelve years.

The plaintiffs in the case before me, as has already been stated, claimed the ownership of a portion of the property by adverse possession and of the rest by succession. The facts which they have to establish relating to each of the two portions cannot, therefore, be the same and have to be dealt with in

(8) 27 I. A. 136; 27 C. 943; 4 C. W. N. 597.
(9) (1876) 1 A. C. 414 at p. 423; 35 L. J. Ex. 613; 35 L. T. 69.
(10) 24 C. 256; 1 C. W. N. 304.
(11) 9 C. 698; 12 C. L. R. 282.
(12) 26 I. A. 236 at p. 239; 27 C. 221.
(13) 14 Ch. Div. 537 at p. 540; 49 L. J. Ch. 473; 43 L. T. 88; 28 W. R. 954.

this judgment separately. First, as to the portion the ownership of which is claimed by adverse possession. The plaintiffs in respect of this portion, as the very nature of their claim shows, are wrong-doers. They seek the help of the Court, in consequence of their continuing wrong, to deprive the rightful owners of their property. By the provision of the Indian Evidence Act the burden of proving their actual, continuous, exclusive and adverse possession lies upon the plaintiffs. They, as worng-doers, in my opinion, are not entitled to the presumption of the continuity of their adverse possession for any appreciable period of time. The law relating to presumptions is not intended to enable a wrong-doer to turn it to his own account. They, therefore, cannot be allowed to call in aid the provisions of section 114 of the Indian Evidence Act to establish their title to the land. They in order to succeed must strictly prove by clear and cogent evidence their *actual, exclusive, continuous* and *adverse* possession for more than 12 years before the institution of their suit. So much as to the presumption of their adverse possession by the lower Appellate Court between 1895 and the 24th January 1907.

Regarding the retrospective continuity of their adverse possession between 1894 and 1905, which the lower Appellate Court has also presumed in their favour, it is enough to say that such a retrospective presumption is unknown to the Law of British India and to the English Law which is the basis of our law in this respect. It is to be noticed further that if retrospective and prospective presmptions of adverse possession were engrafted on the law relating to presumptions in British India, one year's continuous and adverse possession or even an adverse possession for a shorter period with the help of retrospective and prospective presumptions as to adverse possession would be quite enough to confer ownership upon the person in possession and would not only frustrate the provisions of section 28 of the Indian Limitation Act (XV of 1877), which renders twelve years adverse possession a condition precedent to the extinction of the owner's right in the property, but would go against the general policy of law which discourages wrongs. Coming to the plots of land the ownership of which is claimed by succession, I find that the learned Munsif framed the following issue:—Are the plaintiffs entitled to any portion of the property by right of inheritance? He found that the claim by right of inheritance over 3 *bighas*, 19 *biswas*, 18½ *biswansis*, was also barred by limitation. In this view of the case it was unnecessary for him to come to a finding as to the right of succession. The lower Appellate Court, however, came to a different conclusion. It found that Imami and his successors had been in adverse possession as owners of the 7 *bighas* gifted to Karim also for more than 12 years. In order to pronounce such a finding the Court should have found that the plaintiffs had no right to claim by succession. Without a finding they could not be found to be in adverse possession of the plots because an heir cannot be in adverse possession of the property which he claims by succession against a defendant who has no title to it.

For the above reasons, I hold that the findings of the lower Appellate Court relating to the portion claimed by adverse possession are not sufficient. That Court on the evidence on the record ought to find the duration of the actual, continuous, exclusive and adverse possession of the plaintiffs. Regarding the portion claimed by succession, there should be a finding that the plaintiffs are or are not the heirs of the owner of that portion which they claim by right of inheritance.

If the Court finds that they are not heirs of the owner of the property, the finding already recorded will be sufficient for the disposal of the appeal, but if the Court finds that they are the heirs of the owner of that portion, it will have further to find whether their claim is or is not barred by time.

The result is that I, under Order XLI, rule 25, send down the following issues for trial. The Court will be at liberty to take such additional evidence as the parties may adduce. Ten days will be allowed for objections on return of the findings.

The issues are:—

(1) What is the duration of the actual, continuous, exclusive and adverse possession of the plaintiff over the property claimed by adverse possession?

(2) Are the plaintiffs the heirs of the owner of the property claimed by right of inheritance?

If the Court finds on the second issue in the affirmative, it should record finding on the following issue;—

(3) Have the plaintiffs been in proprietary possession of the portion claimed by succession within 12 years of the institution of the suit?

JUDGMENT.—By my order, dated the 15th of May 1909, I sent down three issues to the lower Appellate Court for trial. The findings on these issues are against the defendants-appellants. It is, however, contended by the learned Vakil for the appellants that the findings on issues Nos. (1) and (2) are findings which are vitiated by the learned Judge's erroneous application of law. I am unable to accept the contention of the learned Vakil. In my opinion, the findings arrived at by the lower Appellate Court are findings of fact and are fatal to this appeal. I, therefore, dismiss the appeal with costs.

Appeal dismissed.

(s. c. 13 Bom. L. R. 154).

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 230 OF 1910.

January 11, 1911.

Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Batchelor.

BALAMBHAT RAVJIBHAT JOSHI—APPELLANT

versus

VINAYAK GANPATRAO PATWARDHAN—RESPONDENT.

Decree—Execution—Landlord and tenant - Agreement embodied in decree of Court - Relief against forfeiture—Granted in execution proceedings.

The rule that Courts of equity will not forego their power to grant relief against forfeiture in the case of non-payment of rent where the relations of the parties are those of landlord and tenant, merely on the ground that the agreement between them is embodied in a decree of Court, applies alike to a suit to enforce a decree and to a proceeding in execution.

Krishnabai v. *Hari Govind*, 31 B. 15; 8 Bom. L. R. 813; 1 M. L. T. 370 (F. B.), followed.

Second appeal from the decision of the First Class Subordinate Judge, A. P., at Satara, in Appeal No. 11 of 1909, confirming the order passed by the Subordinate Judge of Tasgaon, in *Darkhast* No. 37 of 1908.

Messrs. *G. S. Rao* and *D. A. Tuljapurkar*, for the appellant.

Mr. *P. P. Khare* for the Respondent,

JUDGMENT.—In this case we think that the Subordinate Judge with appellate powers was in error in thinking that the case of *Krishnabai* v. *Hari Govind* (1) is not in point. The *ratio decidendi* in that case is that Courts of equity will not forego their power to grant relief against forfeiture in the case of non-payment of rent where the relations of the parties are those of landlord and tenant, merely on the ground that the agreement between them is embodied in a decree of the Court.

We think that that ruling applies alike to a suit to enforce a decree and to proceeding in execution.

Upon the materials before us, we think it is a case in which the Court in the exercise of its discretion should have refused to award forfeiture in favour of the plaintiff having regard to the fact that he had already accepted payment of sums more than sufficient to discharge the obilgations of the defendants under the decree.

We set aside the decree of the lower Court and dismiss the application of the judgment-creditor with costs throughout.

Decree reversed.

(1) 31 B. 15; 8 Bom. L. R. 813; 1. M. L. T. 370 (F.B)

(s. c. 13 Bom. L. R. 158).

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 132 OF 1907.

February 1, 1911.

Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Batchelor.

PHEROZSHAW JAMSETJI COMISSARIATVALLA—APPELLANT

versus

WAGHJI KUVERJI RAJE SHIRKE—RESPONDENT.

Jurisdiction - Consent of parties cannot confer.

Consent of parties cannot change the statutory value of a suit, and thus determine the jurisdiction of a Court.

First appeal from the decision of the First Class Subordinate Judge at Thana, in Suit No. 243 of 1903.

Mr. *Raikes* and *Coyaji*, with him Messrs. *S. V. Bhandarkar* and *K. N. Koyaji*, for the Appellants.

Mr. *M. R. Bodas*, for the Respondent.

JUDGMENT.—In this case the suit has been valued for the purposes of Court-fees at Rs. 540. It is a suit which falls within section 7, paragraph (4), sub-sections (*c*) and (*d*) of the Court Fees Act and, therefore, according to the Suits Valuation Act of 1887, the value as determinable for the

computation of Court-fees and the value for the purposes of jurisdiction is the same.

The suit has been disposed of by the First Class Subordinate Judge of Thana. Section 8 of the Bombay Civil Courts Act provides that "Except as provided in sections sixteen, seventeen and twenty-six, the District Judge shall be the Court of Appeal from all decrees and orders passed by the Subordinate Courts from which an appeal lies under any law for the time being in force", and section 26 provides that "In all suits decided by a Subordinate Judge of the First Class in the exercise of his ordinary and special original jurisdiction of which the amount of value of the subject-matter exceeds five thousand rupees, the appeal from his decision shall be direct to the High Court".

We think it clear that the value of the subject-matter according to the provisions of the Suits Valuation Act is less than Rs. 5,000, therefore, the appeal as provided by the Legislature lies to the District Court and not to the High Court.

It is, however, said that on two occasions the pleaders on behalf of the respondents have consented to treat the case as appealable to the High Court and that, therefore, they are estopped from taking the preliminary objection that such an appeal does not lie.

It is pointed out that shortly before the judgment was delivered by the First Class Subordinate Judge, a *purshis* of the 21st March was put in by the pleaders of the parties in which it is stated "by consent of both parties in suit, the value of the property in suit is settled for Rs. 10,500. This we give in writing."

The statement in the decree drawn up by the Subordinate Judge and dated the 27th March 1907 is that for assessing pleaders' fees and determining the jurisdiction of the Court the value of the property in suit has been, by consent of both the parties, determined at Rs. 10,000.

Now that is not a correct statement of the *purshis*, but even if it were a correct statement of the *purshis*, we do not think it could be taken to determine the jurisdiction of the Court.

The Legislature has laid down how the jurisdiction of the Court should be determined, and if, according to the statutory method of valuation the value of the suit is less than Rs. 5,000 consent of the parties cannot make it more than Rs 5,000 for the purposes of jurisdiction.

It seems probable that the *purshis* was put in inorder that the pleaders might be able to have their fees assessed upon a correct basis under Regulation II of 1827 according to the judgment of the Court in *Bai Meherbai* v. *Maganchand Motiji* (1).

It is also contended that on a subsequent occasion the pleader for the respondents consented to an application to this Court which estopped him from now taking the point of jurisdiction. That was an application made to two Judges of this Court, which was consented to by the pleaders on both sides, for the transfer of two other appeals. It was stated in the application that an appeal in this suit lay to the High Court and, therefore, the appeals in the two subsidiary suits which were the subject of that application should be transferred also for hearing to this Court. Upon that statement, that the appeal in the principal case lay to this Court, the Court passed an order by consent that the two subsidiary cases should be transferred.

But now we have to determine whether the appeal in the principal case does lie to this Court and if it does lie to this Court there will be no difficulty in re-transferring the appeals in the succeeding cases.

We think it is quite clear that the appeal does not lie to this Court. And there is no reason why this Court should transfer it for trial to itself rather than have it tried by the Judge provided by the Legislature, namely, the District Judge of Thana.

We, therefore, direct that the appeal be presented to the District Judge of Thana and that the appeals in the subsidiary cases be re-transferred, for trial to that Court. No order as to costs.

Order accordingly.

(1) 7 Bom. L. R. 131; 29 B. 229.

MADHOW PRASAD *v.* AJUDHIYA PRASAD.

(s. c. 13 Bom. L. R. 161).

BOMBAY HIGH COURT.

ORIGINAL CIVIL SUIT No. 318 OF 1900.

January 23, 1911.

Present:—Mr. Justice Davar.

MADHOW PRASAD RAM GOPAL—PLAINTIFFS

versus

AJUDHIYA PRASAD NARAN DAS—DEFENDANTS.

Pratice—Adjournment of cases—Consent of parties.

A Court is bound, and ought at all times, to consider the convenience of parties and any contingency which may necessitate the postponement of a hearing. It is not, however, for the parties to decide when their suit shall be heard, as the regulation of its procedure is entirely the business of the Court.

M. *Raikes*, for the Plaintiffs.

Mr. *Inverarity*, for the Defendants.

JUDGMENT.—This suit No. 318 of 1900 is placed on my Board to day and is sixth on the list. Mr. Raikes for the plaintiffs and Mr. Inverarity for the defendants move by consent of parties for an adjournment of the hearing. This I decline to grant. I have often heard it said that it is the business of the parties to decide when their suit shall be heard and that when parties agree to have it postponed all that the Judge has to do is to take up his pen and write the order. This is an absolutely false notion and ought to have no place in the minds of any one who has a correct notion of the duties of a Judge. The plaintiff, after he files his suit, ought to be ready to go on with it within a period of time reasonably necessary for the preparation of his case, and the defendant is bound to be expeditious in the preparation of his defence, and be ready within the time reasonably necessary to defend the suit. No doubt the Court is bound to, and will at all times, consider the convenience of the parties and any contingency which may necessitate a postponement of the hearing. But to regulate its own procedure is entirely the business of the Court. [His Lordship went into the facts of the case and ultimately refused the adjournment].

Order accordingly.

HOPE MILLS, LD. *v.* SIR COWASJI J. READYMONEY.

(s. c. 13 Bom. L. R. 162).

BOMBAY HIGH COURT.

ORIGINAL CIVIL SUIT No. 650 OF 1908.

December 22, 1910.

Present:—Mr. Justice Beaman.

THE HOPE MILLS, LIMITED—PLAINTIFFS

versus

SIR COWASJI, J. READYMONEY, BART AND ANOTHER—DEFENDANTS.

Mortgage—Redeem up and foreclose down—Res judicata—*Decree in general terms—All the intrinsic evidence may be looked into—Decree* nisi—*Document containing separable parts—Registration—How far necessary—Agreement by mortgagee to get salaray out of profits—Not registrable—Mortgagee in possession—Remuneration for personal services—When allowed—Company*—De facto *Directers—Notice to outsiders—Acquiescence—Depriving a man of his legal rights—Must amount to fraud—Its elements—Liability of mortgagee to account, mortgagee cannot contract himself out of.*

Where there is more than one mortgage upon a property the rule is, redeem up, foreclose down, which means that the first mortgagee suing for foreclosure must make all subsequent mortgagees parties to the suit and so afford each in turn the chance of redeeming before being foreclosed. The first mortgagee can neither foreclose nor be redeemed by the original mortgagor without taking into account intermediate encumbrances. If the intermediate encumbrancers, who are parties to the suit, do not choose to exercise their rights to redeem, each in turn would be foreclosed before the first mortgagee could come into touch with the mortgagor.

A mortgagor can redeem each of the mortgagees above him separately and in their turn, but he cannot skip all the mesne mortgagees and redeem his first mortgagee in a suit brought against him alone.

Even after foreclosure the right to redeem revives if the mortgagee pursues his remedy on the personal covenant.

Where a decree is couched in general terms and a question of *res judicata* arises upon it, the Court may look at all the intrinsic evidence before it and the materials of the case as a whole, even going so far as statements in the depositions of witnesses.

Amriteswari Debi v. *Secretary of State*, 24 C. 504; 24 I. A. 33, followed.

A decree *nisi* cannot constitute a *res judicata*, and so none of the materials upon which that decree is based can be *res judicata* either.

Where a document which as a whole requires registration, contains separable parts which do not require registration, those parts may be admitted in evidence to prove transactions which *ex hypothesi* do not affect immoveable property of the value of Rs. 100 or upwards.

The mortgagee in possession cannot, in the absence of an agreement or stipulation, charge the mortgagor for personal service.

An agreement, whereby a mortgagee in possession is to get a fixed remuneration even straight out of the profits for management of the property mortgaged, is not compulsorily registrable.

As between a Company and persons having no notice to the contrary, the directors *de facto* are as good as directors *de jure*.

HOPE MILLS LD. *v.* SIR COWASJI J. READYMONEY.

Outsiders dealing with a Company are bound to acquaint themselves with its external position which can usually be gathered from the papers of their constitution, the Memorandum of Association, and the Articles of Association; but are not bound to inquire into and satisfy themselves upon all the details of the Company's indoor management. The principle, however, would require modification, where the persons sought to be affected with notice are themselves within the Company.

Howard v. *Patent Joory Manufacturing Company*, (1888) 38 Ch. D. 156; 57 L. J. Ch. 878; 48 L. T. 395; 36 W. R 801; *Mahoney* v. *East Holyford Mining Company*, (1875) L. R 7 H. L. 869; 33 L. T. 338; Ir. R. 9 C. L. 806, referred to.

An agreement whereby a mortgagee in possession agrees with his mortgagor to charge for his personal services is valid if it does not constitute a clog on the equity of redemption. This arises out of the maxim 'once a mortgage always a mortgage', which means that there can be no additional contract in the mortgage-deed which would alter the essential nature of the mortgage contract, so as to preclude the mortgagor from redeeming. But it does not include previous or post agreements independent of the mortgage, unless these were unconscionable, or clearly obtained by undue influence or the abuse of fiduciary relations.

The payment of a fair remuneration to the Manager of a large concern to keep it in a high state of efficiency is not a clog on the equity of redemption, and in principle it makes no difference whether the Manager is the mortgagee in possession or a third party.

No acquiescence of a share-holders' meeting would be of any legal effect to destroy the share-holders' right unless it is given with full knowledge of that right.

The acquiescence which will deprive a man of his legal rights must amount to fraud. The necessary elements to constitute such a fraud are, (*a*) the plaintiff must have made a mistake as to his legal rights, (*b*) he must have expended some money or must have done some act on the faith of his mistaken belief, (*c*) the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff, (*d*) the defendant must know of the plaintiff's mistaken belief on his rights, (*e*) the defendant must have encouraged the plaintiff in his expenditure of money or in the other acts which he has done, either directly or by abstaining from asserting his legal right. All these elements must exist to restrain the possessor of the legal right from exercising it.

Willmott v. *Barber*, (1880) 15 Ch. D. 96 at p. 105, 49 L. J. Ch. 792; 43 L. T. 95; 28 W. R. 911, followed.

A mortgagee in possession cannot contract himself out of his statutory liability to render proper accounts nor deprive the mortgagor of his right to examine into and challenge any of their details.

Mr. *Raikes* with him Messrs. *Setalvad Wadia* and *Bahadurji*, for the Plaintiffs.

Mr. *Jinnah*, with him Messrs. *Kanga*, *Desai*, for the Defendants.

JUDGMENT.—This is a suit by the plaintiffs, the Hope Mills Company, to redeem three mortgages of the year 1900 should it be found that the second and third of these have been *bona fide* purchased by the first mortgagee for himself, and incidentally to have the two agreements of the years 1901 and 1905, respectively, should defendant No. 1 rely upon them, declared invalid and not binding on the plaintiff Company.

On the 5th of April 1900, the plaintiff Company mortgaged the Hope Mills to the defendant No. 1 for five lakhs rupees. The second and third mortgages were effected by one and the same instrument or the 31st of May 1900, and these two mortgages have been referred to throughout the case as Tokersey's and Ichharam's mortgages.

On failure to pay the first instalment of interest, the defendant No. 1 entered into possession on the 14th December 1900. In March 1901, the defendant No. 1 put the mortgage property up for sale, but as the reserved price was not reached, it was withdrawn and no sale effected.

On the 30th May 1901, the first agreement set up by the defendant No. 1 and challenged by the plaintiffs was entered into. By the terms of this agreement the defendant No. 1 was to work and finance the Mill reimbursing himself by way of salary to the extent of an annual sum not exceeding Rs. 15,000.

In August 1903, defendant No. 1 filed a foreclosure suit, annexing to his plaint a copy of the agreement of the 30th of May 1901. The suit came on before Mr. Justice Crowe *ex parte* and a decree *nisi* purports to have been passed in January 1904. In August 1904 defendant No. 1 applied to have the decree made absolute. But as he had not passed his accounts the application was rejected.

On the 5th of October 1905, a second agreement was entered into between the Company and the defendant No. 1, by which the earlier agreement of May 1901 was modified in some particulars. Under this agreement defendant No. 1, in consideration of working and financing the Mill, was to receive a monthly salary of Rs. 1,500 to be paid out of the Agent's commission.

On the 23rd of January 1906, the Directors of the Company passed a resolution approving

of the defendant No. 1's management of the Mill and requesting him to obtain a transfer of Tokersey's mortgage out of the profits of three lakhs which the Mill was shown to have made during that year. Before this Tokersey's mogtgage had been purchased nominally by one Motilal Canji for Rs. 55,000. On the 20th April 1906 the defendant No. 1 bought in this mortgage from Motilal Canji at its full value Rs. 1,67,000 odd. In the meanwhile, the third mortgage owing to the insolvency of the mortgagee had come into the hands of the Official Assignee, from whom it had been bought by Ibrahim Rahimtoola for Rs. 13,000. At a Directors' meeting of the 1st of November 1906 I find the record of a letter in the following terms:—"In consideration of your having at our request saved the Hope Mills from going into the hands of the Hon'ble Mr. Ibrahim Rahimtoola," &c., written by the Agents to defendant No. 1. On the 21st of December 1906 defendant No. 1 obtained a transfer of the said mortgage from Ibrahim Rahimtoola for a sum of Rs. 2,30,000, Rs. 50,000 of which was contributed by the second defendant Permanandas. In 1907, the new Agents as they are called throughout this case, became the active members of the old Agency firm of Rangildas Bhukandas &c., Company and very shortly afterwards the plaintiffs moved before Davar, J., to compel the defendant No. 1 to pass his accounts before the Commissioner under the decree *nisi* of 1904. Defendant No. 1 resisted this application on the ground that Crowe, J.'s decree did not direct him to pass his accounts before the Commissioner and further that the decree had been superseded by the subsequent agreement of October 1905, Davar, J., directed the defendant No. 1 to pass his accounts in the usual way before the Commissioner. Defendant No. 1 being dissatisfied with this order appealed, and a Division Bench consisting of Chandavarkar and Batchelor, JJ., reversed Davar, J.'s order, and in effect left the plaintiffs to obtain what remedy they could or that they may be advised by way of a separate suit. The plaintiffs made one further attempt to have the decree of Crowe, J., executed, but as matters stood after the decree of the Appeal Court it was inevitable that Macleod, J., should reject this application holding that Crowe J.'s decree was defective and could no longer be executed. The result of these proceedings was what I cannot help feeling a very strange and unfortunate position of affairs. Two Judges, Davar J., and Macleod, J., had in effect declared that the decree *nisi* of 1904 was so defective that without the addition of some further direction it could not be executed, while the Appeal Court had declined to allow any such further directions to be added. So that, although in form existing, this decree *nisi* remained, and it seems to me must ever remain, a dead letter, unless defendant No. 1 should consent to supply its deficiency by voluntarily passing his accounts before the Commissioner. So far as the plaintiff Company was concerned, the contemplated redemption was brought to a dead lock, for they could obtain no further relief whatever under the decree of 1904, while it seems that in the view of the Appeal Court their proper course was to file a suit to have the agreements upon which defendant No. 1 relied set aside. In this dilemma no other course was open to the Company than to file a redemption suit, incidentally asking, should need arise, for a declaration that the agreements of 1901 and 1905 were not binding upon them. The obvious difficulty in their way was the existence of the decree *nisi* of 1904, which had all the appearance of being if not actually *res judicata*, a sufficient bar on the ground of avoiding multiplicity in litigation to another suit by the mortgagors for redemption.

The plaintiffs have accordingly filed this Suit No. 650 of 1908, and their claim has been resisted upon a variety of grounds, many of which give rise to questions of much difficulty. In the first place, the defendants contend that this suit is *res judicata* by the decree *nisi* of 1904 and specially with reference to the objections now taken by the plaintiffs to the agreement of 1901. On a first view it would certainly appear that, so long as there is a decree *nisi* for foreclosure outstanding under which a mortgagor as well as the mortgagee can obtain full relief in respect of all causes of action arising out of a mortgage, it would be supereragatory on the part of the mortgagor to bring a separate and independent suit for redemption. On the general principle that the same cause of action cannot be agitated twice synchronously in Court of equal jurisdiction, such a procedure would be looked upon with dis-

favour, if indeed it could technically be allowed. Yet, as I have already intimated the state of affairs here is so peculiar that it is difficult to apply general principles disregarding the actual facts: nor indeed on the authority of the text-book writers can it be safely said that an independent suit to redeem is invariably barred by reason of an outstanding decree *nisi* for foreclosure. See Coote, page 1063, Fisher, page 664; and I cannot refrain from observing here if the defendant's contentions in this respect were sound it would in the events that have happened bring about a very curious, I believe I might say an almost unprecedented, result. I tried to make the learned Counsel for the defendant No. 1 understand the difficulty which I felt, but I am not sure that I quite succeeded in doing so, possibly because the difficulty is not so real as it seemed to me. It comes about in this way. When the defendant No. 1 brought his foreclosure suit in 1903, the mesne mortgagees as well as the mortgagor were made parties. Where there is more than one mortgage upon a property the rule is compendiously expressed in the formula redeem up, foreclose down, which in fact means that the first mortgagees suing for foreclosure must make all subsequent mortgagees parties to the suit and so afford each in turn the chance of redeeming before being foreclosed. Now, if we suppose that the decree *nisi* of 1904 could be made absolute in its present form it would come to this that both the second and third mortgagees would be foreclosed or squeezed out, while the original mortgagor would obtain the whole property on redemption of the first mortgage alone, for I take it to be part of this principle that the first mortgagee can neither foreclose nor be redeemed by the original mortgagor without taking into account intermediate encumbrances. If the intermediate encumbrancers who are parties to the suit did not choose to exercise their rights to redeem, each in turn would be foreclosed before the first mortgagee could come into touch with the mortgagor. Mr. Inverarity saw no difficulty in allowing the mortgagor to redeem the first mortgagee directly without making the mesne mortgagees parties to the suit, and so far as reason and common sense go that might very well be so; but the question is surely materially affected when in fact the mesne mortgagees are parties to the suit. No one disputes the proposition upon which Mr. Inverarity seemed to rely that a mortgagor can redeem each of the mortgagees above him separately and in their turn, but that is quite a different thing from the mortgagor skipping all the mesne mortgagees and redeeming his first mortgagee. Still more widely does it differ from the case of the first mortgage foreclosing down the whole line of mesne encumbrancers to the original mortgagor. In the first case suggested there would apparently be violation of the rule that in a redemption suit all persons intermediately interested must be joined as parties. In the second case they have been joined as parties and, therefore, if they failed to exercise their rights and allow the mortgagor to redeem them, it means only this that before the mortgagor's right to redeem can come into play, they, the mesne mortgagees, must have been foreclosed. I was referred upon this point to *Kinnaird* v. *Trollope* (1). But that is a very different case and does not even raise, much less remove, the difficulty I am indicating. There the mortgagor had assigned his equity of redemption absolutely. The mortgagee then sued him on the personal covenant and it was held, on the analogy of the well-recognised rule that even after foreclosure the right to redeem revives if the mortgagee pursues his remedy on the personal covenant, that here also the mortgagor's right to redeem survived and that the mortgagee could only recover on executing the conveyance to the mortgagor subject to any other existing equity of redemption. It is to be observed that in such a suit, assuming that there were an outstanding equity somewhere that the person having it would not be a party to the suit could not enforce it and, therefore, as against him the decision would not be *res judicata*. But I have been referred to no such case as this in which the mesne mortgagees having been parties to the suit, had a chance of enforcing their equities yet not having done so, would certainly be foreclosed finally. What makes this so peculiar in the events that have happened, is that the first mortgagee has himself after obtaining a decree *nisi* for foreclosure bought

(1) 39 Ch. D. 636; 59 L. T. 433; 37 W. R. 334; 57 L. J. Ch. 905.

in the mesne mortgages, so that if that decree were capable of execution as it stands and were *res judicata* in respect of future suits for redemption as the defendant No. 1 contends, it would appear to have this startling result that he would have foreclosed himself in respect of the two mortgages for which he has paid in the aggregate Rs. 3,97,000. It is unnecessary to go further in this complication, because I do not think that there is anything substantial in the defendants' contention that the present suit is *res judicata* by the decree *nisi* of 1904. The shortest and simplest way of reaching that conclusion is by a syllogism. Only that which is finally decided can be *res judicata*. A decree *nisi* is *ex vi termini* not a final decision. Therefore, no decree *nisi* can in strictness constitute a *res judicata*. Numerous cases from the Indian law books were cited upon this point by the learned Counsel on both sides. So far as the general contention goes, none of these cases seem to me to be of much value or assistance; as, for example, *Malkarjun* v. *Narhari* (2). The question there turned upon whether a Court sale was a nullity or not, and it appears to have been cited for no other purpose than the dictum contained in the judgment of their Lordships of the Privy Council that the Judges have jurisdiction to decide wrong as well as right. That dictum is constantly used in arguments touching the exercise of the High Court's powers of control and superintendence, but neither it nor the case as a whole have much bearing upon the question I am considering. The case of *Maloji* v. *Sagaji* (3) deals with a mofussil decree for redemption which was not a decree *nisi*. The learned Judges, founding that decision on the case of *Gan Savant* v. *Narayan Dhond Savant* (4), held that after the passing of the decree for redemption in which no time was specified, the plaintiff mortgagor will be for ever foreclosed if he does not execute the decree within three years; and I suppose that it is intended to argue from this that a decree *nisi* under the Transfer of Property Act will automatically operate so as to become a decree absolute after some time; so while it is in the process of becoming so, it is a bar to any other suit by either party to it either for redemption or foreclosure.

(2) 25 B. 337; 27 I. A. 216; 2 Bom. L. R. 927; 5 C. W. N. 10; 10 M. L. J. 368.

(3) 13 B. 567.

(4) 7 B. 467.

Now, the case of *Gan Savant* v. *Narayan Dhond Savant* (4) is by far the most interesting of all the cases cited upon this topic from the Indian law books. That very learned and eminent Judge, West, J., in holding that a redemption decree, if not enforced within three years, operated as a foreclosure against mortgagor, dwelt upon the apparent contradiction involved in using a decree in favour of the plaintiff as ultimately *res judicata* against him: *Res secundum se judicata* ought not, in strictness, one would think, to be used against the decree-holder. But, as that learned Judge pointed out, in all decrees of this kind there is implied the assertion of the contrary right, namely, where the decree is procured by a mortgagor of the mortgagee to be paid within the time specified or prescribed by law, or failing that to be for ever freed from the liability to be redeemed. I am not, however, much concerned to inquire further whether that decision would still be good law in the mofussil, for it certainly cannot be applied to a decree *nisi* under the Transfer of Property Act. A decree *nisi* in itself from its nature is provisional and requires the party seeking to have it enforced to move it absolute. Whether the decree be procured by the mortgagor or the mortgagee, it is in the option of either party to enforce it, and have it converted into a decree absolute, but until one or the other party does so, it never can be a final decision or constitute *res judicata*.

While, however, it is easy to dispose of this contention as generally covering the whole ground and barring the present suit, it has special reference to the agreement of May 1901 and so considered may occasion some difficulty. From the very outset of the case, defendant No. 1 has made desperate efforts to get the agreements of 1901 and 1905 on the record, although unregistered, as sufficient proof of the contract of service between the Company and the defendant No. 1, which they contained, on the ground that that contract is not a transaction in any way affecting immoveable property. One of the ways in which this was sought to be done was bringing it in along with the plaint in the suit of 1903 and the decree *nisi* of 1904, and thereupon contending that it was *res judicata* against the plaintiffs who could not now

be heard to dispute either its admissibility or its binding effect upon them. It is strenously argued on behalf of the plaintiffs that only the pleadings and decree in a suit are properly *res judicata*, and that a mere annexure to the plaint ought not to be included, notwithstanding the wide and general language of section 11 of the Civil Procedure Code, under that technical bar. I should have inclined strongly to adopt that conclusion had I not felt myself much oppressed by the decision of their Lordships of the Privy Council in *Amriteswari Debi* v. *Secretary of State* (5), where it was held that where a decree is couched in general terms and a question of *res judicata* arises upon it, the Court may look at all the intrinsic evidence before it and the materials of the case as a whole even going so far as statements in the depositions of witnesses. After carefully studying that judgment, I did not feel myself at liberty to exclude the agreement, while at the same time I intimated that, in this connection at any rate, I should confine its use strictly to the issue of *res judicata*. Having gone so far towards enlarging and extending the application of the principle, which is ordinarily much restricted, the learned Counsel for the plaintiffs asked me to go further still and admit the Judge's notes. I doubt, however, whether in strictness even the agreement, which is annexed to the plaint, but in respect of which no relief is claimed, ought to make part of the *res judicata*, if any *res judicata* there had been arising out of the *ex parte* decree. See the case of *Modhusudun Shaha Mundul* v. *Brae* (6), in which the mere statement of the landlord's rent rate annexed to the plaint in a rent suit in which an *ex parte* decree was obtained was held not to be a statement in issue within the meaning of section 11 of the Civil Procedure Code. Since, however, I have explained already why, in my opinion, the decree *nisi* of 1904 cannot be *res judicata* generally for the present suit, it follows that none of the materials upon which that decree was based can be *res judicata* either. It certainly would appear to be verging upon the absurd to ask a Court to hold that a suit of this kind was *res judicata* by the decree which two learned Judges of this Court have since held to be such as to be incapable of execution, a view which, by a different process of reasoning, also seemed to have commended itself to a Division Appeal Bench of two Judges more. Considering that since that decree was passed, the mortgagee who obtained it, has himself as he alleges purchased for his sole use and benefit the intermediate mortgages, I doubt whether he or any body else could now hope to obtain a substitution of the decree absolute for that decree *nisi*. And this is the same as saying that so far as that decree *nisi* goes, not having finally decided any question, it has subsequently, by reason of intrinsic defects, become a dead letter. I, therefore, hold that this is not *res judicata*.

But I am not to be understood as acceeding, on account of that finding, to the defendant No. 1's contention that the decree *nisi of* 1904 has been superseded by, and become merged in the agreement of 1905. There are many difficulties in the way of reaching that conclusion; the chief of these is, that the agreement was never certified to the Court, nor do I think that, since the mortgagee had gone into possession under the mortgage, he can divest himself of the liabilities and duties of a mortgagee in possession and claim to hold the property from October 1905 merely under and upon the terms of the agreement.

I now come to the question of the agreements of 1901 and 1905. As to the first of these, it cannot be disputed that if it really lies upon the plaintiffs to ask for a declaration to have that agreement set aside, such a prayer would be time barred. So much the plaintiff Company admits, but the learned Counsel for the plaintiffs puts his case differently. This, he says, is an ordinary suit for redemption in which no questions, such as those arising out of the agreement, could ordinarily call for decision. It is the defendant who sets up the agreements and on the strength of them wishes to evade the requirements of a normal account as between the mortgagee in possession and the mortgagor. It is, therefore, for him to establish if he can that the agreements are valid and binding upon the plaintiff Company, and in such a state of affairs the plaintiff Company is not to be put out of Court upon a mere plea of limitation. For the plaintiffs' case touching these agreements is in effect that they are absolutely void by reason of

(5) 24 C. 504 (P. C.); 24 I. A. 33.
(6) 16 C. 300.

being, first, contrary to public policy and such as the law prohibits the mortgagee in possession making with the mortgagor. Next, by reason of various defects, such as want of qualification in the Directors, the numerical insufficiency of the Board, excess of powers, and like. Should it, however, appear that the agreements are not void for any of the foregoing ressons *ab initio*, and should it further appear that, notwithstanding the want of registration, they can be proved in the present suit, then, no doubt, the plaintiffs would be precluded from impugning the agreement of 1901 merely as a voidable agreement by the law of limitation. By far the most difficult part of a difficult case is concerned with the examination of the arguments for and against (1) the proof of, (2) the validity and binding effect of, these two agreements. Although, when Mr. Inverarity opened his concluding address to the Court, Mr. Raikes for the plaintiffs very candidly informed him that he intended to rely upon the want of registration, I was surprised that the defendant's learned and eminent Counsel wholly declined to go into that point. Apparently, he thought it enough that the Court had admitted the agreements in evidence so that no further argument was needed to show to what use they might legally be put. When these agreements were first offered, I was very strongly of opinion that they could not be received in evidence of this particular transaction as being a transaction which indirectly affected immoveable property for want of registration. The question of nicety is, whether the contracts to prove which the agreements had been admitted do in fact affect immoveable property which is the subject of the mortgage, and that is a question which is by no means concluded by admitting the agreements upon the record subject to their use being restricted in compliance with the statutes of registration. I said first I thought they ought not to be admitted at all as proof of the contract of personal service between the Company of the one part, the agents of the other part, and defendant No. 1 of the third part. As a whole, both these agreements indubitably require registration. But a long course of decisions, I suppose, has settled the rule that where a document which as a whole requires registration, contains separable parts which do not require registration those parts may be admitted in evidence to prove transactions which *ex hypothesi* do not affect immoveable property of the value of Rs. 100 or upwards. The common case is of a mortgage-deed with the usual personal covenant. Although the mortgage-deed as a whole requires registration, and if unregistered will not be admitted as proof affecting immoveable property, it has always been allowed to be used in a suit on the personal covenant as proof of debt. Cases, however, arise in which this broad and intelligible distinction is drawn so fine as to become almost imperceptible. The strongest, perhaps, of these cases to be found in our books is that of *Maniram* v. *Bapu* (7), where Sir Charles Sargent held that a document in which the mortgagor consented to the mortgagee spending money on improvements, the said outlay to become a part of the mortgage-debt, was good evidence, although unregistered, of the mortgagor's consent. The ground of that decision appears to have been that it is part of the ordinary contract of mortgage that a mortgagee in possession is entitled to be reimbursed for proper outlays of this kind. So that all the paper was required to prove was the consent of the mortgagor. If, however, proof of that consent were an indispensable preliminary to the outlay becoming part of the mortgage-debt, I confess I still feel very great difficulty in saying that, indirectly, the use of the paper for that purpose did not affect the immoveable property. Yet it is clear that a distinction might be drawn between a case of that kind and a case like the present in which the agreement sought to be proved by the paper is not one ordinarily incidental or ancillary to the mortgage contract. In the former case, even without the mortgagor's consent, the mortgagee might well have shown that the outlay he incurred upon improvements or repairs were just and lawful and within the contemplation of the ordinary mortgage contract. Nothing of that kind could possibly be attempted here. What the defendant No. 1 wishes to prove by these agreements is, that while mortgagee in possession he was employed as a salaried Manager by the mortgagor. Nothing, perhaps, is better established than that the mortgagee in possession cannot, in the absence of an agreement or stipulation, charge the mortgagor for personal service, so that up to this point at

(7) (1887) P. J. 267.

least it is abundantly clear that if defendant No. 1 is to be allowed to retain his salary or remuneration, it can only be in virtue of the agreement and not arising in any way out of the mortgage contract. Then the question arises: Does an agreement of that kind directly or indirectly affect the immoveable property charged with the mortgage? In my first ruling upon this question, I put what appeared to me to be an ineluctable dilemma. This, I said, is either money which by bringing into the mortgage account you seek indirectly to make a charge upon the real estate, or it is something entirely outside the mortgage account and, therefore, irrelevant in the present suit. If we read the clauses in the agreement, it certainly appears that they do not in terms charge this remuneration upon the land and that, in some of recent English cases, seems to have been held almost enough in itself to justify agreements of this kind and take them out of the old rule that the mortgagee might not stipulate for collateral advantages. To some of those decisions I shall have to advert presently in more detail. But I must observe here, what had been entirely overlooked in the whole of the argument for the defendant No 1, that the chief difficulty with which I am confronted in dealing with these agreements and confining them to their proper uses is a difficulty which does arise in England. None of the English cases, therefore, throw any light upon it nor can be of any assistance to me. There are numerous cases in which separate agreements have been entered into between the parties to a mortgage, and the Courts have frequently held that there was no reasonable objection to enforcing such agreements. It is only, however, in connection with the equity rule against allowing any clog or fetter upon the equity of redemption that we even approximate to such a difficulty as is occasioned in this country by the provisions of the Registration Act. For, while an agreement might be in itself unobjectionable and reasonable so that the Courts in England would not hesitate to give effect to it, might nevertheless indirectly affect the immoveable property. But, unless it did so in such a way as to become a clog upon the equity of redemption the Courts apparently would be free from all such hampering considerations as those which gather about want of registration. If upon *analysis* it should be found that such an agreement as that entered into between the plaintiff Company and the defendant No. 1, though in terms a mere contract of personal service, works out in the result to a heavy additional charge upon the mortgaged property, then although in England, since it was an agreement subsequent to the mortgage, in all probability the hard and fast equity rule would not be applied, in this country it would indubitably require registration and, if unregistered, could not be proved. Mr. Raikes saw this clearly enough: and notwithstanding the previous rulings of the Court, terminating in the admission of the agreements or so much of them as did not clearly require registration, he, at the conclusion of the case, urged, and I think quite rightly urged, his objection to the use, to which the defendant No. 1 now sought to put them. It was contended by Mr. Inverarity that the defendant No. 1's remuneration could not possibly be a charge upon the land, inasmuch as he put it in his own pocket from month to month, and it was open at any time to the plaintiff Company to redeem him without any regard to his salary as a Manager. But this appears to me to overlook, or partly at any rate to overlook, the point. The argument so stated really comes to this, that the agreement could only be given in evidence if it were required to prove that which indeed needed no proof. For, if the Company had redeemed the defendant No. 1 before he had earned his first month's salary, it might very truly be said that no additional charge had been imposed upon the land by the agreement, and it might, therefore, be used to prove that, had the Company not redeemed him, Sir Cowasji might have earned the month's salary; but as the Company had redeemed him, and he had not earned the month's salary, the need for proof of this kind seems to disappear. But what defendant No. 1 really means, and what has been substantially in controversy from the moment these agreements were tendered in evidence, is that neither directly nor indirectly do they, to use the language of section 17 of the Registration Act, "purport or operate to create, declare, assign, limit or extinguish whether in present or in future any right, title or interest whether vested or contingent of the value of Rs. 100 and upwards to or in immoveable property;" for if

that were so, then section 49 provides that no documents required by section 17 to be registered, "shall be received as evidence of any transaction affecting such property or conferring such power unless it has been registered." When I, on further consideration, decided to admit so much of the agreements of 1901 and 1905 as contained the contract of employment, doubts had occurred to me whether the defendant No. 1 might not avail himself of the terms of that contract in rendering his account as mortgagee in possession to justify his appropriation of Rs. 16,000 a year up to 1905 and Rs. 18,000 a year thereafter. I set forth various considerations which had occurred to me affording a possible escape from the dilemma upon which my first ruling proceeded; but I had not then finally decided, nor I think could I decide before the case concluded, whether this agreement of service could be used as defendant No. 1 whishes to use, without contravening sections 17 and 49 of the Registration Act. I am quite clear that if I am now satisfied that those clauses of those agreements do operate even indirectly to limit any right of the value of Rs. 100 or upwards in the immoveable property pledged then they must not be taken to be evidence of any such transaction and as no other evidence would be admissible, the result would be that the defendant No. 1 would be precluded from relying upon that contract of service, and the Court in this suit would have to treat it as non existent. I have felt the greatest difficulty in coming to a conclusion upon this important point. I have given it my most careful and best consideration. From the first I have felt strongly oppressed by what is a fairly obvious train of reasoning. I would state it simply thus:—Under these agreements the mortgagee in possession is entitled to withdraw first Rs. 16,000 a year and then Rs. 18,000 a year from the profits of the property he was managing. But for that subtraction the whole of these profits would have gone in reduction of the mortgage-debt. Now that the mortgagor seeks to redeem, the mortgagee in possession claims to be entitled to deduct from the profits which have come to his hands the sums I have mentioned and to leave the balance of the mortgage-debt thus proportionately increased a charge upon the property. Say that the sum roughly is a lakh of rupees, the actual result thus arrived at is before the mortgagor can redeem, he has to pay a lakh of rupees more than he would have done, had that sum not been appropriated under the agreements. So that it appeared difficult to escape from the conclusion that indirectly the agreements have operated though they certainly did not purport to limit the mortgagor's right to redeem to the extent expressed in terms of money of a lakh of rupees. Further, searching analysis has led me to doubt the soundness of that reasoning. It cannot, I think, be denied that the clauses of the agreement in question do not, on the face of them, purport to create, extinguish, etc., any right in immoveable property. If this contract of service had been made independently of other matters, contained in the agreement as a whole, there can, I think, be no question that, on the face of them, they would not have required registration. It is only when they are sought to be put to a certain use in a suit of this kind, that it becomes possible for the mortgagor to contend that, notwithstanding their language and original intention, they are found finally to operate indirectly and unexpectedly to limit rights in immoveable property. But that is tantamount to saying that the agreement is of such a kind as when enforced, to become a a clog upon the equity of redemption. So that viewed in that light I might derive some assistance from the decisions of the English Courts upon this subject. But the reasoning which leads to this conclusion is, I am now disposed to think, somewhat artificial. Apparently, its whole foundation whould be cut away, but for the fact that a person entitled to a salary under the agreement is also the mortgagee in possession: but that fact, I should say, involves such legal consequences as belong rather to a distinct province of the law regulating rights and liabilities of the mortgagor and mortgagee *inter se* than to what was contemplated and intended by sections 17 and 49 of the Registration Act. For, let us suppose that the agreement had been that the defendant No. 1 was to employ a competent Manager instead of doing the work himself on the same salary. As a bare agreement that would certainly not have been exposed to any objection for want of registration, but that objection has been ingeniously grafted upon it in view of

its ultimate result merely upon the fact that the salary of such competent Manager would have been paid out of the profits of the concern, for there we shall have an almost exact parallel to the case decided by Sir Charles Sargent and the principle of that decision would most certainly have covered it. Yet, so far as the mortgagor was concerned, the result would have been exactly the same. That is to say, when he came to redeem now he would still have had to pay that sum in addition which has gone as salary into the Manager's pocket. Yet had the mortgagee in possession, even without any special agreement, employed upon his own responsibility a competent Manager on this salary, I think it quite likely that he would have been allowed the money so paid out of the profits in the interest and for the welfare of the Mill, as a going concern, under the head of "just and lawful expenditure." Now, I will put a third case. Suppose that the mortgagee defendant No. 1 had not gone into possession at all, but the mortgagors had entered into this agreement with him to manage and finance the Mill how could it be said that the salary which they then paid him voluntarily month after month, out of their profits (they being in possession and having control) could possibly be treated as an additional charge upon the land? Yet, again, the result would have been exactly the same, for, to the extent of the salary they chose to pay the mortgagee, the fund available for the reduction of his mortgage debt would have been reduced, and the sum of that mortgage debt, still chargeable on the land, increased. It is only when the mortgagee is himself in possession and makes a contract of this kind with the mortgagors out of possession that the logic of the first line of reasoning appears to be unanswerable, but as soon as it is shown to depend for its validity upon a distinct and inseparable fact, namely, that the person to be paid the salary is the mortgagee in possession then it is really to the legal consequences, if any, following upon that fact, that we must look for a sufficient objection to the agreement and not to any objections taken under the sections of the Registration Act merely for want of registration. For, as soon as it can be shown that where all the consequences of the agreeement are absolutely identical so far as its effects upon the property and the mortgagor's rights thereunder are concerned, in various cases in which want of registration could not possibly be urged against it and that it was only in the single case before me now that those objections could be maintained, the conclusion is plain that whatever force they derive is derived from the peculiar feature of the special case and is not founded on the general law of registration. This is the view which I have adopted after long and anxious thought, and if I am right it is a complete answer to the plaintiffs' objection to receiving the agreements in proof of the contract of service. I hold that they ought not to be excluded when sought to be used for that purpose for want of registration.

I now proceed to deal with other objections to these agreements. The first of these is that there was no sufficient Board of Directors, and that, therefore, agreements into which those Directors purported to enter were null and void. When the agreement of 1901 was entered into the ostensible Directors were Rangildas, Hargowandas, Dharamdas, Sir Cowasji and Dadabhoy. Rangildas and Hargowandas were admittedly qualified. The plaintiffs contend that Dadabhoy was never appointed and use the admission of the Advocate-General for the defendant No. 1 during his *de bene esse* examination that Dadabhoy never acted as a Director. According to Article 91 of the Articles of Association the number of the Directors shall be not less than four, etc. The minutes of the meeting at which the agreement was ratified, Exhibit 53, showed that only four Directors were present, *viz.*, Rangildas, Hargowandas, Sir Cowasji and Dharamdas. Defe dent No. 1 relies upon Exhibit 75 to show that Dadabhoy was appointed a Director. That, however, only shows that on the 31st of May 1900 Dadabhoy was appointed a Director at Sir Cowasji's request during his six months' absence. There is no other evidence of his ever having been a Diretcor or having been qualified, while there is the admission I have mentioned that he in fact never acted as a Director. So that it might be that by the end of November 1900, if Dadabhoy ever was appointed, he had ceased to be a Director. Of the four Directors, who were present at the meeting of May 1901, the plaintiff contend, Sir Cowasji

was disqualified, because he did not hold 10 shares in his own name and for his sole benefit, as required by Article 94 of the Articles of Association. Now, it is admitted that when Sir Cowasji became mortgagee of the Mill both he and Oomrigar were placed upon the Board of Directors and Rangildas assigned to each of them 10 shares. Oomrigar had, however, resigned at the end of 1900 or beginning of 1901, and whether he had resigned or not, the same objection applies to him as to Sir Cowasji. Defendant No. 1 admits, as also does Oomrigar, that neither of them held these 10 shares for his sole benefit, that as to say, beneficially. Defendant No. 1 has contended, however, on the authority of the English Law that as between the Directors and the Company at any rate, a Director, who has been given shares to hold in his own name, holds them techically and effectually for all legal purposes in his own right. Whether the words "in his own right," which occur in the English cases, are synonymous with "for his sole benefit," may be dobuted. It was held in *Pulbrook* v. *Richmond Consolidated Mining Company* (8) that if a Director holds the shares as trustee, he is nonetheless duly qualified and holds them in own right. This case was considered to settle the law, although Palmer on Company Law points out that it is a decision which goes far to defeat the object of the clause that a Director shall have a substantial stake in the Company. And in the later case of *Boschoek Proprietary Company, Limited* v. *Fuke* (9) the opinion of the English Courts seems to have veered in that direction. To show that the words "in his own right" are in law equivalent to "for his sole benefit," the defendant cited the case of *Attorney-General* v. *Duke of Richmond and Gordon* (10). The point at issue there was totally different, and the reasoning upon which the decision was based would not necessarily apply to such a case as this. Here Article 94 is explicit and emphatic, containing the words "in his own name and for his sole benefit." And I feel considerable doubt whether the requirements of that Article can be said to be complied with when a Director, although he holds the share in his own name, had paid nothing for them and merely holds them as a trustee. *Howard* v. *Sadler* (11) shows that a Director might have possession of the shares in his own right without being the beneficial owner and that there was nothing illegal in his selling the shares. This case carries out the principle of the case of *Pulbrook* v. *Richmond Consolidated Mining Company* (8). On the whole, I think, that the defendant's answer to this technical objection is on this point sufficient. It was further contended, upon the general argument about this agreement and that of 1905, that, whatever defects there might be in the qualification of the Directors, they were *de facto* Directors and as such to all intents and purposes, in discharge of their duties, as good as *de jure* Directors. In support of this proposition, which is tersely stated in Buckley, page 168, thus endangering accuracy for the sake of brevity, it may be said that the effect of this section is that, as between the Company and persons having no notice to the contrary, the Directors, etc., *de facto*, are as good as Directors *de jure*, various cases were cited: *Mohoney* v. *East Holyford Mining Company* (12), *Biggerstaff* v. *Rowatt's Wharf Limited* (13). The effect of these cases is briefly that outsiders dealing with the Company are bound to acquaint themselves with its external position which can usually be gathered from the papers of their constitution, the Memorandum of Association and the Articles of Association; but are not bound to inquire into and satisfy themselves upon all the details of the Company's indoor management. Plainly, however, this principle would require modification, where the persons sought to be affected with notice are themselves within the Company and, therefore, presumably responsible for its indoor management, a distinction so obvious that it would hardly, I should have thought, require judicial authority. Were any such needed, however, the manner in which Courts have explained and applied that distinction is well brought out by contrasting the case of *Howard* v. *Patent Ivory Manufacturing Company* (14) with *Mahoney* v. *East Holyford Mining Company* (12).

(8) (1878) 9 Ch 610; 48 L. J. Ch. 65; 27 W. R. 377.

(9) (1906) 1 Ch 148; 75 L. J. Ch 26; 94 L T. 298; 54 W R. 259; 13 Manson 100; 22 T. L R. 196.

(10) (1909) A. C. 466 at p 473; 78 L. J. K. B. 998; 101 L. T. 241; 53 S. J. 713; 25 T. L. R. 775.

(11) (1893) 1 Q B. 1; 41 W. R. 126.

(12) (1875) L R. 7 H. L. 869; 33 L. T. 338; Ir. R. 9 C. L. 505.

(13) (1893) 2 Ch. 93; 65 L. J. Ch. 536; 74 L. T. 473; 44 W. R. 536.

(14) (1888) 38 Ch. D. 156; 57 L. J. Ch. 878; 58 L. T. 395; 36 W. R. 801.

But I do not think that the distinction need be pushed so far as to compel Directors to be satisfied of the propriety and adequacy of their qualifications is so nice a point as the meaning of terms like "in his own right" or "for his sole benefit." So far as this objection reaches, I do not think that it will invalidate the proceedings of the *de facto* Directors, who purported to enter into the agreement of 1901. As to defendant No. 1 himself, it admittedly does not apply to the agreement of 1905, for long before that time Sir Cowasji had ceased to be a Director and was, therefore, in the position of an outsider entitled to treat *de facto* as being as good as *de jure* Directors. It is, however, further contended that Sir Cowasji had relinquished his shares before the meeting of 1901 and, therefore, he was wanting in that essential qualification quite apart from the character in which he had held those shares. Upon this point there is some uncertainty. It is, however, admitted that Sir Cowasji's name remained on the list of share-holders up to the year 1907—(see A 6)—when the Directors asked Sir Cowasji whether he really owned these shares and Sir Cowasji declined to allow them to be transferred to the name of any other person. Subsequently, however, Sir Cowasji's name was struck off the list of share-holders as from the year 1906. It was also objected that Sir Cowasji was disqualified under Article 104, because under this agreement he held a place of profit under the Company. That, however, obviously would not disqualify him prior to the agreement coming into force and it appears to be certain that defendant No. 1 never signed the transfer of his shares to any other person, until long after the agreements were completed, and that, in the meantime, the shares remained standing in his name. So that technically I think he must be held to have had a proper qualification.

I do not think it necessary to go with greater minuteness into the objections raised against Sir Cowasji (defendant No. 1) and Dharamdas for want of share qualification. At the time of the agreement of 1901 there were (if we count Dadabhai, and although he may not have been in reality a Director at that time, he had been appointed in 1900 and for all Sir Cowasji knew, might have remained on the board) five *de facto* Directors I have already said that I do no not think that the principle of *Howard* v. *Patent Ivory Manufacturing Company* (14) would make it incumbent on each Directors to know whether his fellow *de facto* Directors were also *de jure* Directors, or even to be satisfied that his own share holding was in law what the terms of Article 94 required. All that was necessary was that there should be at least four Directors of the Company and to all outward seeming there were then five. When the agreement of 1905 was made, there were again a sufficient number of *de facto* Directors, and it is almost admitted that this objection does not apply in the case of that agreement.

Nor do I think there is any force in the other objections that the agreements were beyond the powers—(*a*) of the Company as whole; (*b*) of the Directors. As to (*a*), it was a late thought, and cannot, I think, be maintained. As to (*b*), it appears to me that the very comprehensive language of Article 109 may, without any undue stretching, amply cover these agreements.

This brings me to the last substantial contention of the plaintiff Company that the agreements are in their nature such as the law prohibits a mortgagee in possession to make with a mortgagor, and so against public policy and void.

This rests principally upon the well-established rule of the English Equity Courts, which remained apparently virtually unbroken and unchallenged up to the repeal of the Usury Laws in 1854. A long series of decisions, of which the most significant and important are *Chambers* v. *Goldwin* (15) and *Leith* v. *Irvine* (16), forbade a mortgagee in possession to charge the mortgagor for any personal services. It is not strictly correct to say, as one of the learned Lords said in *Noakes* v. *Rice* (17), that all these cases were referable to the Usury Law, and lost their authority when those laws were repealed. For *Leith* v. *Irvine* (16) is certainly an exception. That case was decided in 1833 and Lord Brougham put the decision partly at least on the broad ground that a mortgagee in possession was *quasi*-owner, or *quasi*-trustee, and as such could not obtain any remunera-

(15) (1804) 9 Ves. 264; 7 R. R. 181.
(16) (1833) 1 Myl & K 277.
(17) (1902) A. C. 24; 71 L. J. Ch. 130; 86 L. T. 62; 50 W. R. 305; 66 J. P. 147.

tion for managing his own property, which in any event he was bound to do. *Biggs* v. *Hodinott* (18) and *Reve* v. *Lisle* (19), both after the repeal of the Usury Laws; go far to support the defendant's contention that at present an agreement of that kind would no longer be treated in England as necessarily against public policy and void. The true criterion adopted in most of the later cases appears to be (*a*) that the agreement should not constitute a clog on the equity of redemption. This arises out of the maxim once 'a mortgage always a mortgage,' which means that there can be no additional contract in the mortgage-deed which would alter the essential nature of the mortgage contract, so as to preclude the mortgagor from redeeming. But it dees not appear to have been stretched always to include previous or post agreements independent of the mortgage, unless (*b*) these were unconscionable, (*c*) or clear ly obtained by undue influence or the abuse of fiduciary relations. To the latter rule must be specially referred all cases between solicitor and client, such as, for example. *James* v. *Kerr* (20); *In re Wynn Mackenzie* (which is also an authority on the subject of ratification). While, on the other hand, we have to consider such cases as *Salt* v. *Marquis of Northampton*(1),the two Irish cases of *Comyns* v. *Comyns* (22) and *In re MacKinley* (23) *Reve* v. *Lisle* (19) shows that a mortgagee might make a stipulation to buy the mortgaged property out and out, while *Samuel* v. *Jarrah Wood Company* (24) is cited to show that this was not accepted as a universal settled principle. Later cases, to which I have referred, are *Bradley* v. *Corritt* (25) and *Santley* v. *Wilde* (26). There is no case to be found in the English books, none at least to which I have been referred, or which I have been able to find, like this case. The nearest to it, perhaps, is the Irish case of *In re J. MacKinley* (23). The defendant contends broadly and generally that there is nothing in the statute or case-law to preclude a mortgagee in possession from making a fair bargain to do what he is not otherwise bound to do; and that a mortgagee in possession is certainly not bound to work a Mill, or to finance it. Looking to the terms of sections 72 and 76 of the Transfer of Property Act, and some of the cases which have been decided under them it may be doubted whether this proposition is quite correct. It has been held, for example, that a mortgagee taking possession of culturable land is bound to cultivate it, and raise the best crops he can upon it. By a parity of reasoning it might be contended that a mortgagee who takes possession of such a property as a Mill is bound to work and finance it. Either that, or bring it to sale. For, if he deprives the mortgagor of possession, yet will not work the Mill himself, in a very short while the concern might fall out of all local competition, the machinery become rusty and useless, and the value of the property as a whole be seriously depreciated. So that, what is really to be considered is, the question whether (*a*) the defendant No. 1 was bound to do all that he has done under the agreements by the law regulating the rights and duties of mortgagees in possession, (*b*) and whether, if so, he can contract to receive remuneration for doing that which the law makes it compulsory for him to do? Or, if the law does not impose these duties upon him then whether the contract is, on the face of it, unconscionable or can be shown to have been obtained by undue influence or fraud or oppression. And whether in fact there has been any consideration for it.

Further, the plaintiff impugns these agreements on the ground, which indeed underlies the whole of his reasoning upon this part of the case, that their effect is to place the mortgagee in possession, in a situation in which his interest must conflict with his duty which the law would never do.

Let me here look at the facts. The defendant No. 1 had gone into possession

(18) (1898) 2 Ch. 307; 67 L. J. Ch. 540; 79 L. T. 201; 47 W. R. 84.
(19) (1902) A. C. 461; 71 L. J. Ch. 768; 87 L. T. 308; 51 W. R. 576.
(20) (1888) 40 Ch. D. 449; 58 L. J. Ch. 355; 60 L. T. 212; 37 W. R. 279; 53 J. P. 628.
(21) (1892) A. C. 1; 61 L. J. Ch. 49; 65 L. T. 765; 40 W. R 529.
(22) (1871) Ir. R. 5 Eq. 583.
(23) 1873) Ir. R. 7 Eq. 467.
(24) (1904 A. C. 323; 73 L. J. Ch. 526; 90 L. T. 731; 52 W R. 673; 11 Manson 2 6; 20 T. L. R. 536.
(25) (1903) A. C. 253; 72 L. J. K. B. 471; 88 L. T. 333; 52 W. R. 636.
(26) (1899) 2 Ch. 474; 68 L. J. Ch. 681.

in December 1900. The Company and its Agents were then much embarrassed. Early in 1901 the defendant No. 1 tried to sell the Mill but as he could get no good offer, he withdrew it from sale. What was he now to do? It did not suit him to sell, for the price he could realize would not have re-paid his loan on the mortgage. It is alleged for the defendant, and I see no reason to doubt the truth of the allegation, that the Agent Rangildas solicited him to work and finance the Mill, rather than persist in selling it. He, the defendant, might, of course, have put up the property for sale again and again in the hope of obtaining a good offer. I do not think he could have remained in possession indefinitely without working the Mill. But was he bound also to finance it? Obviously, a large concern of that kind could not be worked without considerable funds. And the evidence of defendant No. 1 and his man Oomrigar is that he, the defendant No. 1 only entered into this agreement at the earnest request of Rangildas, who said that this was the only way to save the property and himself and the other share-holders from ruin.

If I accept that state of facts, and I think I safely may, then it would appear that the agreement was pressed upon the defendant No. 1 not so much for his own benefit, as for that of the mortgagors and that it imposed on him duties and out-lay that he was not in strictness bound by law to undertake or make.

Before proceeding further, I may incidentally notice, with special reference to the second agreement of 1905, to points (1) that long before that agreement was made both Rangildas and Hargowandas had taken the benefit of the Insolvency Act: (2) that referring back to the argument against the admissibility of these agreements for want of registration the latter is distinguishable from the former in this that it purports to pay the defendant No. 1 salary of Rs. 1,500 a month of the Agents' commission. I should have gone into that more fully had my final conclusion been that these contracts of service could not be proved for want of registration; for, from the defendant's point of view, this distinction constitutes a strong ground against the validity of that objection so far as it was brought against the second agreement. Assuming, however, that both the agreements had operated indirectly to limit a right in immoveable property, I think that considerations arising out of this distinction would rather have enforced than weakened that conclusion, for, supposing that it was the duty of the mortgagee in possession to pay the Agents' commission, he might have done that without any agreement and charged it in his account. As, then, between him and the mortgagor, this agreement would certainly not have affected the immoveable property either directly or indirectly, nor would it have needed to be proved; but, supposing the Agents' commission during the currency of the agreement had amounted say to Rs. 25,000 a year and the defendant had deducted therefrom Rs. 18,000 a year for himself, then, while the whole sum would have been passed as just and proper expenditure in the mortgage account, the Agents themselves might have complained they had only received Rs. 7,000 a year instead of Rs. 25,000. In answer to that, there can be no doubt that the mortgagee in possession might have set up the agreement as between himself and the Agents without registration, and it would have been a complete answer. This is, indeed, a pointed illustration of the distinction which under our law ought always I think to be kept in view when unregistered documents are sought to be used for purposes which are alleged indirectly to effect immoveable property. As, however, I have held that even were the mortgagee's remunerations taken straight out of the profits and not confined to a separate head of expenditure such as the Agents' commission, the agreement would still not require registration, this interesting point is no longer of importance. As to the insolvency of the Agents, nothing, I think, turns upon it. In their relation to the Company they stood upon a contract of personal service which would not vest in the Official Assignee. So, too, even if Rangildas had been disqualified by reason of his insolvency, he would have immediately again become an *ex-officio* Director in virtue of his agency. In the agreement of 1905 Rangildas has alone signed for the Agents' firm and the names of the remaining members do not appear on the documents. Whether Rangildas could in this way bind his firm again loses all its importance as a

practical question since any difficulty so arising would fall to be decided between the Agents and defendant No. 1 and I am not concerned here with them.

Turning back now to the general question, I will briefly review the most important cases.

In re Wallis (27) decided that a Solicitor who acts on his behalf in proceedings relating to the mortgage debt or the mortgage security, cannot (in the absence of express contract) charge against the mortgagor, as part of his costs, charges and expenses incurred as mortgagee, etc. *Semble* that he could have done so if there were an express contract, Lord Esher, M. R., said,—

"It has been settled for many years that the rights of mortgagor and mortgagee *inter se* depend upon the contract between them, and that when there is no express contract, but only the ordinary contract which arises out of the relation of mortgagor and mortgagee, the mortgagee cannot charge the mortgagor with remuneration for his own personal services in relation the mortgage debt or the mortgage security."

Fisher on Mortgages says,—

"In the absence, however, of express agreement, a mortgage cannot under just allowances or costs charges and expenses include remuneration for work done by himself except a Solicitor coming within the provisions of the Mortgagees' Costs Act, 1895." (p. 896).

Contra Coote,—

"A mortgagee cannot, as a general rule charge for his personal trouble, even though there be a special stipulation to that effect." (p. 1211).

I apprehend that what the learned author means is a special stipulation in the mortgage-deed. The case might be different if it were a distinct agreement made before or after the mortgage or separable from it. So in *In re Roberts* (28) it was held that a Solicitor cannot charge his client with private costs for the preparation of a mortgage from the client to himself. But that, like most of the cases cited on this head, seems to have dealt with a charge of this kind not founded on an express and separable agreement. *French* v. *Baron* (29) *Scott* v. *Brest* (30); *Bonithon* v. *Hockmere* (31), *Godfrey* v *Watson* (32), were all cases decided while the Usury Laws were in force and although *Leith* v. *Irvine* (16) also belongs to the same period, the ground of the decision is, as I have pointed out, different, much broader, and might survive the repeal of the Usury Laws. *Chambers* v. *Goldwin* (15) was really made the ground of decision in *In re J. McKinley* (23). In the latter case the facts of which, although it was decided after the Usury Laws were repealed, all took place while those laws were still in force, there was a special agreement between the mortgagee and the mortgagor under which the former was to go in to possession an *inter alia* to receive £4 a year remuneration for collecting rents and profits. After commenting on *Parkinson* v. *Hanbury* (33) Flangan, J., said of that case,—

"It does not establish the proposition that a mortgagee can by contract with his mortgagor, go into possession as agent and escape the liabilities of a mortgagee in possession .....In the case before me Bonsall was a mortgagee of McKinley under a deed of 1840, under which he could have gone into possession; but a device was resorted to, by which he in effect said: 'I will make it a condition that you shall secure me by a bond and warrant for confessing judgment, and also by a Power-of-Attorney authorising him to receive rents, and the £4 per annum for receiver's fees'; and by thus doing Bonsall thought he could escape the liabilities of a mortgagee in possession. In my opinion he cannot. Mr. Richey has argued that the terms of the Power-of-Attorney excluded the relation of mortgagor and mortgagees, and that McKinley could at any time have proceeded against Bonsall to make him account as agent for the surplus. But I cannot distinguish this case from that of *Chambers* v. *Goldwin* (15). In which the same argument was urged, and not considered a sound one either by the Master of the Rolls (Sir R. P. Arden) or by Lord Eldon; and the defendant was charged as a mortgagee in possession, notwithstanding the special provisions in the deed directing a special application, of the receipts"

(27) (1890) 25 Q. B. D. 176; 55 L. J. Q. B. 500, 62 L. T. 674; 38 W. R. 482; 7 Morrell 148.

(28) 59 L. J. Ch. 25; 62 L. T. 33; 38 W. R. 225; (1889) 43 Ch. D. 52.

(29) 2 Atk. 120.

(30) (1788) 2 T. R. 238.

(31) (1685) 1 Vern. 316.

(32) (1847) 3 Atk. 517.

(33) (1867) L. R. 2 H. L 19; 36 L. J. Ch. 292; 16 L. T. 243; 15 W. R. 642.

Now, turning to *Chambers* v. *Goldwin* (15) I find that Lord Eldon said,—

"It (the bill) distinctly alleges that he was not entitled to commission while he resided here. *First*, is it the law that he was not entitled, while in possession, and in the Island? *Secondly*, supposing the law to be so, is this the time, considering the form of the bill, in which that ought to be declared? Considering him as a mortgagee independent of the usage and law of the Island, Courts of justice here apply to the relation of mortgagor and mortgagee upon West Indian mortgagees, all the principles that exist as to that relation here. It is clear, the mortgagee cannot originally covenant for a collateral advantage: also, if upon the true effect of the instrument there is nothing more than that the mortgage shall do what a mortgagee ought to do as a trustee, there is no pretence to say, the trust is distinct from the mortgage. There is nothing unfair or perhaps illegal in taking a covenant originally, that, if interest is not paid at the end of the year, it shall be converted into principal. But this Court will not permit that, as tending to usury, though it is not usury. So, a mortgagee cannot stipulate to be receiver of the rents and profits with a commission. In one case that has been considered by the Court of King's Bench usurious: *Scott* v. *Brest* (30). But it has been long determined here, that though a mortgagee may stipulate for a Receiver, to be paid by the mortgagor, and may appoint a bailiff, etc., he cannot himself stipulate for any advantage beyond the interest; and though it seems to make little difference to the mortgagor who is Receiver, yet this Court considers it as tending to usury and oppression, and collateral advantage, which a man contracting for a loan of money shall not make."

In *Leith* v. *Irvine* (16) Lord Brougham says,—

"If the only ground of this doctrine were that the allowance of such stipulations or of such charges opened a door to usury, the argument would be much the stronger for extending to the case of mortgagee in possession the exception which has been made in favour of West Indian mortgagees. But there is another ground; the mortgagee, by taking possession, changes the relation in which he stands to the estate, he becomes *quasi*-owner. He is in some sort likened to a trustee: not that he can with any correctness of speech be called a trustee." (p. 286.)

The distinction is well and forcibly expounded in *Cholmondely* v. *Clinton* (34) by Sir Thomas Plumer in his able and elaborate judgment, and His Honour's exposition is adopted generally by Lord Eldon in moving the affirmance of the judgment. In truth, till the debt is paid off, the mortgagee in possession cannot be considered at all as a trustee. Nevertheless, all the authorities place him in the same predicament with a trustee as far as incapacity to charge for his trouble is concerned. Thus Lord Keeper North in the case referred to [*Bonithon* v. *Hockmore* (31)] observes, where mortgagees or trustees manage the estate themselves, there is no allowance to be made them for their care or pains; and Lord Eldon was so much impressed with the similarity of their situation in some respects, that both in *Chambers* v. *Goldwin* (15) and *Cholmonedly* v. *Clinton* (34), while he refers to that resemblance, he seems hardly to think himself safe in considering them to be different. In *Biggs* v. *Hodinott* (18), the case upon which the defendant principally relies, decided in 1898 it was held that a mortgagee may stipulate for a collateral advantage at the time and as a term of the advance, provided the equity of redemption is not thereby fattered, and the bargain is a fair and reasonable one, entered into between the parties while on equal terms, without any improper pressure and unfair dealing, or undue influence. The facts there were that the plaintiff was a brewer and the defendant an hotel-keeper. The plaintiff advanced £7,654 to defendant on a mortgage. This deed contained a joint and several covenant by the defendant to the effect that they would deal with them and would purchase all their beer, etc., from the plaintiff. On these facts the defendant contended that the stipulation upon which the plaintiff relied was for a collateral advantage and, therefore, could not be enforced. This contention was overruled by Romer, J., upon the grounds which I have just indicated. No consideration either relating to the Usury Law or such as were expressed by Lord Brougham in *Leith* v. *Irvine* (16) found favour with that learned Judge. What in effect this decision lays down is that no fair stipulation for a collateral advantage made by the

(34) (1820) 2 J. and W. 1; 22 R. R. 84; 2 Mer. 173; 16 R. R. 167.

mortgagee is to be set aside unless it can be shown to be a clog upon the equity of redemption. As the case of *Salt* v. *Marquis of Northampton* (21) has also been relied upon here by the plaintiff, it is interesting to note how Romer, J., deals with it. He says:—

"Lastly, the case before the House of Lords, *Salt* v. *Marquis of Northampton* (21), had nothing whatever really to do with the point I have to decide here. That was merely a question whether a certain policy was mortgaged; and when the House of Lords held that the policy was mortgaged, it, of course, followed that in equity a bargain seeking to prevent the mortgagor from having the right to redeem it could not be enforced. I need scarcely point out, therefore, that that has no bearing really upon the question before me".

Then he goes on, —

"Finding, therefore, as I do, in the result an honest bargain entered into the benefit of which has been obtained by the mortgagors, and finding, as I am glad to say and as I think, no principle or authority which prevents me from enforcing this contract on the mortgagor's part, I enforce it accordingly".

Now, the principle of that decision certainly does appear to me to be applicable to the present case, although the facts here are widely different and do, no doubt, afford ground for the contention that if effect is given to this agreement it would place the mortgagee in a situation in which his interest and duty conflict, a consideration which did not arise in *Biggs* v. *Hodinott* (18). If that is not the ground of many dicta of the learned Judges in such cases as *Chambers* v. *Goldwin* (15) and *Leith* v. *Irvine* (16), something very like it, is; so that it is worth while considering whether in fact the terms of this agreement, if carried out, would bring about that result. Mr. Raikes has argued this point very ingeniously, but I am not satisfied that reading the agreement in its natural sense and stripping it of those special difficulties which are attributable to the fact that the mortgagee means to use it to justify expenditure in the mortgage-account, there is anything in it which really would place the mortgagee in such a situation. It is said that as under this agreement he draws a handsome annual salary it is clearly to his interest to pay himself as slowly as possible. But that would only mean that it would be to his interest to work the Mills at the lowest margin of profits which would suffice to pay his salary leaving no surplus to reduce the mortgage-debt. I think, however, looking at the disproportion between the salary and the mortgage-debt, the mortgagee's real interest would still be to work the Mills to the best advantage and make them as valuable property as possible. And this in fact appears to have been done. For, not only has the mortgagee succeeded in paying off the greater part of his mortgage-debt but has brought the Mills into a state of such prosperity that other mortgages which were sold for Rs. 55,000 and Rs. 13,000 respectively two or three years ago are now probably worth more than five times that amount. I do not think that, for this reason alone, the Court would be justified in declaring such an agreement as this void and not binding upon the mortgagor. Nor do I think that it can be fairly said to be a clog upon the equity of redemption. My reasons for that conclusion in effect are the same that I have given for holding that the agreements did not need registration before they can be proved. No one could seriously argue that the payment of fair remuneration to the Manager of a large concern like the Spinning and Weaving Mills to keep it in a high state of efficiency would be a clog upon the equity of redemption and in principle, for the purpose of that argument only, it seems to me to make no difference whether the Manager is the mortgagee in possession or a third party. Then, guiding myself by the conditions prescribed by Romer, J., and since then I think generally approved in England, I have to inquire whether this agreement was a fair ageement or whether it was open to exception as having been obtained by undue influence or is in itself unconscionable and oppressive. It has been contended that at the time the defendant No. 1 obtained the agreement from Rangildas, he was in a position to dominate the will of the plaintiff Company; and specially it is pleaded that he exercised undue influence and oppression upon Rangildas himself by threats of exposing has malpractices in the capacity of Agent to the Mills. The plaintiffs' case here is this. That Oonrigar and B. J.

Lam, who both were Directors at that time, discovered various acts of misconduct on the part of Rangildas and that they deliberately used this knowledge as an engine of oppression to intimidate him into making this agreement with defendant No. 1. Now it is certainly true that Oomrigar had taxed Rangildas with misconduct and that he adopted a very hostile attitude towards him in the meeting of the Directors in December 1900. Shortly afterwards, both Oomrigar and Lam resigned their seats on the Board of Directors. Oomrigar at any rate assigning as his reason the very unsatisfactory way in which the affairs of the Company were being conducted, and it is suggested that all this was done to coerce Rangildas into persuading the Company to give Sir Cowasji the agreement of May 1901. To strengthen that argument it is pointed out that no sooner was that agreement made then nothing whatever more is said about Rangildas's alleged misdemeanour. I do not for a momemt believe that this was the reason which induced Rangildas to offer the agreement to the defendant No. 1. Of the testimony we have on the point, both Oomrigar and Sir Cowasji are very positive that Rangildas was eager and pressing and it seems very natural that he should have wished to prevent the sale of the Mills and to obtain the benefit of the defendant No. 1's reputation and experience, and above all his purse to tide the Mills over this crisis. Then, there is the argument that, from the very nature of the relations subsisting between the parties, defendant No. 1 was in a position to dominate the will of the plaintiff Company. He was the mortgagee in possession and was threatening to sell their property out and out. By means of such threat, it is alleged, he forced them into an unconscionable agreement under which he was to reap excessive advantages. Again, I am unable to accede to this argument. So far as the evidence before me and the probabilities of the case go, I do not think the agreement unconscionable, or that there is any solid reason for disbelieving Oomrigar's statement that it was the Company rather than Sir Cowasji who were desirous of making it. Then there is the question of consideration, which is closely allied with the broader and general question whether the mortgagee is permitted by law to make any agreement of this kind, for if he was bound by law to do all that he contracted to do under this agreement, then where would be the consideration? In my opinion, however, that argument goes too far. I must confine myself to the actual consideration stated in the agreement, and say whether it is real or merely nominal. The plaintiffs complain that Sir Cowasji neither did nor could do anything to help the Mills in the way of personal management and so merit the salary of Rs. 16,000 or afterwards Rs. 18,000 a year. It is pointed out that by his own confession he was constantly away and really took no practical part in the management. All this devolved on his *factotum* Oomrigar, to whom he paid an additional salary. He also employed salaried clerks and bestowed upon Oomrigar and others bonuses. So that, so far as the Mills benefited at all, they benefited by the services of these underlings who were not paid in conformity with the terms of the agreement, but over and above the salary which that agreement gave the Manager. The answer to all this is that if Sir Cowasji should be unable to justify the expenditure of monies upon Oomrigar and other subordinates, those sums will be struck out of the accounts. But that really has nothing to do with the consideration of the agreement. It may be argued that Rs. 1,200 or Rs. 1,500 a month was far beyond the deserts of Sir Cowasji regarded merely as a Manager. But I think that we must consider the Company to have been paying in this way for several things partly no doubt for defendant No. 1's forbearance to sell the Mills. I am not quite sure, whether that would be in strict law good consideration. It savours rather too closely of oppression and menace still, if the mortgagee has the right to dispose of his property and those who hold the equity of redemption are extremely desirous that he should not exercise that right for a time at least, it is quite conceivable that they might be willing to pay him for his forbearance, and that in so doing the consideration moved from them voluntarily and was not induced by threats or undue influence. Partly, again, no doubt they were paying for Sir Cowasji's name and reputation as an experienced financier and Manager of Mills. Partly, too, and I dare say in a large measure, for his financial backing and lastly,

his position and standing is not to be wholly ignored. A man of Sir Cowasji's rank and wealth could hardly be expected to accept remuneration except upon a fairly liberal scale. So that I do not think that there is sufficient ground in any of these contentions of the plaintiffs for annulling the agreement. It appears to me to have been on the whole a fair and reasonable agreement, such as business men like the plaintiff Company might very well have entered into with their eyes open and uninfluenced by any consideration peculiar to the possibility of their will being dominated by that of Sir Cowasji in the relations existing between them.

Before concluding my examination of this part of the subject, I must refer to another term in these agreements by which the Company binds itself to accept all the mortgagee's accounts when they have been passed before a firm of Accountants. I have admitted those parts of the agreement merely as an admission by the Company of the sum at the time due upon the mortgage but I do not certainly intend to admit them as precluding the plaintiff Company from exercising its legitimate rights against Sir Cowasji in surcharging and falsifying. If the point is to be carried to that length, I think that would be extremely oppressive and might really operate to create a heavy additional charge upon the mortgaged property. In this connection, as well as in dealing with the agreement generally, the defendant has strenuously contended that whatever defects may have existed in the Directors who made those agreements, and whatever exceptions the plaintiffs may now have been advised to take to those agreements as originally made, all have since been condoned and ratified. It is said that these agreements have been acted upon and accepted by the Company for many years so that they are now estopped from impugning their validity and binding effect. I am not inclined to adopt that view. Such ratification, as is sought to be established by culling passages from the letters of the present Agents, appears to me to amount to nothing. First, I do not read those passages as really intended to ratify the agreements, as some of them at least occur long after the Agents had openly repudiated them, nor in any event could I treat a casual phrase of that kind used by the Agents as a ratification binding and estopping the Company. Another ground upon which the defendant contends that the Company have ratified the agreement as a whole is that accounts purporting to have been submitted under the clauses of these agreements have been passed at the general meetings of the Company. That goes a good deal nearer. I have consulted several cases upon the point, such as *Langstoffe* v. *Fenwick* (35); *Eyre* v. *Wynn Mackenzie* (36); *Willmott* v. *Barber* (37); *Blackburn and District Benefit Building Society* v. *Cunliffe, Brooks & Co.* (38); *Irvine* v. *Union Bank of Australia* (39). The strongest and most instructive of these cases is *Willmott* v. *Barber* (37). In that case Fry, J., said,—

"It has been said that the acquiescence which will deprive a man of his legal rights must amount to fraud, and in my view that is an abbreviated statement of a very true proposition. A man is not to be deprived of his legal rights unless he has acted in such a way as to make it fraudulent for him to set up those rights. What, then, are the elements or requisites necessary to constitute fraud of that description? In the *first* place the plaintiff must have made a mistake as to his legal rights. *Secondly*, the plaintiffs must have expended some money or must have done some act (not necessarily upon the defendant's land) on the faith of his mistaken belief. *Thirdly*, the defendant, the possessor of the legal right, must know of the existence of his own right which is inconsistent with the right claimed by the plaintiff. If he does not know of it, he is in the same position as the plaintiff, and the doctrine of acquiescence is founded upon conduct with a knowledge of your legal rights. *Fourthly*, the defendant, the possessor of the legal right, must know of the plaintiff's mistaken belief of his rights. If he does not know, there is nothing which calls upon him to assert his own rights. *Lastly*, the defendant, the possessor of the legal right, must have encouraged the plaint-

(35) (1805) 10 Ves Jr. 405; 8 R. R. 8.

(36) (1880) 1 Ch. 248; 63 L. J. Ch. 259; 8 R. 53; 69 L. T. 823; 42 W. R. 220.

(37) (1880) 15 Ch. 105; 49 L. J. Ch. 792; 33 L. T. 95; 28 W. R. 911.

(38) (1885) 29 Ch. D. 902; 54 L. J. Ch. 1091; 53 L. T. 741.

(39) (1877) 2 App. Cas. 366; 46 L J. P. C. 87; 37 L. T. 176; 25 W. R. 682.

iff in his expenditure of money or is the other acts which he has done, either directly or by abstaining from asserting his legal right. Where all these elements exist, there is fraud of such a nature as will entitle the Court to restrain the possessor of the legal right from exercising it, but in my judgment, nothing short of this will do."

Applying that principle, no acquiescence of a share-holders' meeting would be of any legal effect to destroy the share-holders' right unless it is given with full knowledge of that right; and such, I think, could not possibly have been the case at any of the meetings of this Company. For even now it is very doubtful what the precise legal rights of the contracting parties to this part of the agreement are. In my opinion, however, the defendant cannot contract himself out of his statutory liability as the mortgagee in possession to render proper accounts nor deprive the plaintiff of his right to examine into and challenge any of their details.

I have now concluded my examination of that part of the case, and the result is this I find both the agreements of 1901 and 1905, so far as they constitute a contract of service between defendant No. 1 and the Company, are valid and binding upon the Company.

There is one other point which remains over, and that is whether Sir Cowasji can as and from the date of both the agreements claim to be in possession solely in virtue of them and not as mortgagee in possession. The effect of holding that he could, might affect the nature of the accounts he will have to render. But I am of opinion that, notwithstanding those agreements, he is not absolved from his duty to account from December 1900 as mortgagee in possession. The only use to which, in my opinion, he may put those agreements is to justify his appropriation of salary under them, or to explain, in so far as they can legitimately explain, any other items of expenditure in his working account.

I come now to the last point in the case, which is, whether the defendant No. 1 holds the second mortgage called Tokersey's mortgage in his own right and for himself or as Agent of the Company; and whether he and the defendant No. 2 jointly hold in partnership the third mortgage called Ichharam's mortgage for themselves and in their own right or as Agents of the Company. A very great deal of time was spent during the hearing over the part of the plaintiff's case but it really resolves itself into a question of comparative simplicity. As to the second or Tokersey's mortgage, it is conceded that it makes now no difference to the plaintiff Company whether Sir Cowasji bought it for himself or as their Agent since he appears to have paid the full value of it. Briefly, the story of this mortgage is as follows: It was effected in May 1900 and when the affairs of the Mill were going from bad to worse it was purchased nominally by one Motilal Canji for Rs. 55,000. In reality, it is only too plain that the real buyers were Rangildas, Parmanandas defendant No. 2 and Chaddulal Divan. It is impossible, perhaps, now to say with certainty which of these three really advanced the money. Motilal Canji's share in the transaction was insignificant. The sinister feature of these and the same persons, that is to say Rangildas, Parmanandas and Divan, trafficking in the third mortgage is, there can be little doubt, that Rangildas, as Agent of the Company, was thus endeavouring to make a great profit for himself out of the Company. He and Parmanandas and Divan were all hand in glove in these underhand and tortuous dealings. Unfortunately, they proved only too successful, for having obtained Tokersey's mortgage for Rs. 55,000, Rangildas either persuaded defendant No. 1 to buy in the said mortgage for Rs. 1,67,000 on his own account; or, as the plaintiffs allege persuaded the Directors of the Company to ask him to do so as their Agent. In 1906, the defendant No. 1 bought this mortgage from its nominal owner Motilal Canji for its full value Rs. 1,67,000. So that Rangildas, Parmanandas and Divan between them cleared over a lakh, and this money, whether, as alleged by the Company in the first instance is their own, or whether Sir Cowasji's money, would in the result have to be paid by the Company. On the 23rd of January 1906, there is the resolution of the Directors, (Exhiblt 1) approving of Sir Cowasji's working the Mill referring to the balance of over 3 lakhs of rupees, and inviting Sir Cowasji to buy in Motilal Canji's

mortgage. Both Oomrigar and Sir Cowasji swear that that resolution was never communicated to either of them. I may observe, generally, that Sir Cowasji's evidence as evidence is quite valueless. Owing to a severe accident he, for many years, completely lost his memory and even now appears to be quite incapable of remembering the details of his transactions with the Mill. If it were worth while going further into this question, I should be obliged to say that all the probabilities point to Sir Cowasji having acted in this instance upon the request of the Directors. It seems unlikely that so prudent and cautious a speculator would have, without question, paid the full value of this mortgage out of his own pocket. But it is not worth while, except as affording a ground of inference in dealing with the other mortgage, to pursue this topic further. Whether Sir Cowasji bought this mortgage for himself or for the Company the Company, would have to pay the same amount, or virtually the same amount, to get rid of it unless indeed it could be shown that the price was actually paid out of the Company's money and that certainly cannot be done.

The story of the third mortgage, is that when the original mortgagees became insolvents, the Official Assignee sold this mortgage for the beggarly sum of Rs. 13,000 to Ibrahim Rahimtoola. It is difficult to understand how the Official Assignee could have been persuaded that that was a fair price for it. It was probably represented to him that owing to depression in the Mill industry and owing to the existence of two prior mortgages, there would be no chance of realizing anything on this mortgage. But things have turned out very differently. In 1906 Ibrahim Rahimtoola was threatening to redeem Sir Cowasji. The defendant's case is that Rangildas again applied to Sir Cowasji and said that if the management of the Mill passed from his hands into those of Ibrahim Rahimtoola, the Company would be ruined, and implored him to buy this third mortgage. At that time Ibrahim Rahimtoola was asking over 3 lakhs for it, but after some negotiations with Oomrigar and Sir Cowasji he consented to take Rs. 2,30,300.

Here we come upon the extraordinary arrangement made between Sir Cowasji and the second defendant Parmanandas, I cannot entertain the least doubt but that this was Rangildas's doing, and that he and Divan, working in concert and in secret, saw their way to making another huge profit out of Rangildas's own Company. Sir Cowasji's fears appear to have been worked upon to such an extent that he refused to buy Ibrahim Rahimtoola's mortgage unless he could obtain a partner and naturally Rangildas produced a partner in the person of his own man Parmanandas, defendant No. 2. The terms of the partnership were that Parmanandas was to contribute Rs 50,000, in return for which he was to have half the profit, and to be indemnified against all possible litigation and loss occasioned by attacks upon the validity of Ibrahim Rahimtoola's title. This Rs. 50,000 were promptly paid out of the proceeds of the nefarious transaction in the second mortgage, and almost coincidently with the resolution of the 1st of November 1906, in which the Directors speak of Sir Cowasji having saved the Hope Mills at their request from going into the hands of the Honourable Mr. Ibrahim Rahimtoola, Sir Cowasji and Parmanandas bought the third mortgage for Rs. 2,30,000. Now there can be no doubt that defendant No. 1 himself was very uncertain about his position in this transaction. While negotiations for the settlement of the suit were proceeding, Sir Cowasji wrote to Parmanandas a very significant letter. Had it not been for defendant No. 2's obstinacy in holding out for his share of the profits to this third mortgage, a settlement would undoubtedly have been effected and this heavy and expensive litigation averted. Sir Cowasji was at that time willing and anxious to settle and he says he wrote this letter to the second defendant not as expressing his opinion but by way of threat hoping to persuade him to relinquish the claim under the mortgage. In that letter, Ex. 94, of the 19th January 1909, Sir Cowasji admits that in view of the wording of the resolution of the 1st of November 1906 their position was very doubtful. Further, when we consider the very extraordinary terms upon which Sir Cowasji took Parmanandas into partnership in this transaction, it is very hard to believe that he was acting entirely independently and for himself alone. On the other hand, there is nothing really in the Directors' resolution to show that they had empowered Sir Cowasji to act as their agent. Taken literally, it amounts to no more than acknowledging that he had done them

great service at their request, and it certainly seems to me that if Sir Cowasji had been dealing with this matter not with his own but with the Company's money he would not have been so alarmed at the possibility of loss as to take Parmanandas into partnership on terms so favourable to the latter and unfavourable to himself. His and Oomrigar's explanation of this is that they did not expect that there would be any profit on the mortgage, while they feared that there would be some loss, so that they were quite willing to supplement their own contribution of Rs. 1,80,000 by Rs. 50,000 of Parmanandas's on terms of giving him half the profits, if any. Whatever I may think about this transaction, there is really nothing in evidence to support the Company's allegation that the money was theirs or that Sir Cowasji was acting as their Agent. The defendant argues that if Sir Cowasji had been acting as the Company's Agent, he could not possibly have taken a partner in the transaction, and I think there is some force in that contention. Then, assuming, as the letter states, that the Directors had asked Sir Cowasji to relieve them of the risk of Ibrahim Rahimtoola redeeming Sir Cowasji and becoming mortgagee in possession and had Sir Cowasji complied with that request, I do not see that any relation of agency is necessarily established. An attempt was made to show that some part of the money at least which Sir Cowasji paid Ibrahim Rahimtoola for this mortgage was taken from the balance to the Company's credit in the working account. I do not think that the attempt was very successful, and I have to observe generally on this and like arguments that until Sir Cowasji's first mortgage was completely paid off, all profit balance of the Company were available to him to apply for that purpose and in that sense his own money. Although it is with some regret that I come to this conclusion, since it is probable that it will result in putting further large profits into the pockets of Parmanandas and Chandulal Divan, I feel that I must hold on the evidence that the Company has failed to establish its allegation that Sir Cowasji bought in Ibrahim Rahimtoola's mortgage as the Company's Agent out of the Company's money.

Decree accordingly.

Attorneys for the plaintiffs: Messrs. *Bhaishankar Kanga* and *Girdharlal*.

Attorneys for the Defendants: Messrs. *Mulla* and *Mulla*, and *Daphtary*, *Firreira* and *Diran*.

(s. c. 13 Bom. L. R. 200.)

BOMBAY HIGH COURT.

CRIMINAL REFERENCE NO. 3 OF 1911.

March 1, 1911.

Present:—Sir N. G. Chandavarkar, Kt., Judge, and Mr. Justice Heaton.

EMPEROR

versus

MAHOMED ISAF HABIB—ACCUSED.

Criminal Procedure Code (Act V of 1898), ss. 35, 397 *Separate trials on one and the same day—Concurrent sentences.*

The accused was tried and convicted separately for two offences of cheating. The trials took place on one and the same day and one after the other:

Held, that for all practical purposes the trial was one and under section 35, Criminal Procedure Code, the sentences could have been legally ordered to run concurrently.

Criminal Reference made by the District Magistrate of East Khandesh.

ORDER.—The prisoner, it is true was tried separately for the two offences of cheating; but he could have been tried at one trial for both,—section 234, Criminal Procedure Code; and in that case the sentences could have been legally ordered to run concurrently,—section 35, Criminal Procedure Code. In the present case, the trials took place on one and the same day and one after the other. So it was, for all practical purposes, one trial. The Court, therefore, does not consider the order of the trial Magistrate in this case to be illegal.

Order accordingly.

(s. c. 8 A. L. J. 270.)

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 1051 OF 1901.

December 3, 1903.

Present:—Mr. Justice Blair and
Mr. Justice Banerji.

MUHAMMAD ABDUL RAHMAN KHAN AND OTHERS—DEFENDANTS—APPELLANTS

versus

MUHAMMAD KHAN—PLAINTIFF—RESPONDENT.

Muhammadan Law—Pre-emption—Talab-i-mowasibat, *essentials of.*

To say "I am pre-emptor and my right extends to the land" is not sufficient to constitute a *talab-i-mowasibat* within the meaning of the Muhammadan Law. Such claim must be found in the words which constitute the *talab-i-mowasibat* either in express terms or by implication.

A mere expression or declaration of his right does not of itself go to show that the plaintiff wishes to enforce his right.

Second appeal from the decision of the Extra Additional Subordinate Judge of Aligarh, reversing a decree of the Munsif of Khurja.

Mr. *Abdul Majid* (with him Hon'ble Mr. *Sundar Lal* and Mr. *Karamat Husain*), for the Appellants.

Mr. *Abdul Raof* (with him Mr. *Motilal Nehru*), for the Respondent.

JUDGMENT.—In this suit which is one for pre-emption, two points have been raised on behalf of the plaintiff. He claims to be entitled under the provisions of Muhammadan Law. He also claims under some custom not specified in his plaint. Upon the question of the Muhammadan Law the Court of first instance dismissed his claim. The Court of first appeal has found in favour of the plaintiff. That Court having disposed of the case upon the question of his right under the Muhammadan Law, did not proceed to try the issue whether there was or was not any custom other than that of Muhammadan Law of which the plaintiff could claim benefit. As to the decision of the Court upon the question of Muhammadan Law, we find ourselves driven to the conclusion that no right under that law has been acquired by the plaintiff. We cannot find, as the Judge has done, that for the plaintiff to say "I am pre-emptor, and my right extends to the land" constitutes a *talab-i-mowasibat* within the meaning of the Muhammadan Law. He declares a right, but neither by express words nor by implication does he claim to exercise that right. It is needless to go into the authorities, because it is abundantly manifest that such claim must be found in the words which constitute the *talab-i-mowasibat* either in express terms or by implication. The words used in the present case do not, in our opinion, constitute either an express claim or a claim by implication. There is a concurrence of authority upon the subject. "It is immaterial" according to the Hedyaya, "in what words the claim is preferred, it being sufficient that they imply a claim" and instances are given in that book which imply such a claim. But we have nothing before us upon which it is possible to say that such a claim has been made or can be inferred. Mr. Justice Amir Ali in his work upon Muhammadan Law, Vol. 2, p. 597, following therein the last authority says, "if a pre-emptor were to say to the purchaser, 'I am thy *shafi*, or pre-emptor.' it would be void." The reason of this is clear that a mere expression or declaration of his right does not of itself go to show that he wishes to enforce that right. We find ourselves constrained to overrule the Court of first appeal upon this question and to hold that the plaintiff has not proved the first demand necessary under the Muhammadan Law. But there still remains undisposed of by that Court the claim based upon custom. As the Court below decided the case solely upon the point whether the demand required by the Mnhammadan Law had been made, we remand this case to that Court under section 562 of the Code of Civil Procedure for trial upon the merits.

Appeal decreed; Cause remanded.

(s. c. 4 Bur. L. T. 67.)

LOWER BURMA CHIEF COURT.

MISCELLANEOUS CIVIL APPEAL No. 160 OF 1909.

December 19, 1910.

Present:—Mr. Justice Parlett and
Mr Justice Twomey.

PALANEAPPA CHETTY—APPELLANT

versus

R. M. P. V. N. MUTHU CHETTY BY HIS ATTORNEY SUBRAMANIAN CHETTY—RESPONDENT.

Civil Procedure Code (Act V of 1903). O. IX, r. 1, O. XVII, r. 3—Appearance—Advocate appearing and

EMPEROR *v.* NGA LU NYUN.

applying for adjournment and then withdrawing on the application for adjournment being refused—Ex parte *decree—Application for setting aside—Sufficient reason.*

Where time was given to the defendant to summon his witnesses but he failed to summon them, whereupon his Pleader applied for a potsponement of the case and on his application being refused, withdrew his appearance:

Held, that the withdrawal of his appearance by a Pleader, who had represented the defendant in this case continuously for over two years, simply because the Court proceeded under Order XVII, rule 3, to decide the suit forthwith, declining to give further time to the defendant, would not necessarily render the subsequent proceedings *ex parte*.

In every application for setting aside a decree, the petitioner must satisfy the Court that he was prevented by any sufficient cause from appearing when the suit was called on for hearing.

Appeal against the order of Mr. Justice Ormond rejecting the application to set aside an *ex parte* decree passed in Civil Regular Suit No. 168 of 1907.

Mr. *P. N. Chari*, for the Appellant.

Mr. *N. M. Cowasji*, for the Respondent.

JUDGMENT.

PARLETT, J.—This is an appeal against an order refusing to set aside an *ex parte* decree. The suit was originally filed on 18th June 1907 and decreed *ex parte* on 5th August 1907. On 10th August 1907, 2nd defendant, the present appellant, applied to have the *ex parte* decree set aside. This was refused, but was allowed on appeal, and the case was restored to the list on 3rd August 1909. A written statement was filed for all the defendants and a commission was issued on the application of appellant. It was returned unexecuted on 14th August 1909. On 23rd August 1909 it was stated that a re-issue of the commission was unnecessary as the witnesses were in Pegu and the hearing was adjourned to the 30th August 1909. On that day Mr. A. B. Banerjee who had represented 2nd defendant present appellant, continuously since 10th August 1907, appeared for the defendants. Summonses had not been issued in time for the Pegu witnesses to appear and Mr. Banerjee asked for an adjournment. Plaintiff opposed the application. After hearing both sides, the learned Judge refused the application on the ground that defendant was responsible for the delay in issuing the semmons and passed a decree in favour of plaintiff. It is noted that on refusal of the adjournment, Mr. Banerjee "withdrew his appearance," and it is contended that the subsequent proceedings were *ex parte*. The case being adjourned for hearing on 30th August and when called on for hearing on that date, Mr. Banerjee having appeared. I do not see how he could withdraw an appearance which he had in fact made. He did not merely appear on this one occasion to ask for an adjournment; he had represented appellant in this case continuously for over two years.

Having been given time to produce his evidence and having failed to do so, the Court proceeded under Order XVII, rule 3, to decide the suit forthwith and Mr. Banerjee's withdrawal from the case at that stage would not necessarily render the subsequent proceedings *ex parte*.

But assuming that the decree was *ex parte* the appellant, before he could get it set aside, was bound to satisfy the Court that he was prevented by any sufficient cause, from appearing when the suit was called on for hearing. As noted above, he admittedly did appear by the Advocate, who had represented him throughout. In his application and affidavit, the appellant so far from advancing any cause at all for not appearing himself on 20th August 1909, now here states that he did not so appear, nor has it even been alleged before us, that he did not appear.

I hold that there are no grounds whatever for interfering and would dismiss this appeal with costs. Advocates' fees two gold *mohurs*.

TWOMEY, J.—I concur.

Appeal dismissed.

(s. c. 4 Bur. L. T. 67.)

LOWER BURMA CHIEF COURT.

CRIMINAL REVISION No. 672A OF 1910.

Present:—Mr. Justice Twomey.

EMPEROR - APPLICANT

versus

NGA LU NYUN—RESPONDENT.

Penal Code (Act XLV of 1860), s. 71—Double punishment for same offence.

Where the accused was convicted and sentenced for the offences under sections 354 and 506, Indian Penal Code, to three months' rigorous imprisonment for each offence:

Held, that the intimidation by throwing a knife formed part of the assault in this case, consequently the sentence under section 506 was illegal and must be set aside.

FACTS.—Nga Lu Nyun was convicted and sentenced for offences under sections 354 and

506 to three months' rigorous imprisonment for each offence. The District Magistrate of Bassein referred the case to the Chief Court giving it as his opinion that the double conviction was wrong.

JUDGMENT.—The intimidation by throwing a knife formed part of the assault in this case and the Additional Magistrate erred in imposing a double punishment (section 71 of the Indian Penal Code). The sentence under section 506, Indian Penal Code, is set aside as illegal and the sentence under section 354, Indian Penal Code, having already expired, it follows that the accused should be at once released so far as this case is concerned.

(s. c. 4 Bur. L. T. 68.)

LOWER BURMA CHIEF COURT.

CRIMINAL REVISION No. 292B OF 1910.

Present:—Mr. Justice Twomey.

MA KYWE—APPLICANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 562—Petty squabbles of young persons—Sentence of imprisonment without choice of fine inappropriate.

In a petty case arising out of a squabble between two girls of 16 and 14 the younger girl was convicted of slapping the elder's cheek and pulling her hair and was sentenced to 7 days' rigorous imprisonment:

Held, that the sentence of imprisonment without the option of a fine was inappropriate.

Criminal revision preferred against the sentence of 1st class and 2nd Additional Magistrate of Bassein in Criminal Regular No. 474 of 1910.

FACTS AND GROUNDS OF REFERENCE.

This is a petty case arising out of a squabble between two girls of 16 and 14. Accused, the younger girl, came into the house where complainant lives and slapped her cheek and pulled her hair. The conviction appears to be correct, but the sentence inflicted of seven days' rigorous imprisonment without the option of a fine appears obviously inappropriate. It was a case to which the provisions of section 562, Criminal Procedure Code, might, in my opinion, have been fittingly applied.

The case was tried by the second Additional Magistrate, Bassein (Maung Ket, 1st class). Accused was released by me on bail before she reached jail.

The proceedings are submitted to the Chief Court under section 438, Criminal Procedure Code, with the recommendation that the sentence may be set aside and t eaccused admitted to the benefit of section 562, Criminal Procedure Code.

JUDGMENT—Agreeing with the learned Sessions Judge I set aside the sentence passed on the applicant Ma Kywe in this case and direct instead that she shall enter into a bond under section 562, Criminal Procedure Code, for six months with one surety in Rs. 50 to appear and receive sentence when called upon and in the meantime to keep the peace and be of good behaviour. On her entering into a bond as aforesaid her present bail bond will be cancelled.

(s. c. 4 Bur. L. T. 68.)

LOWER BURMA CHIEF COURT.

CRIMINAL APPEAL No. 763 OF 1910.

December 9, 1910.

Present:—Mr. Justice Twomey.

NGA PO HNYIN—APPELLANT

versus

EMPEROR—RESPONDENT.

Punishment—Sentence—Effect of previous convictions—Sentence for a fresh offence—Offence of a petty nature.

Where the aggregate value of property stolen by the accused was only Rs. 3 but, on account of his previous convictions, he was sentenced to 7 years' transportation:

Held, that the offence was of a very petty kind, and the sentence of 7 years' transportation was altogether disproportionate even after taking the accused's previous convictions into account.

Criminal appeal preferred against the conviction and sentence passed under sections 379/75, Indian Penal Code, by the District Magistrate of Hanthawaddy in Criminal Regular No. 8 of 1910.

JUDGMENT.—The appellant stole some cocoanuts from a tree in a Pongyi Kyaung compound, and a basin belonging to the Kyaung was also found in his possession. The aggregate value of the stolen property is stated to be Rs. 3. The offence is of a very petty kind and might suitably be punished with a whipping but for the appellant's previous convictions. But even when the previous convictions are taken into account, the sentence of 7

years' transportation seems to me altogether disproprtionate.

I think the offence charged against the appellant was established and I will not interfere with the conviction. But the sentence is reduced to one of two years' rigorous imprisonment. I also direct that the accused Po Hnyin shall notify his residence and any change of residence as provided under section 565, Code of Criminal Procedure, for a term of three years from the date of the expiration of this sentence.

(s. c. 4 Bur. L. T. 69.)

LOWER BURMA CHIEF COURT.

CRIMINAL REVISION No. 393A OF 1910.

August 30, 1910.

Present:—Mr. Justice Twomey.

EMPEROR—APPLICANT

versus

MYA DIN—RESPONDENT.

Wounds inflicted with a dah—*Sentence—Are an application for compromise and the complainant's treatment as an out-door patient considerations for reduction of sentence.*

Where, in the course of a trivial quarrel, the accused inflicted a *dah* wound on the complainant's right buttock and was sentenced to 4 months' rigorous imprisonment and on appeal the senior Magistrate reduced the sentence to one month's imprisonment, merely on the grounds (1) that a petition to compound the offence was filed by the complainant and (2) that the complainant was treated as an out-door patient:

Held, that the original sentence was appropriate and the senior Magistrate was ill-advised in reducing the sentence.

Criminal revision against the order of the Senior Magistrate of Thaton in Criminal Appeal No. 37 of 1910 on the sentence of the Township Court of Paung in Criminal Trial No. 8 of 1910.

Messrs. *Ginwala* and *Mg. Hpaw*, for the Respondent.

ORDER.—The complainant and the accused had a trivial quarrel in the course of which the accused inflicted a *dah* wound on the complainant's right buttock. The complainant was treated at the Government Hospital as an out-door patient, the injury being slight. The parties are cousins and the witnesses, both for the prosecution and the defence, are more or less related to the accused. The Magistrate who tried the case considered that the witnesses had stated less than they knew in order to save the accused from severe

punishment. This view appears to be correct, for when complaint was first made at the Police Station, the complainant said that the accused had cut him with a *dah* from behind, while, according to the version given at the trial by the complainant and witnesses, the *dah* was merely thrown by the accused. In all the circumstances of the case; the sentence of four months' rigorous imprisonment passed by the Magistrate was appropriate. I think the Senior Magistrate who dealt with the accused's appeal was ill-advised in reducing the sentence merely on the grounds (1) that a petition to compound the offence was filed by the complainant and (2) that the complainant was treated as an out-door patient. The use of *dahs* in quarrels will never be checked by sentences of one month's imprisonment. The wound was not grievous. But it was 2 inches long, ½ inch deep.

It is over two months since the accused Mya Din was released from jail on the expiry of his reduced sentence, I will not order his re-commitment to jail, but I impose in addition to the punishment already undergone by him a fine of Rs. 10. In default of payment Nga Mya Din, will be rigorously imprisoned for one month.

(s. c. 4 Bur. L. T. 69.)

LOWER BURMA CHIEF COURT.

CRIMINAL APPEAL No. 467 OF 1910.

August 26, 1910.

Present:—Mr. Justice Hartnoll.

NGA PO TOK—APPLICANT

versus

EMPEROR—RESPONDENT.

Reformatory Schools Act (VIII of 1897), s. 8—Applicability of the section to cases where fine alone is inflicted.

Where a boy under 12 years was convicted of stabbing a companion with a knife and sentenced to pay a fine of Rs. 100 or in default of payment to go to the Reformatory School for 3 years:

Held, the order was illegal.

Under section 8 of the Reformatory Schools Act, before such an order is passed, the offender must have been sentenced to transportation or imprisonment and not to mere fine.

Criminal appeal against the order of the District Magistrate, Rangoon, in Criminal Trial No. 24 of 1910.

The Government Advocate, for the Respondent.

MAUNG BA CHIT *v.* EMPEROR.

JUDGMENT.—Maung Po Tok, a boy, described on the record as not more than 12 years of age, has been convicted under section 323, Indian Penal Code, and sentenced to pay a fine of Rs. 100, and in default to payment to go to the Reformatory School for three years. The fine was paid. He now appeals. The sentence, or rather the order, passed was illegal. An order for an accused to go to a Reformatory School in default of payment of fine is inoperative if the fine is paid. When an order is passed for the detention of an offender, it is always meant to be operative before such an order is passed, an offender must have been sentenced to transportation or imprisonment and it is only in such a case an order can be passed that, instead of the sentence being undergone, the offender shall be sent to a Reformatory School and detained there for a certain period. This is clear from the wording of section 8 * of the Reformatory Schools Act.

A sentence of Rs. 100 on a boy of 12 years old was inappropriate in my opinion. The appellant's offence was that of stabbing a companion in the armpit with a knife. The most appropriate punishment, in my opinion, would have been a whipping as a juvenile offender. It is now too late to order such a whipping.

The fine is reduced to one of Rs. 5 and the remainder Rs. 95 will be refunded. The rest of the order relating to detention in a Reformatory School is set aside.

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* Section 8—(1) Whenever any youthful offender is sentenced to transportation or imprisonment, and is in the judgment of the Court by which he is sentenced, a proper person to be an inmate of a Reformatory School, the Court may, subject to any rules made by the Local Government, direct that, instead of undergoing his sentence, he shall be sent to such a school, and be there detained for a period which shall be not less than three or more than seven years.

(2) The powers so conferred on the Court by this section shall be exercised only be (*a*) the High Court, (*b*) a Court of Session, (*c*) a District Magistrate, (*d*) any Magistrate specially empowered by the Local Government in this behalf and may be exercised by such Courts whether the case comes before them originally or on appeal.

(s. c. 4 Bur. L. T. 70.)

LOWER BURMA CHIEF COURT.

CRIMINAL REVISION No. 63B OF 1910.

March 26, 1910.

Present :—Mr. Justice Towmey.

MAUNG BA CHIT AND ANOTHER—APPLICANTS

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 497 and 498—Bail—Re-arrest of accused persons who are granted bail—Under what sections it would be legal—Effect of setting aside an illegal order for such re-arrest.

A District Magistrate ordered the re-arrest of the applicants who were accused of an offence under section 304, Indian Penal Code, and had been released on bail by the Sub-Divisional Magistrate:

Held, that such an order was illegal and must be set aside.

The District Magistrate's order having been set aside, the applicants, by virtue of the Sub-Divisional Magistrate's previous order, must be released on bail as before and there will be no reason for them to apply under section 497 or section 498, Criminal Procedure Code, that they be so released.

Reference by the Sessions Judge of Tenasserim :—

This application was filed as a Miscellaneous Appeal, but at the request of Mr. Law, after discussion, it is treated as an application for revision.

FACTS.—Ba Chit, Suban and Po Pwe were sent up by the police on a charge under section 304, Indian Penal Code. On the 24th February 1910, Mr. Law applied to the Sub-Divisional Magistrate, Moulmein, before whom the case was, for bail.

The Magistrate noted that the police did not object, and allowed bail

The District Superintendent of Police then applied to the District Magistrate for the re-arrest of the three accused, and stated that the officer who had appeared before the Sub-Divisional Magistrate had made a mistake in stating that there was no objection to their release on bail.

The District Magistrate, Amherest, Mr. J. D. Fraser, went through all the police papers and considered that the accused should not have been released on bail, and ordered the re-arrest of the first two, allowing the third Po Pwe to remain on bail.

The prayer in the present order is that the order of the District Magistrate be set aside and the two petitioners released on bail.

As to the first part of the prayer, I do not consider that I have any power to interfere,

except by referring the matter to the Chief Court. The District Magistrate's order appears to be one for which the Criminal Procedure Code nowhere provides, and it has been ruled in the case of *Imperatrix* v. *Sadashiv Narayan Joshi* (1) that such an order is not within the powers of a District Magistrate. It was there held that if he thought the release was improper, the proper course was to refer the matter to the High Court.

But it is clear that no provision is made for and appeal against such an order, and, in my opinion, section 498, Criminal Procedure Code, does not give me any power of interference. That section does not give this Court the power to release the accused on bail, but that power should, in my opinion, be exercised only after a consideration of the merits of the case, and not merely on the ground that the District Magistrate's order was illegal.

Mr. Law does not wish to have the question considered now on its merits, as this would inevitably delay the inquiry, but asks me to refer the case with a view to getting the order of the District Magistrate set aside.

I agree with his view that the order was illegal, and therefore, I refer the matter to the Chief Court with a recommendation that the District Magistrate's order of the 3rd March be set aside. I do not consider it desirable that the accused should be ordered to be released on bail except on a consideration of the merits of the case, and would, therefore, recommend that after the order has been set aside they be left to make a fresh application under either section 497 or 498, Criminal Procedure Code, if they see fit.

* * * * *

JUDGMENT.—I concur in the view of the Sessions Judge that the District Magistrate's order for re-arrest of the two applicants who had been released on bail by the Sub-Divisional Magistrate was illegal and it is now set aside. I think the Sessions Judge could have disposed of the matter himself. The power conferred on Sessions Court by section 498 of the Code of Criminal Prodcedure is unqualified.

The Sessions Judge recommends further that after the order has been set aside the applicants should be left to make a fresh application under section 497 or section 498 if they see fit. I do not understand the recommendation. The District Magistrate's order being set aside, the applicants must by virtue of the Sub-Divisional Magistrate's previous order be released on bail as before and there will be no reason for them to apply under section 497 or section 498. But the Sub-Divisional Magistrate who has taken congnizance of the offence charged, may, if he thinks, fit, proceed under section 497 (3), and if he causes the applicants to be arrested under that sub-section they can then, if they see fit, apply to the Sessions Court under section 498.

(1) 22 B 549.

(s. c. 4 Bur. L. T. 71.)

LOWER BURMA CHIEF COURT.

CRIMINAL REVISION No. 78B OF 1909.

May 28, 1909.

Present:—Sir Charles Fox, KT., Chief Judge.

LU GALE *alias* KYWET SHAUK—APPLICANT

versus

EMPEROR—RESPONDENT.

Burma Gambling Act (I of 1899), s 10—Place to which public have access—Fenced garden not such a place.

"The place to which the public have access" in section 10 of the Burma Gambling Act must be a place akin to or of the same nature as a street or a thoroughfare.

A fenced garden which is private property cannot be held to be akin to or of the same nature as a street or thoroughfare.

Ah Kon v. *King-Emperor*, 2 L. B. R. 195, 10 Bur. L. R. 137; 1 Cr. L. J. 461, followed.

Appeal against the order of the Eastern Sub-Divisional Magistrate, Rangoon, passed in Criminal Trial No. 30 of 1909, on the 27th February 1909.

Mr. *Patker*, for the Appllicant.

JUDGMENT.—The Magistrate devoted much study of authorities to the case, but he appears to have lost sight of the fact that he was bound to follow the Full Bench Ruling of this Court in *Ah Kon* v. *Emperor* (1). He found the accused guilty of an offence punishable under section 10 of the Gambling Act, that is, he found the accused had done one of the things mentioned in the section in a "street or thoroughfare or place to which the public have access." The gambling was in a fenced garden which was evidently private property,

(1) 2 L.B.R. 195; 10 Bur. L. R. 137; 1 Cr.L.J. 461

although the witnesses did not know the name of the owner. The garden was not a street or a thoroughfare, nor was it a "place to which the public have access." In the Full Bench Ruling of this Court above referred to, the learned Chief Judge laid down that to fall within the above terms the place must be a place akin to or of the same nature as a street or thoroughfare. That construction is binding on all Magistrates in Lower Burma. The fenced garden cannot be held to be akin to or of the same nature as a street or thoroughfare.

The conviction under section 10 of the Act was illegal. Both conviction and sentence are set aside and the accused is acquitted. The fine paid will be refunded

Petition accepted.

(S. C. 4 Bur. L. T. 71).

LOWER BURMA CHIEF COURT.

FIRST CIVIL APPEAL No. 70 OF 1909.

January 9, 1911.

Present—Sir Charles Fox KT., Chief Judge, and Mr. Justice Twomey.

ANA PENA NATER SHA AND OTHERS—APPELLANTS

versus

K. A. L. T. ANAMALAY CHETTY—RESPONDENT.

Mortgage—Implied authority of one of the partners to create—Parties—Non-joinder—Time for redemption.

Where the nature of the business of a partnership included the buying of land and the raising of money on loan in order to carry on the business, an authority to one partner to mortgage the partnership land may be implied.

Where one of two mortgagees sued on a mortgage alleging that he had bought up the share of the other mortgagee but the latter was not joined as a party and there was no registered deed of assignment of his interest in the mortgage to the plaintiff:

Held, that the formal defect in the suit might be remedied in appeal by permitting him to join as a plaintiff or permitting plaintiff to add him as a formal defendant.

A Court ought not to allow a period of less than six weeks for redemption.

Appeal against the decree of the District Judge, Myaung-Mya, in Civil Regular Suit No. 7 of 1906.

Mr. *Nariman*, for the Appellant.

Mr. *N. C. Sen*, for the Respondent.

JUDGMENT.—The plaintiff sued the 1st defendant on a mortgage of lands and houses for Rs. 40,000. In the mortgage-deed, the plaintiff and Saterappa Chetty are the mortgagees. Both said that the mortgage was taken for old debts due on promissory-notes signed by the 1st and 3rd defendants and for fresh advances made at the time. Rupees 23,200 was due to the plaintiff and he advanced Rs. 3,800. Rs. 11,000 was due to Saterappa and he advanced Rs. 2,000. The 1st defendant admitted execution of the mortgage-deed, but he set up that it was a sham transaction made with the intention of protecting the properties from being wasted by his brothers, the other defendants, during his absence on a visit to India. He admitted, however, that he had received Rs. 1,800 from Saterappa on its execution. He further set up that the properties mentioned in the deed belonged to himself and his brothers the other defendants jointly and that he had no legal right to effect a valid mortgage of them. He also contested the plaintiff's right to sue alone on the mortgage. The plaintiff alleged that he had bought up Saterappa's share and interest in the mortgage. The 1st defendant said he knew nothing about this. The 2nd and 3rd defendants applied to the Court to be made parties to the suit and this was granted. They denied all knowledge of the mortgage and contested its validity if it had been made by the 1st defendant. They set up that the properties were jointly owned properties of themselves and the 1st defendant, and they denied all knowledge of any assignment of Saterappa's share to the plaintiff.

Most of the properties are entered in the Revenue Registers as being the property of the 1st defendant. Some are in the names of the 1st and 3rd, one is in the name of the 3rd defendant, and two are properties which were held by the 1st defendant as mortgagee. The District Judge has given the plaintiff a mortgage decree against the 1st defendant in respect of all the properties which stood in the name of the 1st defendant and of half of those which stood in the name of 1st and 3rd defendants. He dismissed the suit against the 2nd and 3rd defendants.

All three defendants appeal. It is objected that the 2nd and 3rd defendants have no appeal since the suit was dismissed as against them. The situation is peculiar and arises in consequence of the manner in which the Judge dealt with the case. If he

added these defendants as parties in consequence of their claiming an interest in the property, he should have made a decree against them in so far as and to the extent that they claimed interest in the properties.

In his judgment he found that the 2nd and 3rd defendants had no interest in the properties which stood in the Revenue Register in the name of the 1st defendant alone. This finding adversely affects the rights which the 2nd and 3rd defendants claimed, and if they cannot appeal against the decree, because the suit was dismissed against them, they have no means of contesting the finding. In the peculiar circumstances of the case, their appeal must, I think, be considered along with the 1st defendant's appeal.

All three defendants set up that they jointly owned all the properties included in the mortgage. Although a great part of the evidence of the defendants was obviously untrue, it is fairly clear on their evidence and that of a witness for the plaintiff who knew their history that all three brothers had immigrated from Madras bringing with them little or no property. The 1st and 3rd defendants started working for their livelihood in Burma as clerks. Afterwards, either one or both of them started a shop in the bazaar at Wakema and both worked together in it. They then took to trading in paddy and one set up at a place named Inaungadi. The 2nd defendant joined the 1st defendant there and he continued working there all along. Monies were borrowed from Chetties on promissory-notes signed by the 1st and 3rd defendants and with these monies and the profits from the shop and trading in paddy, lands were bought. Documents of purchase of the lands were made out in favour of whoever happened to have effected the particular transaction. The 1st defendant being the eldest brother and the one who, apparently, had most to do with such transactions, most of the conveyances were to him by name. Some, however, were made out to him and the 3rd defendant and some to the 3rd defendant alone. As often happens amongst immigrants of the class of these brothers, no definite arrangement was come to between them as to their several interests in the property acquired by their labour and skill and each taking what he wanted for his personal expenses out of what came to him; no occasion for any settlement of what each one's share in the business was appears to have arisen. Although there was no definite agreement, either oral or in writing, between them, the course of conduct spoken to is sufficient to show that there was an implied contract of partnership between them in the business carried on and that the properties acquired belonged to that partnership. The course of conduct also shows that each brother managed what he happened to be doing in the business and each impliedly had full authority from the others to deal with the property of the partnership as he pleased. The very reason which the first defendant set up for entering into what he called a sham transaction with the plaintiff and Saterappa goes to show that in his absence the other defendants, or either of them, might have disposed of the bulk of the property although it stood in his name.

As to the particular transaction in suit, it is clear that large amounts were due to the plaintiff and Saterappa on promissory-notes signed by both the 1st and 3rd defendants. It was originally intended that the 3rd defendant should expressly join in the mortgage and his name was entered in the deed, but was subsequently struck out as he did not go to the Registration Office when the deed was to be executed. The 1st defendant's allegation that the mortgage was a sham one is childish and there is no reason for doubting the version of the plaintiff and Saterappa as to the consideration and how the mortgage came about.

I come to the conclusion that the three defendants were interested as joint owners of the properties mentioned in the mortgage-deed, but I also am of opinion that there is no reason for holding that the 1st defendant could not validly bind his fellow partners by the mortgage which he effected. Considering that the nature of business of the partnership included the buying of land and the raising of money on loans in order to carry on the business, an authority to one partner to mortgage the partnership lands may be implied. In any case, the other defendants must be held estopped from denying the 1st defendant's right to mortgage the lands which stood in his name in the Revenue Register, they having allowed him to hold himself out to the world as the sole owner of such lands. In this view the decree gives the plaintiff

MA HNIN GAING *v.* MA THA LI.

less than he was entitled to, but he has not appealed. In regard to the question of the plaintiff's right to sue alone, the defendant's objection was, in my opinion, a valid one and Saterappa Chetty should have been a party to the suit either as plaintiff or defendant. The plaintiff alleged that he had bought Saterappa's interest in the mortgage, that interest was an interest in immoveable property and the only manner in which it could be legally transferred to the plaintiff was by registered deed in accordance with the provisions of section 54 of the Transfer of Property Act.

The objection, however, does not affect the merits of the case, and, it being clear that Saterappa claims no interest in the mortgage, the formal defect in the suit may now be remedied by permitting either Saterappa to join as a plaintiff or permitting the plaintiff to add Saterappa as a formal defendant. I would allow either of these courses.

The Judge was very wrong in allowing a period less than six weeks for the redemption of the property. As, however, the 1st defendant obtained ample time within which to pay off the amount found due, there is no need to now alter the decree. I would dismiss the appeal with costs.

TWOMEY, J.—I concur in the above judgment.

Appeal dismissed.

(S. C. 4. Bur. L. T. 74.)

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL NO. 39 OF 1910.

February 23, 1911.

Present:—Mr. Justice Twomey.

MA HNIN GAING -- APPELLANT

versus

MA THA LI—RESPONDENT.

Buddhist Law—Inheritance—Orasa *son—Devolution of the status on the next eldest son—Transmission of right.*

If a first-born son dies in infancy, the status of '*orasa*' is capable of devolving on the next eldest son and does so devolve when he attains his majority, provided that he is unaffected by any of the disabilities or disqualifications mentioned in the texts on the subject. He can transmit the superior right of inheritance to his own issue in the same way as an '*orasa*', who is actually the first-born of the family, can do.

Ma Mya Thu v. *Po Thin*, S. J. L. B. 585; *San Dwa* v. *Ma Min Tha*, 8 Bur. L. R. 60; *Po San* v. *Po Min*, 3 L. B. R. 45; *Tun Myaing* v. *Ba Tun*, 2 L. B. R. 292, followed.

Appeal against the judgment of the District Court of Prome in Civil Appeal No. 144 of 1909 varying the one passed by the Township Court of Hmawsa in Civil Regular Suit No. 89 of 1909.

Mr. *P. N. Chari*, for the Appellant.

Mr. *Ba Dun*, for the Respondent.

JUDGMENT.—The parties are related as shown in the following genealogical table:—

MYAT ZE (deceased)

A male child that died in infancy.	Myat San, deceased	Ma Hnin Gaing, defendant.
	Ma Tha Li, plaintiff.	

Myat San died before his father Myat Ze. The question raised in this appeal is whether in the distribution of Myat Ze's estate, Ma Tha Li should share equally with her aunt Ma Hnin Gaing as daughter of an *orasa* son or whether she should get only one-fourth of one-half, *i. e.*, one-eighth, of the estate as an ordinary "out of time" grandchild.

The Township Court was certainly wrong in any case in awarding Ma Tha Li one-fourth of the whole estate.

I find that the question raised in the appeal has been virtually decided already by a course of rulings of this Court. They are—

Ma Mya Thu v. *Po Thin* (1), *San Dwa* v. *Ma Min Tha* (2), *Po Sein* v. *Po Min* (3), *Tun Myaing* v. *Ba Tun* (4).

It is sufficiently clear from these rulings that if the first-born son dies in infancy, the status of *orasa* is capable of devolving on the next eldest competent son and does so devolve when he attains his majority provided that he is affected by none of the disabilities or disqualifications mentioned in the texts on the subject.

There is nothing to show and it is not suggested that Mi Tha Li's father Myat San was in any respect incompetent to fill the place of *orasa* and it must be held that he became the *orasa* when he grew to manhood. Having attained this status, I think it would be altogether unreasonable to hold that he thereby obtained merely a contingent right

(1) S. J. L. B. 585.
(2) 8 Bur. L. R. 60.
(3) 3 L. B. R. 45.
(4) 2 L. B. R. 292.

to claim a greater share of the estate on his father's death, and that it is only an *orasa* who is actually first-born of the family who can transmit the superior right of inheritance to his own issue. There is no ground for such a distinction and no authority has been cited in support of it.

I, therefore, confirm the decree of the District Court and dismiss this appeal. But I make no order as to costs.

Appeal dismissed.

(s. c. 4 Bur. L. T. 74.)

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL NO. 13 OF 1910.

February 17, 1911.

Present:—Mr. Justice Twomey.

MAUNG BYA—APPELLANT

versus

MAUNG SAN THU AND OTHERS—RESPONDENTS.

Parties—Agent - Benamidar—*Transfer of Property Act (IV of 1882)*, s. 41—*Re-purchase, condition for*—Bona fide *purchaser for consideration without notice.*

Where in any transaction a person is an avowed agent or a *benamidar* for another, he is not a necessary party to a suit in respect of such transaction.

A stipulation for re-purchase cannot be enforced against a *bona fide* transferee for consideration without notice.

Appeal against the judgment of the Divisional Judge of Bassein, in Civil Appeal No. 35 of 1909 confirming the judgment and decree of the Sub-Divisional Court of Ngathaingyong in Suit No. 38 of 1909.

Mr. *Hay*, for the Appellant.

Mr. *Kyaw*, for the Respondents.

JUDGMENT.—The plaintiff's case was that the 1st defendant's son-in-law Maung Maung bought the land in suit expressly as agent for the 1st defendant, that the word "*Koza*" or agent, was prefixed to Maung Maung's signature on the Pyatbaing. As the Divisional Court remarked, there is no proof of this, but Maung Maung's relationship to San Thu and the circumstances that it was on account of debts due to San Thu that the plaintiff first mortgaged and sold the land to Maung Maung certainly suggest that the real buyer was San Thu and that Maung Maung was merely *banamidar*. This view is strengthened by Maung Maung's action in formally transferring the land to his father-in-law a few months later. But neither of the lower Courts has pronounced with any certainty on the question whether Maung Maung was a mere *benamidar*. The Sub-Divisional Court said that the matter smacked "redolently of a *benami* transaction" but pointed out that such was not the plaintiff's case at all. The Divisional Court merely found that there were grounds for suspecting that the transaction was *benami*

If Maung Maung was San Thu's avowed agent, Maung Maung would not be a necessary party to the suit. Nor would he be a necessary party on the assumption that the transaction was *benami*. As explained in Mayne's Hindu Law (7th Ed. paragraph 446) "where a transaction is once made out to be a mere *benami*, the *benamidar* absolutely disappears from the title. His name is simply an *alias* for that of the person beneficially interested." I consider, therefore, that there has been no want of parties in this case. I will now turn to the matter substantially in issue on the case.

The plaintiff admitted that in form at any rate, the transaction of 1902 between him and Maung Maung was an outright sale for Rs. 500. It was reported to the Revenue Surveyor as an absolute sale and nothing was said to the Revenue Surveyor about an option of re-purchase. I can see no reason for inferring that the parties contemplated a mortgage merely because of the corrections in red-ink which suggest some uncertainty as to whether it was to be classed as a mortgage or a sale. Looking to the unambiguous terms of the report itself, which was signed by the plaintiff, and to his admission that he told the Surveyor nothing about an option of re-purchase, I think the corrections must be regarded as due to a clerical error. The learned Divisional Judge seems to be mistaken in attaching any significance to the entries "Ngwe Shin Lekkan" and "Mye Shin Lekkan." Ngwa Shin in this context means the person paying the money and "Mye Shin" means the person selling the land. Exhibit I is endorsed "Ngwe Shin Lekkan," because it is the foil given to the man who paid the money (*i. e.*, Maung Maung) and Exhibit II is endorsed "Mye Shin Lekkan" because it is the foil given to the man who sold the land, *i. e.*, Maung Maung who sold to San Thu.

What the plaintiff alleges is that, though

the transaction at Zayathla was to all outward appearances an absolute sale, yet it was governed by a previous oral agreement at Bassein by which they the plaintiff agreed to transfer his land for debt to San Thu on condition that San Thu would afterwards allow re-purchase. It was for the plaintiff to prove this allegation. He said that the agreement at Bassein was witnessed by his brother Shwe Tha his sister's son-in-law Po Ke and his hired boatman Aung Gyi Shwe Tha and Aung Gyi were examined and corroborated the plaintiff. They are interested witnesses and their evidence must be regarded with suspicion. Neither of the lower Courts appears to have thought it sufficient to discharge the burden of proof as regards the alleged agreement and I am of the same opinion.

The circumstances differ from those described in the case of *Ma Dun* v. *Maung Lu O* (1) cited by the Divisional Court, inasmuch as there was in that case a considerable body of evidence showing that at the time of mutation of names, the parties meant the transfer to operate as a mortgage. Here not a word about the alleged option to re-purchase was said at the time and, the evidence as to the previous agreement to this effect is of the flimsiest kind. The allegation that San Thu's son Ba Thein afterwards sold the land back to the plaintiff for Rs. 200 Rs. 150 down and Rs. 50 to be paid afterwards—is not supported by any reliable evidence and is on the fact of it altogether incredible. The plaintiff, no doubt, paid Rs. 150 but as he was San Thu's tenant at the time, the natural presumption is that the money was paid at rent.

Even if the claim to exercise a right of re-purchase were established it is clear that the plaintiff has lost the right since the 3rd defendant Lan Thu bought the land. The plaintiff had held out San Thu as the ostensible owner and himself as San Thu's tenant since 1902 and I concur in the view of the Divisional Court that the principle of section 41 of the Transfer of Property Act must be applied in favour of Lan Thu who is a *bona fide* transferee for consideration without notice.

The appeal is dismissed.

Appeal dismissed.

(1) 5 L. B. R. 40; 2 Bur. L. T. 105; 2 Ind. Cas. 535.

(s. c. 4 Bur. L. T. 76.)

LOWER BURMA CHIEF COURT.

CIVIL REGULAR No. 281 OF 1910.

March 6, 1911.

Present:—Mr. Justice Robinson.

MAUNG AUNG MYAT AND OTHERS—PLAINTIFFS

versus

MA YWET AND OTHERS—DEFENDANTS.

Fraud—Suit for declaration that decree is void for fraud practised on the Court Ponna burial ground—Suppression of existence of Hindu Temple on land—Effect of such suppression on the validity of the decree—What constitutes fraud Setting aside whole or part decree—Consent of the Ponna community—Custom—Observances of Ponnas—Sanctity of burial ground—Consecration—Removal of dead body.

Two contractors purchased from the Trustees of the Ponna community a burial ground, promising to give the Ponnas another piece of land for burying purposes and to pay for the removal of the remains of the dead buried at the old cemetery to the new place, and the Court in a suit at the instance of four members of the community settled a scheme for carrying out the said transfer. After this, some Ponnas sued for a declaration that the decree in the above suit was void, making the trustees, the plaintiffs in the first suit and the contractors, all defendants. On the date fixed for the hearing of this second case, some Madrasi Hindus were also made parties as the decree and transfer would affect a temple of theirs on the land.

It was contended that the decree was obtained by practising a fraud on the Court when it was led to believe that the exchange of the burial ground with the contractors was made known to, explained to and accepted by, the whole Ponna community:

Held, that on the evidence, it was proved that the scheme was duly explained to the community and the minutes of the meeting of the community properly represented what occurred.

It was further contended that the Court was not informed of the existence of a Madrasi temple on part of the land and of the fact that the Madrasis had an interest in it and that the facts material for the Court to know were kept deliberately from the Court:

Held, that if the Court had been informed of the temple it must have issued notice to the Madrasis, who would have strenuously opposed the scheme and then the Court would have either declined to entertain the scheme at all or might have sanctioned the scheme except in so far as it affected the Madrasis, or would at any rate have called upon the trustees to prove that they had the right to have the temple removed at will.

Held, further, that as there was a suppression of material facts which it was essential that the Court should have before it and which might, and probably would, have caused it to arrive at a different decision, the decree passed in the previous suit for settling the scheme must be set aside so far as it affected the land occupied by and for the Madrasi temple.

Boswell v. *Cooks*, 27 L. R. Ch D. 424; *Brook* v. *Lord Mootsqre*, 46 Eng. Rep. 419; *Pasupati Nath Bose* v. *Nando Lal*, 30 C. 718, relied upon.

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Among Ponnas, cremation is considered the better way of disposing of their dead, and even if the dead are buried, no sign is maintained of where the graves are. No custom exists requiring the relatives to go to the cemetery to invite their dead to feasts, nor does any peculiar reverence attach to the graves or the remains. The cemetery is not consecrated and a body once interred can be disinterred and then cremated or removed to another place.

Ramrao Narayan v. *Rustumkhan*, 26 B. 198; *In re Plumstead 'Burial ground'*, L. R. Pro. Div. (1895) 225; at p 234; *The Queen* v. *Twiss*, L R. 4 Q. B. 407; 10 B. and S. 298; 38 L J Q B 28; 20 L. T. 522; 17 W. R. 765; *The Rector of St. George's Hanover Square* v. *Stuart*, 93 Eng. Rep. 1077; *Queen* v. *Dr. Tristram*, 15 T. L. R. 214, distinguished.

Messrs. *Ginwala* and *Patel*, for the Plaintiffs.

Messrs. *Colman*, *Das* and *Ruttledge*, for the Defendants Nos. 1 to 8.

Mr. *Lentaigne* with Mr. *Sivaya*, for the Defendant No. 9.

JUDGMENT.—A suit, being No. 353 of 1909, was filed in this Court on the 28th August 1909 by four persons who are members of the Ponna community of Rangoon against Ma Ywet and Ma Hnin Bwin who were described as the registered land-holders of a burial ground and trustees for the Ponna community. The plaint set out that the plaintiffs were members of the Ponna community which had burial ground in the Thenbyu Circle and that the defendants were the trustees thereof; that the burial ground had become unsuitable for the requirements of the community and that the defendants had, by an agreement dated the 26th February 1906, agreed with two persons Kali Das and Abdul Rahman, to convey the burial ground to them in consideration of the latter buying and conveying to the defendants another piece of land which was specified and on certain other terms. It alleged that the agreement had been submitted to a very large and representative meeting of over 300 Ponnas who unanimously approved of it on condition that the remains in the graves should be either cremated or reinterred in the new burial ground and that Kali Das should pay the cost thereof. A copy of the minutes of the meeting was annexed. It further recited that the proposal and the agreement has been approved of by the Local Government on certain conditions contained in a letter from the Collector annexed to the plaint. The prayer was for a decree authorizing the transfer by the defendants of the old burial ground ; for the settling of a scheme for the carrying out of the said transfer and for the disposal thereof and for laying out of the new burial ground in accordance with the terms of the said agreement and for such further or other relief and directions as might be necessary or proper.

The plaint was admitted and notice of the suit was ordered by advertisement. It was only advertised.

On 22nd November 1909, the defendants filed their written statement admitting all the facts stated and consenting to a decree. No one else appeared and no objections were put forward. The Court directed the parties to submit a draft scheme. This was done and on the 13th December the scheme was approved and a decree authorising the transfer of the trust and the carrying out of the agreement modified in accordance with Government's orders was passed. The decree further directed the defendants to hold the land to be given in exchange in trust for the purposes of a burial ground to be administered subject to the provisions of the scheme.

Thereafter, both the lands to be exchanged were surrendered to Government and on the 9th April 1910, conveyances were executed effecting the exchange. Then Kali Das and Abdul Rahman (whom I will hereafter throughout this judgment style "the contractors") commenced to cut trees, level the land and removes the graves. As soon as they began to do this, some Ponnas objected and went to the Commissioner of Police and on the 1st June 1910, a suit was filed praying for permanent *ad interim* and mandatory injunction. For fear a suit for an injunction only might not be allowed, a second suit was filed on the 1st August 1910, praying that the scheme and decree in C. R. No. 353 —09, be declared void, for the settlement of the new scheme and for the appointment of new trustees in addition to the injunction. The Secretary of State was not made a party as the period for notice on him had not expired but as soon as it expired a third suit was filed against him, the trustee and the contractors for the same reliefs. It is sufficient to say that an injunction pending the decision of the case had been granted.

Notices calling on persons interested to appear were issued and on the 11th August 1910, all three suits were consolidated and

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fixed for hearing on the 15th August. On that date certain Madrassi Hindus appeared and were made parties as the decree and the transfer would affect the temple of theirs on the land.

The following issues were framed:—

1. Do the minutes of the meeting of 23rd September 1908, deposited with the Financial Commissioner fraudulently misrepresent what took place at the meeting.

2. Were the persons who signed the document attached to such minutes induce so to do by the fraud as alleged in paragraph 16 of the plaint in C. R. 296-10 of the defendants or any of them and which?

3. Was the Collector induced to affect the exchange of the land and grant the old burial ground to the 7th and 8th defendants by the fraudulent misrepresentations or concealment as alleged in paragraph 19 of the plaint in C. R. 296-10, of the defendants or any of them and which?

4. Was the decree of this Honorable Court in C. R. 353-09 obtained by the fraud of these defendants or any of them and which?

5. Have the 7th and 8th defendants above-named observed the conditions under which the old burial grouud was transferred to them?

6. Have the first six defendants done or aided in doing or threatened to do any act in contravention of the terms under which the land was exchanged and the old burial ground transferred in the 7th and 8th defendants?

7. Is the present suit brought *bona fide* for the benefit of the Ponna community?

8. Are th Hindu community represented by defendant No. 9 interested in the land in these questions and, if so, to what extent?

9. Are the allegations made in paragraphs 5 (1) to (6) of defendant No. 9's written statement true and, if so, should the decree in C. R. 353—09 and the transfer be set aside?

10. Are the plaintiffs entitled to have the graves in any case retained on the land and to perform their ceremonies there?

11. If the transfers are maintained, can the relatives of the persons buried in the land refuse to consent to the graves being opened?

Put briefly, the ground on which the decree is challenged is that there was a fraud committed on the Court in that it was led to believe by a collusive suit that the exchange with the contractors was made known to, explained to, and accepted by the whole Ponna community whereas it was not; that the Court was led to believe that the Collector and through him the Financial Commissioner had full knowledge of all the facts, whereas they had been deceived; that the existence of a Madrassi temple on part of the land and that the Madrassis had an interest was concealed from the Court and the Collector, and that thus facts material for the Court to know were deliberately kept from the Court.

A vast mass of evidence has been led, but I do not consider it necessary to go into it in any great detail. The history of the land and of the transactions that led up to this case is not in dispute. Many years ago Ko Moh and Ma Mah Gyi, the father and mother of Ma Ywet and Ma Hnin Bwin, the present trustee, squated on a piece of Government land. It was then *jungle* waste and no one interfered with them. There is no record of any dedication by them but the land was always used as a burial ground for the Ponna community. In 1879 the Chief Commissioner decided that they had no rights in the land but he determined not to eject them and recognised their occupation of it so long as it was used as a burial ground. No formal document was given. After the death of Ko Mob, Ma Mah Gyi looked after the cemetery. After her death, her daughters did so. They were never elected trustees but were recognised as such by the community.

On the 25th February 1906, an agreement was entered into between Ma Ywet and Ma Hnin Bwin (whom I will hereafter call the trustees) and the contractors. The trustees were to get the burial ground transferred into their names and when this had been done the contractors were to buy a similar piece of land in the neighbourhood of Kyaiksan. The parties were then to exchange the two lands. The contractors agreed to bear all the expenses of removing the buildings on the old burial ground to the new, of sinking a well and building a wall round the new burial ground and of levelling the old burial ground and laying it out as sites. These sites were to be sold and then all expenses that had been incurred (of which the contractors undertook to keep proper accounts) were to be deducted from the proceeds of the sale and the net balance divided equally, one-half to be held by the trustees in trust for the needs of the new burial ground. On the

31st August 1906 the trustees filed a petition in the office of the Deputy Commissioner, Rangoon Town lands, setting out that the old burial ground had become unsuitable, that they had found a plot of land belonging to the contractors who were willing to exchange if Government would convert the old burial ground into a free hold, and that they would convert into building sites. The Deputy Commissioner was, for obvious reasons, willing to look favourably on a scheme which would remove a burial ground from a populous part of the town, without involving religious feeling. On the 7th December 1906, the trustees and contractors in reply to his inquiry stated that they were willing to remove the buildings on the old burial ground and level it.

It then appears that Government approached the trustees suggesting an exchange with Government and on the 12th April 1907, the trustees appeared before the Deputy Commissioner. They said they personally would have no objection but were afraid that the contractors might claim damages for breach of the agreement. As regards the temple, they said it was begun about a year before and that they were agreeable to its being removed to the new ground or left where it was. Inquiries were certainly made as to this temple and then its erection was sanctioned. This was on the 26th February 1903 and the Municipality refused to take action for its demolition though it was not erected in accordance with the sanctioned plan. The next step was that the Financial Commissioner made inquiries as to the agreement between the trustees and the contractors and as a result Mr. Noyce and Mr. Burjorjee appeared before the Deputy Commissioner. Mr. Noyce, for the trustees, stated that they now had changed their minds; that they would not agree to the temple being left where it was but demanded its removal to the new site or that an equivalent temple be built there; that they required a well and tank and boundary wall for the new ground and an approach road. Further, they claimed as a condition, without which they would not consent, that they should be given an endowment equivalent to what they would have got out of an exchange with the contractors.

These demands were, of course, absurd and Mr. Burjorjee in his evidence states that the trustees and the contractors joined forces and Mr Noyce piled on the agony with the object of making Government drop the idea of any exchange with it. He says, he knew the temple was a Madrassi temple but nothing about this was said to the Collector. The next admitted step is, that the Thugyi made inquiries as to whether Ma Ywet and Ma Hnin Bwin were recognised by the community generally as trustees and as to who the influential Ponnas were who were competent to voice the wishes of the community generally. He reported that Ma Ywet and Ma Hnin Bwin were recognised as trustees and could speak for the community but that five or six then stated that the trustees in future should be men. These persons then filed a petition objecting to Mya Ywet and Ma Hnin Bwin as trustees on the grounds that they used part of the land for their private purposes, allowed buildings to be erected by other nationalities and so on.

Mr. Burjorjee states that he and Mr. Giles had been in communication with the Financial Commissioner about the matter and it is clear that Government eventually abandoned the scheme of any exchange with it. It was prepared to meet the parties and carry out the agreement so far as its help was needed. The trustees and contractors were informed of the conditions on which the exchange would be effected and Ex. 29P is their reply.

After interviews with the Financial Commissioner, Mr. Burjorjee says he advised that as large a meeting as possible of the Ponnas should be convened in order to ascertain definitely whether the community as a whole approved of the scheme. This meeting was held on the 23rd September 1908 and minutes of the proceedings were submitted to the Financial Commissioner. Eventually, the sanction of the Government of India was obtained and the parties were informed that the trustees should obtain the sanction of the Court and then the scheme would be carried out. Civil Regular No. 353 of 1909 was then filed and a decree as prayed was passed and a scheme for the management of the burial ground was passed.

As regards the meeting of the 23rd September 1908, plaintiffs allege that they were deceived, that they were told that the Govern-

ment contemplated the resumption of the cemetery and that as there were no regularly appointed trustees, the two women were to be appointed trustees to protect against the resumption. Very numerous witnesses were examined to prove this, and that at the meeting nothing was said about the agreement. They say they never heard of the agreement and were ignorant of all that had taken place. They admit the Thugyi and Akunwun came to inquire and it seems incredible that not the slightest suggestion of the true facts should have reached them until the contractors cut the trees and dug up the graves. The evidence on the other side was far more trustworthy, and, after Mr. Burjorji's evidence, there can be no doubt that plaintiffs' evidence was not true. I am satisfied that the scheme was duly explained to them and that the minutes properly represent what occurred. The signatures were, I am convinced, properly obtained and I have no hesitation in holding that the community was informed of what was in contemplaton. They agreed, because they thought that they would not only get a larger cemetery and better equipped but also a fund for its maintenance. The value of land has since then greatly fallen and it does not seem likely that, after all the expense that has been incurred, there will be nearly so large a fund. I believe also that the Madrassi community has influenced some of them who were ill-disposed towards the trustees and some are broken Ponnas who are not admitted by the rest.

I must, therefore, decide issues Nos. 1 and 2 against the plaintiffs.

Issue No. 3 is practically a repetition of the others and I hold there was no fraud on the Collector.

Issue No. 4 also fails as no other ground is really set up unless it be that the fact that Kali Das was the son-in-law of Ma Ywet was not disclosed. Even if it was not, the question to be decided would have been whether the exchange was for the benefit of the community, and not whether Kali Das was likely to make a good thing out of it.

As to the observances in connection with their dead, I am not satisfied that any case has been made out. The evidence in support of the allegation that it is a rule that the relatives must go to the cemetery to invite their dead to feasts is not convincing. It does not seem to have heen regularly done and it is admitted that cremation is the better way and even if the dead are buried no sign of where the graves are is maintained. The trustees produced a Pundit who denies any such practice and it has not been proved. As to the temple, it is clear that its existence and the possible rights of Madrassis were never mentioned. I am not, perhaps concerned with what the Collector or the Government knew about it but there is very little doubt that it was understood that it belonged to the Ponnas. The Court was not told of it. If it had been it is certain, it must have issued notice to the Madrassis and it seems also fairly certain that they would have strenuously opposed the scheme. Their temple which had cost them a considerable amount would be removed and their God desecrated. Had they raised any objection, it is also clear that the Court would have either declined to entertain the scheme at all or would, at any rate, have called upon the trustees to prove that they had the right to remove them at will. Or, it might have sanctioned the scheme except in so far as it affected the Madrassis.

The trustees assert that the arrangement had all along been that the Madrassis would remove whenever called upon to do so. They say that they were informed during the negotiations with Government that they might have to remove, and that the Madrassis said that they did not beleive the Government would ever agree but that, in the unlikely event of their doing so, they would peaceably quit and remove their temple. Now, I am unable te believe this story. It rests on the sole evidence of Ma Ywet and Kali Das who are now most interested. It is, on the face of it most improbable and is flatly denied. I consider that Ma Ywet must have known that the application to build was for a temple and she knew a temple was built and was being enlarged. Much has been made of the Madrassi's minute book but I cannot see that it really helps to a solution. The trustees and the contractors could hardly have failed to realize the existence of the temple and the position of the Madrassis would effect the Court's decision and I am of opinion that it was intentionally kept back from the Court. It is no excuse to say their Counsel were informed, and decided that they were not necessary parties.

As to what amounts to a fraud on the Court there is no doubt. It is not equivalent to moral fraud, but what in the eye of a Court of Equity amounts to a fraud. If materials necessary to enable the Court to form a fair judgment were withheld, though within the knowledge of the party, that would be a fraud on the Court. If the facts withheld were material and might have led the Court to arrive at a different decision, there would be fraud. In *Boswell* v. *Cooks* (1), Baggallay, L. J., says that the duty of person dealing with a Court of Justice is either to abstain from laying any information before the Court in order to obtain the approval or he must lay before it all the information he possesses and which it is material that the Court should have to enable it to form a judgment on the subject under its consideration. This follows the decision in *Brook* v. *Lord Mootsqure* (2). There was in this case a suppression of material facts which it was essential that the Court should have before it and which might and probably would have caused it to arrive at a different decision. The decree must, therefore, be set aside so far as it affects the land occupied by the Madrassi temple.

I have now to consider the question whether this must result in the whole decree being set aside or whether there having been no fraud so far as the Ponnas were concerned, it can or should be set aside in its entirety. I do not think I am compelled to set it aside altogether. The Ponna plaintiffs have failed entirely to make out their case and the trustees, the contractors and the other Ponnas should not, I think, be made to suffer, if it is not an essential result from my decision as to the Madrassis. The Government Advocate appeared and stated that Government did not desire to take part, in the suit and would accept any decision arrived at. The decree is capable of execution even though set aside in part though it may be necessary to execute fresh conveyances. *Pasupati Nath Bose* v. *Nando Lal* (3) is an authority that a decree obtained by fraud may be set aside as against one party and remain as regards another and that was a decree for partition. I am, therefore, of opinion that the whole decree need not be set aside.

(1) 27 L. R. Ch. Div. 424.
(2) 46 Eng. Rep. 419.
(3) 30 C. 718.

The decree passed in C. R. 353-09 is, therefore, set aside in so far as it affects the land occupied by and for the Madrassi temple, but no further. The scheme for the management of the new burial ground can stand for the present and until it is amended, if necessary, in due course of law.

There remains four issues, *viz.*, Nos. 5, 6, 10 and 11 for decision. The two last are more or less involved in the main case. I have held that the Ponnas' religion does not require any invitations to the dead to be given at the graves. So far as the evidence goes, no peculiar reverence attaches to the graves or the remains so far as their religious rules or practice are concerned. The agreement is that the remains should be either cremated and the ashes of forehead bone sent to the Ganges or that they should be re-interred in the new cemetery. In except possibly a few instances, it will be impossible to know whose the remains are and if there was any rule or practice of really binding force, it is hard to understand how so many respectable Ponnas, most if not all of whom have relatives buried there, should deny it. Besides this I cannot overlook the fact that the question of dealing with the remains was laid before the community and was agreed to.

As to issue No. 11, it is urged that the Ponna religion lays down that a body once interred should never be disinterred. As to this I am of opinion that the proposition has not only not been established, but that it has been proved that it would be a meritorious act to disinter and cremate and send the ashes to the Ganges when the relatives were able to do so. Mr. Ginvala relies on a case reported in *Ramrao Narayan* v. *Rustumkhan* (4) but that related to Muhammadans. He also refers to *In re Plumstead 'Burial Ground'* (5), *Queen* v. *Twise* (6). *The Rector of St. George's Hanover Square* v. *Stuart* (7) and the *Queen* v. *Dr. Tristram* (8). These are all cases dealing with consecrated ground whereas there is no consecration in the present case. He urges that the religious duty to visit the graves, to invite,

(4) 26 B. 198.
(5) L. R. Pro. Dev. (1896) 225 at p. 234.
(6) L. R 4 Q. B 407; 10 B. and S. 298; 38 L J, Q. B. 228; 20 L. T. 522; 17 W. R. 765.
(7) 93 Eng. Rep. 1077.
(8) 15 T. L. R. 214.

lodged a fresh complaint alleging the commission of a fresh offence by the accused:

Held, that the complaint was barred under section 15 of the Merchandise Marks Act.

When the language of a statute in its ordinary meaning and grammatical construction leads to a manifest contradiction of the apparent purpose of the enactment, a construction may be put upon it which modifies the meaning of the words.

The intention of the Legislature will be frustrated if it is held that the owner of a trade-mark can stand by for several years while his trade-mark is being infringed continuously and then bring a criminal complaint in respect of some recent instance in which there has been an infringement. To interpret the section in that way would reduce its provisions to a nullity, for it would entirely remove the bar of limitation except in cases where the series of infringements has actually ceased.

Ruppel v. *Ponnusawmy Tevan*, 22 M. 488, followed.

Appeal against the order of the Sessions Judge, Prome, in Criminal Revision No. 245 of 1910, directing further inquiry into the case against the applicant in respect of an offence punishable under section 482, Indian Penal Code.

Mr. *D. N. Palit*, for the Applicant.

Mr. *MacDonnel*, for the Respondent.

JUDGMENT.—The accused Mahomed Jewa Motalla was prosecuted under section 482, Indian Penal Code, for using false trade-mark, the charge against him being that he sold oil which was not oil manufactured by the Burma Oil Company, Limited, in second-hand tins of that Company's make without obliterating the Company's trade-mark on the tins.

Previously, in 1908, the accused had been prosecuted for a similar offence, but he was acquitted as the Magistrate held that there was no fraudulent intent. Application was made to the Local Government to appeal, but the Government declined to do so.

In 1910 Motalla was again prosecuted on a similar complaint but he was again acquitted this time on the ground of limitation. The Magistrate relied on the Madras ruling in *Ruppel* v. *Ponnusawmy Tevan* (1) as authority for holding that the complaint was time-barred.

The Company by their agent thereupon lodged a fresh complaint alleging the commision of a fresh offence by the accused on the 26th July 1910. The District Magistrate dismissed this complaint on the ground of limitation citing the Madras ruling above referred to. But the Sessions Judge in revision dissented from the Madras ruling set aside the dismissal and directed that further inquiry should be made into the complaint.

The accused has now moved this Court in revision to set aside the Sessions Judge's order and confirm the dismissal of the complaint.

The question for decision is whether the interpretation put upon section 15 of the Merchandise Marks Act, 1889, by the Madras High Court in the case above cited should be followed.

The section provides that no prosecution under the sections of the Indian Penal Code relating to trade-marks, etc., shall be commenced "after the expiration of three years, next after the commission of the offence or one year after the first discovery thereof by the prosecutor whichever expiration first happens." It is urged that "the offence" means the offence of which cognisance is being taken by the Magistrate, *i. e*, in this particular case, offence alleged to have been committed on the 26th July 1910, and the Sessions Judge has held that this is the right interpretation. He considers that each sale of oil by the accused in the Company's tins being a fresh offence gives a new starting point for calculating limitation under section 15. This is, no doubt, the ordinary meaning of the words. The Sessions Judge cites the observation of Byles, J. (Broom's Legal Maxims, page 422) that statutes must be read in their popular, natural and ordinary sense, unless there is reason upon their face to believe that they were not intended to bear that costruction: also the dictum of Pollock, C. B. (*ibid*) that "when the intention of the Legislature is not clear, we must adhere to the natural import of the words." The next sentence of the judgment of Pollock, C. B., is as follows:—"But when it is clear what the Legislature intended, we are bound to give effect to it notwithstanding some apparent deficiency in the language used." Thus some latitude of construction is permissible in order to give effect to the true intention of the Legislature. In Maxwell's Interpretation of Statutes, it is remarked (page 30) that "the literal construction has in general but *prima facie* preference." "To arrive at the real meaning it is always necessary to get an exact conception of the aim, scope and object of the enactment." The circumstances with reference to which the words were used have to be considered. In another

(1) 22 M. 488.

Chapter of the same work (page 344), it is remarked that "when the language of a statute in its ordinary meaning and grammatical constructions leads to a manifest contradiction of the apparent purpose of the enactment, a construction may be put upon it which modifies the meaning of the words and even the structure of the sentence."

There can be no doubt, I think, as to the intention of the Legislature in enacting section 15. It was intended that if a trade-mark be infringed, the person aggrieved should be able to prosecute the offender criminally within three years of the infringement or one year after the infringement is discovered. If criminal proceedings are not taken within the time limited by the section, the owner of the trade-mark was to be left to the ordinary civil remedy of an injunction. The intention of the Legislature will be frustrated if it is held that the owner of a trade-mark can stand by for several years while his trade-mark is being infringed continuously and then bring a criminal complaint in respect of some recent instance in which there has been infringement. To interpret the section in that way would reduce its provisions to a nullity, for it would entirely remove the bar of limitation except in cases where the series of infringements has actually ceased.

Moreover, the words of the section are not free from ambiguity as they stand. If it had been intended that the words "next after the commission of the offence" should be read in their ordinary literal sense. the use of the qualifying word "first" before the word "discover" would be meaningless. The word "first discovery" cannot reasonably be applied to the last of a long series of similar offences extending without interruption throughout several years to the knowledge of the prosecutor. In my opinion, they can refer only to the first offence of the series which comes to his knowledge. This is the interpretation adopted by the Madras High Court in the case already cited above and I think we should adopt it here.

It appears that at some time before the District Magistrate passed the order of dismissal in this case, the Burma Oil Company, Limited, had obtained a civil injunction restraining the accused from selling his oil in their tins. There was, therefore, no substantial justification for continuing the criminal prosecution. Even if the Sessions Judge's interpretation of section 15 were correct, I think he should have hesitated in the circumstances to interfere in revision with the order dismissing the complaint.

The Sessions Judge's order is set aside and the order dismissing the complaint is restored. The costs of the accused in all Courts will be borne by the complainant. The Advocate's fee is fixed at two gold *mohurs*.

(s. c. 4 Bur. L. T. 84.)

LOWER BURMA CHIEF COURT.

CRIMINAL REVISION NO. 378B OF 1910.

January 31, 1911.

Present:—Mr. Justice Twomey.

U. DHAMMALOKA, *alias* COLVIN—APPLICANT

versus

EMPEROR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), ss. 108 (b), 451—Security for good behaviour—Penal Code (Act XLV of 1860), s. 153A—Intention to provoke feelings of enmity between Christians and Buddhists—Rights and duties of religious preachers.

Section 451 of the Criminal Procedure Code applies only to trials and an inquiry under section 108 (*b*) is not a trial. A Magistrate, who is a European British subject and a Justice of the Peace, is competent to hold an inquiry under section 108 against a European British subject.

In order to sustain an order under section 108 (*b*) of the Criminal Procedure Code, it is not sufficient to prove that the language used was highly offensive to a community but it must be shown that the applicant intended to provoke feelings of enmity or hatred between two communities. It is not necessary, however, that he should have succeeded in exciting such feelings if deliberate intention to do so can be inferred.

Preachers are at liberty to descant on the errors of other religions and to extol their own faith to the skies. But they may not consciously inflame the minds of their hearers by holding up the ministers and followers of other religions to public execration.

What may be harmless when merely printed in an English book may be highly inflammatory when translated into an Oriental language and served out with spicy comments to an audience of Orientals in a public address.

In estimating the intention and probable effect of a man's public utterances, it is proper to consider not only the personality of the speaker but the tone and spirit of the speeches and also the circumstances in which he spoke.

Review of the order of the District Magistrate of Amherst, dated the 24th No-

vember 1910, passed in Criminal Miscellaneous No. 71 of 1910.

FACTS.—The petitioner was ordered to be bound over for one year with two sureties for Rs. 1,000 each for good behaviour under section 108 (*b*) of the Criminal Procedure Code by the District Magistrate of Amherst on 24th November 1910. He applied for revision of the order on the following grounds: —

(*a*) that the learned District Magistrate erred in refusing to inquire into the petitioner's case as a European British subject by a jury;

(*b*) that the learned Magistrate was wrong in refusing to summon two defence witnesses on insufficient grounds;

(*c*) that the lower Court should have considered the evidence for the prosecution and the defence with due weight;

(*d*) that there was no recorded evidence to show that the petitioner promoted or attempted to promote enmity and hatred between Christians and Buddhists by his sermons;

(*e*) that the learned Magistrate was wrong in anticipating enmity and hatred between Christians and Buddhists without any evidence even from the prosecution witnesses;

(*f*) that the Magistrate had improperly refused time to furnish sureties.

Messrs. *Harvey* and *Mg. Ch t Hlaing*, for the Applicant.

Mr. *Rutledge*, for the Crown.

JUDGMENT.—The applicant Colvin, *alias* U Dhammaloka, is an Irishman who has become a Buddhist *hpoonygi*. He has been placed on security by the District Magistrate, Amherst, under section 108 (*b*), Code of Criminal Procedure, for orally disseminating matter, the publication of which is punishable under section 153A, Indian Penal Code. Section 153A provides for the punishment of any person who by words spoken or written, promotes or attempts to promote feelings of enmity or hatred between different classes of His Majesty's subjects. The prosecution was instituted because the applicant made a scurrilous attack on the Christian religion and its Ministers in three addresses which he delivered through interpreters to large Burmese audiences at Moulmein on the 29th October, 1st November, and 5th November 1910.

The first ground of the application for revision is that the applicant's claim for a jury should have been allowed by the District Magistrate. There is no force at all in this objection. Section 451 of the Code of Criminal Procedure provides that European British subject may claim a jury in trials. But an inquiry under Chapter VIII of the Code is not a trial. The inquiry in this case was held by the District Magistrate, Amherst, who is a European British subject and a Justice of the Peace, and was, therefore, competent to hold the inquiry under section 443, Criminal Procedure Code.

It is next urged that the District Magistrate refused on insufficient grounds to summon two of the witnesses cited for the defence. The names of the two witnesses referred to were not included in the list at first put in by the applicant. An oral application was made for summonses on these witnesses on the day before the hearing. The applicant declined to explain why they were wanted but admitted that they were not present when his addresses were delivered. I think in the circumstances the District Magistrate had power under section 257, Criminal Procedure Code, to refuse summonses on these witnesses.

According to the third prosecution witness the applicant in his address of the 29th October said *inter alia*: "The American Missionary Baptists are the biggest blackguards that ever existed." He also told his hearers that if any Christian minister came to them they should repeat what he had told them. Two witnesses describe from their recollection what the applicant said in his address of the 1st November to an assembly of from 1,000 to 2,000 Burmese. Christian ministers were represented as addicted to immorality and as going about each with a bible, a bottle of whisky and a knife. He referred to convents as places in which numberless infants are born and then buried in quicklime and one of the two witnesses says that the applicant referred to the Founder of the Christian religon as "the son of a carpenter, born in filth." He concluded his address by asking Burmese Christians to return to Buddhism. In his defence the applicant denied the accuracy of the accounts given by the witnesses of the addresses of

the 29th October and 1st November. He said they were only partly correct but he did not state which parts were correct and made no attempt to prove what he really said. A shorthand writer was present at the lecture of 5th November, and his *verbatim* report of it has been put in evidence. The substantial accuracy of the report is admitted. Among the statements made by the applicant on that occasion was the following:—The Christian missionary has come to Burma to convert the people to Christianity and secondly to destroy the customs of the people, to destroy everything that has been in Burma for 2,000 years. He gave a highly coloured account of the Inquisition, describing how thousands of men, women and children were killed every month and hundreds and thousands of young girls taken by the priests for immoral purposes. Further on, the audience was informed that nine million women were put to death on accusations of witchcraft by the Christian Church, all in the name of Christianity and Christ. Finally it was said that Christianity is to-day the same devil as it was 2,000 years ago; but at present its power has gone, its wings having been clipped by science.

The defence was that the statements of which exception is taken were called by the applicant from various books, and that his object was only to deter Burmese Buddhists from becoming Christians and to induce Burmese Christians to become Buddhists. There can be no doubt that the language used by the applicant was highly offensive to Christians. But this is not sufficient. The order under section 108 can be sustained only if it is clear that he intended to provoke feelings of enmity or hatred between Christians and Buddhists. It is not necessary, however, that he should have succeeded in exciting such feelings, if a deliberate intention to do so can be inferred. And it is no defence to plead that his object was merely to gain converts to Buddhism. That is an entirely lawful object; but it must not be pursued in a manner forbidden by law. Preachers are at liberty to descant on the errors of other religions and to extol their own faith to the skies. But they may not consciously inflame the minds of their hearers by holding up the ministers and followers of another religion to public execration. Nor is there any force in the plea that the offensive statements complained of in their case are based upon books which are accessible to English readers. What may be harmless when merely printed in an English book may be highly inflammatory when translated into an Oriental language and served out with spicy comments to an audience of Orientals in a public address.

In estimating the intention and probable effect of such utterances it is proper to consider not only the personality of the speaker but the circumstances in which he spoke. The majority of the audience were presumably uneducated persons with no means of checking the extravagant statements that were made. They would be the more inclined to believe them as the speaker was by birth a European and presumably a Christian. The audience was composed chiefly of Buddhist subjects of a Christian Government. The lurid picture of horrors done in the name of Christianity and the attacks on Christian ministers as a class were, in my opinion, calculated to excite ill-feeling in the minds of such auditors towards Christians in general. From the tone and spirit of the speeches there can be little doubt that this result was contemplated by the speaker. He made hardly any reference to Christian dogmas or to the Christian code of morals, but devoted himself chiefly to attacks on Christian ministers as a class. He recited the terrible deeds done by Christian priests long ago and attributed the deepest licentiousness and hypocrisy to the Christian ministers, of the present day. This appears to be the language of spleen rather than that of true missionary ardour. I think it is a fair inference that the applicant intended to produce in the minds of his ignorant hearers such feelings as are described in section 153A, Indian Penal Code, and as the objectionable matter was uttered with variations in several public addresses, there was an attempt to "dissemirate" it, *i. e*, to scatter it abroad, as contemplated in section 108, Criminal Procedure Code. The application is dismissed.

Application dismissed.

In the matter of CHARLES STEVENS.

(s. c. 4 Bur. L. T. 87.)

LOWER BURMA CHIEF COURT.

MISCELLANEOUS CIVIL APPEAL NO. 16 OF 1910.

January 23, 1911.

Present:—Mr. Justice Twomey and Mr. Justice Parlett.

In the matter of an Appeal of CHARLES STEVENS—INSOLVENT.

Presidency Towns Insolvency Act (III of 1909), s. 15—Insolvency Act (11 & 12 Vic. C. 21), s. 47—Debtor obtaining personal discharge—Right to apply again in respect of fresh debts.

The petitioner who had filed an insolvency case in 1904 and had been granted his personal discharge, again filed a fresh petition of insolvency in respect of debts contracted subsequent to his personal discharge:

Held, that there was nothing in the Insolvency Act or in the new Act of 1909 to prevent an undischarged debtor from filing a fresh petition in respect of fresh debts.

Morgan v. *Knight*, (1864) 33 L. J. (C. P.) 168; 15 C. B. (N. S.) 669; 9 L. T. 803; 12 W. R. 428, *Ex parte Watson*, E. L. R. 1879 (C. D.) XII P. 380; *Dossa Gopal* v. *Bhanji Damji*, 26 B. 171, relied upon.

Mr. *Naidu*, for the Appellant.

M. *Vertannes* for Mr. *Patel*, for the 6th Creditor.

JUDGMENT.

TWOMEY, J.—The petitioner Stevens filed a petition of insolvency in 1904 and was granted his personal discharge on the 2nd May 1904. No further steps were taken by the debtor or the creditors in that insolvency, but on 8th December 1909, the debtor filed a fresh petition of insolvency in respect of debts contracted subsequent to his personal discharge. The petition was refused on the ground that the debtor was bound to obtain his final discharge under the earlier insolvency before filing a fresh petition. This order was passed on 13th January 1910. The new Act (Presidency Towns Insolvency Act 1909—Act III of 1909) had come into force in Rangoon on 1st January 1910.

The learned Judge cited no authority in support of the view which he took. We have been referred to the English case, *Morgan* v. *Knight* (1), which shows that in England there is no objection to a man becoming a bankrupt a second time before he has received his final discharge under the first bankruptcy. This decision was followed in the case *Ex parte Watson* (2). It was followed

(1) 33 L. J. (C. P.) 186; 15 C. B. (N. S.) 669; 9 L. T. 803; 12 W. R. 428.

(2) E. L. R. 1879 (C. D.) XII P. 380.

also in the Bombay case, *Dossa Gopal* v. *Bhanji Damji* (3), in which the Bench held that there was no reason why an insolvent under the Indian Insolvency Act (Statute 11 and 12 Vic. C. 21), who had only obtained his personal discharge under section 47 should not subsequently be again adjudicated an insolvent on the petition of a creditor.

The present case is different inasmuch as the petitions in both the first insolvency and the second insolvency are filed by the debtor. But we can find nothing in the Indian Insolvency Act or in the new Act of 1909 which prevents an undischarged debtor from filing a fresh petition in respect of fresh debts. The appeal is opposed by only one creditor for Rs. 200, the total amount of indebtedness being Rs. 3,495 and the learned Advocate for this creditor is unable to site authority in support of the Judge's order. The power conferred by section 15 of the Act of 1909 is discretionary but we are of opinion that the reason given by the learned Judge for refusing an adjudication in this case is not a valid reason. We, therefore, allow this appeal and direct that an order of adjudication shall be passed. Appellant's costs will be borne by the opposing creditor. Advocate's fees two gold *mohurs*.

PARLETT, J.—I concur.

Appeal allowed.

(3) 26 B. 171.

(s. c. 4 Bur. L. T. 87.)

LOWER BURMA CHIEF COURT.

CRIMINAL APPEAL NO. 12 OF 1911.

February 17, 1911.

Present:—Mr. Justice Twomey.

T. R. S. CHARI—APPELLANT—ACCUSED

versus

EMPEROR—RESPONDENT.

Burma Gambling Act (I of 1899), ss. 3, 7, 12—"Common gaming house"—Presumption under s. 7—Whether rebutted by circumstances—Revision—Power to interfere with sentences of persons who have not appealed.

Where there is no independent evidence as to the actual taking of commission by the accused and the conviction of the accused rests on the bare presumption coupled with the discovery of the instruments of gaming under section 7 of the Burma Gambling Act, it is necessary to consider very carefully whether the legal presumption is rebutted by the circumstances of the case and by the evidence produced for the defence.

In exercise of its revisional jurisdiction, the High Court can, on the appeal of one accused, deal with

the sentences passed on the other co-accused who have not appealed.

Appeal from the order of the Eastern Sub-Divisional Magistrate, Rangoon, passed in Criminal Trial No. 658 of 1910; convicting the accused under section 12A of the Burma Gambling Act and sentencing him to a fine of Rs. 51 or in default three weeks' rigorous imprisonment.

Mr. *Lambert*, for the Appellant.

Mr. *Ruttledge*, for the Respondent.

JUDGMENT.—The appellant is a lawyer's clerk living in Mogul Street. The Superintendent of Police received information that the appellant's abode was "a common gaming house" and issued a search warrant under the Gambling Act. The place was entered by the Police about 7-30 one evening and the appellant and six other persons were found seated in a ring round a carpet. Some of them had cards in their hands and there were more cards on the carpet. Rupees 3 odd in cash was also found on the carpet and several of the men had heaps of cowries in front of them while the appellant had in front of him a small tin box containing Rs. 24. It is not disputed that the appellant was playing cards with some of the other men for money. But it is denied that any commission was taken by the appellant or that the place was in any respect a "common gaming house" as defined in section 3 of the Gambling Act. The warrant was regularly issued and there was no irregularity in the manner of its execution. There can be no doubt that the presumption set out in section 7 of the Act arose in the case. It is, however, one of those cases in which there is no independent evidence as to the actual taking of commission. The conviction of the appellant and his companions rests entirely on the bare presumption under section 7 coupled with the discovery of instruments of gaming under the warrant. In such cases it is necessary to consider very carefully whether the legal presumption is rebutted by the circumstances of the case and by the evidence produced for the defence.

Several of the six persons who were found in the appellant's room were inmates of the same house. The others state that they had come to the appellant on business of various kinds and there is no special reason for discrediting their statements as the appellant is a lawyer's clerk and the hour was not late.

The prosecution evidence shows that only some of the six persons were actually playing, the others being presumably mere onlookers.

The game played was a variety of *Vrag* which is not commonly a game played by a large number of players. Apart from the artificial presumption under section 7 of the Act, the circumstances do not *prima facie* suggest that there was anything more than a friendly game of cards in which the appellant as host took an equal chance of profit or loss with his guests. The appellant called several apparently respectable persons of his acquaintance who frequently played cards at his house and who stated that no commission was taken by the appellant on these occasions. The Sub-Divisional Magistrate considered that the statements of these witnesses were unreliable but has given no reason for this opinion.

It appears to me that in the absence of any independent evidence to strengthen the presumption under section 7, it must be held that the presumption is not in accordance with the probabilities of this particular case and that it is rebutted by the evidence for the defence.

The conviction under section 12 of the Gambling Act and the sentence are set aside and the fine of Rs. 51 paid by the appellant will be refunded to him. The cash, etc., taken from him at the time of the raid will also be returned to him.

The sentences imposed on the remaining six accused under section 11 of the Gambling Act were also appealable under the ruling in *Ba Thaw* v. *King-Emperor* (1). But they were apparently not aware of this and they did not appeal. It seems right in the circumstances that the sentences on these six persons should be dealt with in revision.

In exercise of the revisional powers of the Court and for the reasons set forth above, I set aside the convictions and sentences of the remaining six accused and direct that the fines of Rs. 15 each paid by them shall be refunded and that any cash etc. confiscated from them shall also be restored.

(1) 4 L. B. R. 354; 9 Cr. L. J. 356.

SOMASUNDARAM CHETTY *v.* MUTHUVEERAPPA CHETTY.

(s. c. 4 Bur. L. T. 89.)

LOWER BURMA CHIEF COURT.

CIVIL REGULAR No. 419 OF 1908.

March 30, 1909.

Present:—Mr. Justice Bell.

A. R. A. R. S. M. SOMASUNDARAM CHETTY—PLAINTIFF

versus

S. M. R. M. MUTHUVEERAPPA CHETTY—DEFENDANT.

Attachment before judgment of property situate outside the Court's jurisdiction—Allowable under the new Code—Civil Procedure Code (Act V of 1908), ss. 46 and 138, O. XXXVIII, r. 5—Civil Procedure Code (Act XIV of 1882), ss. 483, 648.

Though the property, referred to in clause (*b*) of Order XXXVIII, rule 5, of the new Civil Procedure Code, must be property within the local limits of the Court's jurisdiction, no such restriction is imposed with regard to the property mentioned in clause (*a*). The rule clearly permits the attachment before judgment of property situate either within or without the legal limits of the Court's jurisdiction.

The removal from the new rule of this restriction as to the locality in which property capable of being attached under it must be situate, which was in the corresponding section 483 of the old Code, has altered the law.

JUDGMENT.—The plaintiff in the case applied to the Court for an order that the defendant should furnish security for the amount of his claim and cos's and that in the meantime there should be a conditional attachment of a quantity of baskets of paddy lying at a place within the jurisdiction of the District Court of Pegu and, therefore, outside the local limits of the Original Civil jurisdiction of this Court. On this, notice was issued to the defendant to comply with or show cause against the order asked for and a conditional order was passed under Order XXXVIII, rule 5, read with section 136 of the new Code a copy of which has been sent to the District Court of Pegu. The defendant now comes in and raises the preliminary objection that upon the view of the law taken by this Court no such order as the one asked for can be made. He relies on the decision of the special Court passed before the Chief Court was created in *A. M. Madar Saib Bros. and Coy.* v. *Moona Abdul Kassim* (1) and the judgments of this Court in *N. Pannu Thevappa* v. *Satha Chetty* (2) and *Sivasawmy Sitia* v. *Sulaiman Dawoodji Parek* (3). On the other side, it is contended that the law has been altered by the new Code of 1908 and that these rulings which proceeded upon the Code of 1882 are no longer in force. It appears that there are also rulings of the High Courts of Madras and Bombay to the same effect as those of this Court while the High Court of Calcutta has the contrary view even under the old Code. As the rulings of this Court are binding upon me, I do not propose to refer to the Calcutta ruling and will confine myself to the rulings of this Court and of the High Courts of Bombay and Madras. In addition to the arguments which he based upon these decisions regarding the Code of 1882, Mr. Bannerji has also referred to decisions upon the provisions of the older Procedure Codes of 1859 and 1877 as showing that the view urged by him is the correct one.

For the present I will deal with the Code of 1882. The sections of that Code which are material are sections 483 and 648. Section 483 lays down that if the plaintiff satisfies the Court that the defendant with intent to obstruct or delay the execution of any decree that may be passed against him (*a*) is about to dispose of the whole or any part of his property or to remove the same from the jurisdiction of the Court in which the suit is pending or (*b*) has quitted the jurisdiction of the Court leaving therein property belonging to him, the plaintiff may apply to the Court to call upon the defendant to furnish security to satisfy any decree that may be passed against him in such suit and on his failing to give such security to direct that any portion of his property within the jurisdiction of the Court shall be attached until the further order of the Court. Section 648 provides that where any Court desires that any person shall be arrested or that any property shall be attached under any provision of this Code not relating to the execution of decrees, and such person resides, or property is situate, outside the local limits of its jurisdiction, the Court may in its discretion issue a warrant of arrest or make an order of attachment and send a copy of such order to the District Court within the local limits of whose jurisdiction the person resides or property is situate and it then lays down the procedure to be followed by that Court in arresting the person or attaching the property and so forth. Section 648 has been re-enacted in

(1) (1893-1900) P. J. 56.
(2) 1 L. B. R. 310.
(3) 3 L. B R. 255.

the new Code as section 136. I do not think it is necessary to set out the language of section 136 as, for the present purpose, it is substantially the same as that of the old section. Section 483 re-appears as Order XXXVIII, rule 5. That rule provides that where a Court is satisfied that the defendant with similar intent to that mentioned in section 483 (*a*) "is about to dispose of the whole or any part of his property or (*b*) is about to remove the whole or any part of his property from the local limits of the jurisdiction of the Court, the Court may direct the defendant either to furnish security to produce and place at the disposal of the Court, when required, the said proporty or the value of the same or such portion thereof as may be sufficient to satisfy the decree or to appear and show cause why he should not furnish security." It further provides that ordinarily the plaintiff must specify the property required to be attached and that the Courts may in its order direct the conditional attachment of the whole or any portion of the property so specified.

It will be noticed that though the property referred to in clause (*b*) of this new rule must be property within the local limits of the Court's jurisdiction, no such restriction is imposed with regard to the property mentioned in clause (*a*). In other words, on the face of it, this rule clearly permits of the attachment before judgment of property situate either within or without the local limits of the Court's jurisdiction. The question is whether the removal from the new rule of this restriction as to the locality in which property, capable of being attached under it, must be situate, which there was in the corresponding section of the old Code, has altered the law as laid down in the judgments above referred to. In my opinion it has. The reasoning in all these judgments may be summarised as follows: Section 648 itself does not confer upon the Court any power to attach property. It merely prescribes the procedure to be followed in cases where property outside the local limits of the Court's jurisdiction is ordered to be attached under the powers conferred upon the Court by other sections of the Code as the power of attachment conferred by section 483 is explicitly limited by the language of that section to property within such local limits and section 638 does not itself enlarge the powers of the Court. The provisions of section 648 can have no application to a case in which the power to attach is conferred only by the restricted provision of section 483. It seems to me, therefore, that the existence of the restriction as to locality expressly set out in section 483 is the basis upon which all the decisions under the Code of 1882 rest and that now as this restriction has been removed by the Legislature in enacting Order XXXVIII, rule 5, the same line of reasoning which was adopted in dealing with cases under the Code of 1882 necessarily leads one to the opposite conclusion to that to which it formerly impelled the Courts, *viz.*, that section 136 applies to cases under Order XXXVIII, rule 5, and provides the procedure by which attachment under that rule in the case of property outside the local limits of the jurisdiction of the Court is to be effected. I may remark, though it is not necessary for my decision, that it is not surprising that the Legislature should have so extended the power of attaching property before judgment, as by section 46 of the new Code it has similarly conferred upon the Courts a power which they have not hitherto possessed of promptly issuing what really is an *interim* attachment after judgment of property situate outside the local limits of their jurisdiction.

Considering, therefore, the language of these two Codes alone, I think it clear that the Court now has power to make an attachment such as the one now in question. It has, however, been argued that the above reasoning based on the removal, from what was section 483, of those words which limit the property therein mentioned to property within the jurisdiction is shown to be erroneous by decision on the older Codes in which the language of the corresponding sections was general and was not limited to property within the jurisdiction.

I will deal first with the Code of 1859. Section 81 of that Code which corresponds to the late section 483 gave power in a similar case to attach "any property moveable or immoveable belonging to the defendant." Phear, J., in the case of *Balaram Mullik* v. *E. R. Solano* (4), held that section 81 did not authorise the Court to attach property

(4) 8 B. L. R. 335.

outside the local limits of the Court's jurisdiction, but his reason was that "express words are necessary in order to give to a Court of locally limited jurisdiction a power of action beyond its local limits, "and that he saw" nothing in the Act to indicate that the Legislature intended an extra-jurisdiction power of attachment to be given to a local Court before judgment." Here, however, I think that such an intention is shown quite clearly by section 136 when read with Order XXXVIII, rule 5. There was no provision in the Code of 1859 similar to the present section 186.

Then, as regards the Code of 1877, it is true that Pontifex, J., held, in the case of *Kedar Nath Dutt* v. *Seena Veyana Rana Luchuman Chetty* (5), that the words "any portion of his property" in the latter part of section 483 refer only to property within the jurisdiction of the Court in which the suit is pending. But if that decision be looked at, it will be seen that the learned Judge proceeded on the ground that the word "property" in the latter part of the section meant the property mentioned in the first part of the section in clause (*a*) *i. e.*, property within the jurisdiction of the Court. That restriction no longer exists in the early part of the present Order XXXVIII, rule 5.

It seems to me, therefore, that the Court has jurisdiction to make such an order as the one now asked for and I will consider this application on the merits.

(5) 1 C. L. R. 336.

(s. c. 4 Bur. L. T. 91).

LOWER BURMA CHIEF COURT.

FULL BENCH.

CRIMINAL APPEAL No. 252 OF 1910.

February 20, 1911.

Present: - Sir Charles Fox, KT., Chief Judge, Mr. Justice Hartnoll, Mr. Justice Ormond and Mr. Justice Twomey.

EMPEROR—APPELLANT

versus

KAN HAW AND OTHERS—RESPONDENTS.

Burma Gambling Act (I of 1899), s. 7—Criminal Procedure Code (Act V of 1898), s. 103—Search—Ward Headmen and Block-Elders not qualified to be witnesses of search.

By the Full Bench (*Ormond, J.* dissenting):

The words "respectable inhabitants" in section 103 of the Criminal Procedure Code should not be construed to include ward headmen and block-elders who are appointed by the Deputy Commissioner.

King-Emperor v. *Kwe Haw*, 4 L. B. R. 213; 14 Bur. L. R. 81; 7 Cr. L. J. 479, followed.

Per *Twomey, J.*—"Respectability" in this context means much the same thing as impartiality, the presumption being that all respectable people are *prima facie* impartial. There is no sufficient reason for holding that ward headmen as a class should not be regarded as impartial. The genesis of the presumption under section 7 of the Gambling Act is traceable not to the respectability or impartiality of the persons who witnessed the search but to the sufficiency of the grounds on which the warrant was issued under section 6 coupled with the finding of cards or other instruments of gaming in the place searched.

Paw Ya v. *King-Emperor*, U. B. R. (1908) Gamb. 1; 8 Cr. L. J. 413, followed.

Per *Hartnoll, J.*—As the duties of the ward headmen and block-elders appointed under the Lower Burma Towns Act, 1892, or the Burma Towns Act, 1907, include duties which relate to the prevention of certain offences and the discovery of crime and as it is part of their duty to assist all Officers of the Government in the execution of their public duties, they are not such persons as the Legislature contemplated should be called as witnesses within the meaning of section 103 (1) of the Code of Criminal Procedure

Per *Fox, C. J.*—The ward headmen and the block-elders, although appointed by a Deputy Commissioner, having the same duties to perform as wardmen appointed by the Commissioner of Police, Rangoon, are not qualified witnesses to the search under section 103 of the Code of Criminal Procedure, which applies whatever the offence may be and is not confined to searches under the Gambling Act.

Per *Ormond, J.*—The witnesses to a search should not be policemen but there is no necessity to further limit the words "respectable inabitants". Ward headmen and block-elders are not policemen. The appointment or selection of the witnesses rests with the Officer or person conducting the search and if the selection is not *bona fide* the Court will have no difficulty in coming to the conclusion that there was no entry or search within the meaning of the Burma Gambling Act or the Code.

Appeal against the order of acquittal of an offence punishable under sections 11 and 12, Gambling Act, passed by the District Magistrate, Amherst, in Criminal Appeal No. 42 of 1909 from the order of the Township Magistrate of Moulmein in Criminal Regular Trial No. 136 of 1909.

Mr. *Godfrey*, for the Appellant.

JUDGMENT.

ORMOND, J.—The Full Bench case of *King Emperor* v. *Kwe Haw* (1) decided that (*i*) in the case of instruments of gaming being "found" (or produced) in any house, etc., without any actual search being made, the presumption under section 7 of the Burma Gambling Act does not arise unless the en-

(1) 4 L. B. R. 213; 14 Bur. L. R. 81; 7 Cr. L.J. 471.

try into the premises was made in the presence of two or more respectable inhabitants of the locality within the meaning of section 103 of Criminal Procedure Code, and (*ii*) that ward headmen in Rangoon are not competent to be witnesses of a search under that section, inasmuch as they are appointed by the Commissioner of Police.

The question in this appeal is whether the words "respectable inhabitants" in section 103 of the Code should be construed so as to exclude ward headmen and block-elders who are appointed by the Deputy Commissioner? Sections 96 and 100 of the Code apparently contemplate the possibility of searches being made by persons other than Police Officers, and section 103 applies to such searches; but all searches under the Code are made either by the Police or with their assistance. That being so when the law requires the presence of two or more respectable inhabitants of the locality to witness a Police search, there is a necessary implication, I think, that the witnesses should not be policemen. After carefully considering the reasons for the judgment of the learned Chief Judge in the Full Bench case, I regret that I cannot accept them so as to further limit the words respectable inhabitants. I think there is no necessity for doing so. The appointment or selection of the witnesses rests with the Officer or person conducting the search; and if the selection is not *bona fide*, the Court would have no difficulty in coming to the conclusion that there was no entry or search within the meaning of the Burma Gambling Act or of the Code. Ward headmen and block-elders are not policemen and would not be actuated by the same motive, as the Police might be, for obtaining convictions in gambling prosecutions. I think it would be incongruous for a Police Officer to be able to appoint the witnesses for his search and yet, because ward-headmen or block-elders have been appointed to their offices by Government and are already under the obligation in other matters of assisting the Police, that he should be precluded from appointing them his witnesses of the search. The idea of requiring the witnesses to be respectable inhabitants of the locality is intelligible not only on the grouud of convenience, but because of the ignominy that should attach to a false witness who assists in a false search, the falsity of which would in all probability be known amongst the neighbours. And this sanction would apply equally in the case of ward-headmen and block-elders as in the case of any other respectable inhabitants of the locality.

I may add that, in my opinion, a Government official whom the Court has reason to distrust, would not be a "respectable" inhabitant within the meaning of the section.

I would allow the appeal and confirm the findings and sentences of the Township Magistrate.

TOWMEY, J.—There can be no doubt that this Court is competent to interpret such wide expressions as "respectable inhabitants" in section 103, Criminal Procedure Code. In doing so, the Court should have regard to the object of the enactment and should apply that interpretation which is best calculated to give effect to the intentions of the Legislature. The object of the Legislature in this matter, as pointed out by the learned Chief Judge in the case of *King-Emperor* v. *Kwe Haw* (1), is clearly that the Court may not have to rely solely on Police evidence as to incriminating discoveries made under search warrants, but may have also the statements of independent impartial neighbours as to what articles were found and where and when. It is manifest that the object of this provision would be defeated if the searching Officer had only to call two other policemen to witness his proceedings. Clearly, therefore, policemen, however respectable, cannot be regarded as "respectable inhabitants" under section 103. Again if the witnesses called in happened to be personal enemies of the man whose house is searched, their impartiality might be impugned on that score, however high their standing might be in the neighbourhood. In short I think it may be said that respectability in this context means much the same thing as impartiality. Impartiality is what is wanted, the presumption being that all respectable inhabitants are *prima facie* impartial.

But I think the case of ward headmen is clearly distinguishable from that of policemen. I adhere to the following remarks which I made in the Upper Burma case, *Paw Ya* v. *King-Emperor* (2):—

(2) U. B. R (1908) Gamb. 1; 8 Cr. L. J. 413.

EMPEROR *v.* KAN HAW.

"The two disqualifications of ward headmen as discerned by the learned Chief Judge are (1) that he is appointed by Government and (2) that he takes part in the prevention and discovery of crime. As to the former disqualification, it may be noted that in Mandlay, and probably also in other Upper Burma towns when a vacancy occurs, an informal election is held by the Sub-Divisional Officer, and the candidate who receives most of the householder's votes is usually appointed, if he appears to be otherwise suitable, *i. e*, if he is a man of substance, of a good character and intelligence. In theory, at any rate, the ward headman like the village headmen is chosen for his "respectability", the very quality which is contemplated by section 103. It is true that the actual appointment of ward headmen and village headmen is made by the Deputy Commissioner, but they are not officials in the same sense as salaried servants of Government, and their usefulness lies chiefly in the fact that they are spokesmen and representatives of the people in their charge and intermediaries between them and the various Government Departments. In these circumstances, I do not think that the mere fact of their appointment by Government should be regarded as a bar. At the same time if the prevention and discovery of gambling offences were one of the duties of ward headmen, I think that circumstance might properly be so regarded. But the only offences to which their duties directly relate are the serious offences mentioned in section 6 of the Burma Towns Act, and gambling offences are not included among these. Seeing that the Criminal Procedure Code, Chapter IV, imposes on land-holders and even on private individuals the obligation of assisting the police in certain circumstances, I think it is clear that the existence of similar though somewhat wider obligations in the case of ward and village headmen cannot be regarded as disqualifying them in the matter of searches under the Gambling Act."

I think the ruling in *Emperor* v. *Kwe Haw* (1) unduly restricts the meaning of the words "respectable inhabitants." There is, in my opinion, no sufficient reason for holding that ward headmen as a class should not be regarded as impartial. It should not be assumed that they are mere police satellites. If they have degenerated to this level in Rangoon, the fault lies in the method of selection, not on the nature of duties imposed upon them. It is open to any accused person, who disputes the genuineness of discoveries made under a search warrant, to show that the witnesses to the search were not impartial. He can show that they owe him some private grudge or that they are men who are habitually called as witnesses to police searches and that their impartiality is for that reason questionable. In either of these cases, I think the Magistrate trying the case would be at liberty to hold that the witnesses to the search were not "respectable inhabitants" as contemplated by section 103, Criminal Procedure Code, and if the search were a search under the Gambling Act, I think he might hold accordingly that the presumption under section 7 does not arise. But I would hold that ward headmen are *prima facie* "respectable inhabitants" under section 103, Criminal Procedure Code.

I think it is not out of place to remark that the genesis of the presumption under section 7 of the Gambling Act is traceable *not* to the respectability or impartiality of the persons who witness the search but to the sufficiency of the grounds on which the warrant was issued under section 6, coupled with the finding of cards or other instrument of gaming in the place searched. In the present case, as commonly in prosecutions under sections 11 and 12 of the Act, the finding of the cards, etc., is admitted. The dispute centres in the taking of commission not in the finding of instruments of gaming. It is clear that the impartiality of the witnesses to the entry and search gives the Magistrate no firmer ground for deciding that commission was really taken or that the house raided by the Police was a "common gaming house". If the finding of the instruments of gaming is disputed, it is reasonable that the accused should impugn the competency of the witnesses called in under section 103 Criminal Procedure Code. But where the finding of the cards, etc., is admitted the defence that the witnesses were not "respectable inhabitants" is obviously a wholly technical defence. The clear intention of the law is that the presumption under section 7, Gambling Act, should arise if (1) a District Magistrate, Sub-Divisional Magistrate, etc. etc., finds that there are sufficient

grounds for issuing a search warrant and if (2) cards or other instruments of gaming are actually found in the house. The provisions of section 6 sub-section (3) are intended merely to ensure that the Police shall not pretend they have found cards etc., when they have not really found them. Without doubt, the application of section 7 may cause very great hardship if the Officer who issues the warrant does so on insufficient grounds. It is his action in issuing the warrant which launches the presumption. The law is a hard one, but I do not think the Courts should go out of their way to soften its effect by such devices as holding that a ward headman is not a respectable inhabitant of his ward.

In cases where the offence under the Gambling Act, rests upon the bare statutory presumption under section 7, the Magistrate should, in my opinion, consider most carefully whether the presumption is rebutted by the circumstances of the case and by the evidence called for the defence. In the present instance, there was no independent evidence as to the house being a common gaming house. The evidence of the accomplice Sullivan is not trustworthy. The case for the prosecution rested entirely on the prosecution which arose under section 7 coupled with the finding of cards, etc. On the other hand, there was for a defence a good deal of evidence, some of it apparently independent, showing that the house owner was not in the habit of taking commission. I consider that this evidence was in the circumstances sufficient to rebut the presumption under section 7 and I would, therefore, dismiss the appeal.

HARTNOLL, J.—In the present case one of the witnesses to the search seems to have been an elder of a block appointed by the Deputy Commissioner under the provisions of the Lower Burma Towns Act, 1892, or the Burma Towns Act 1907, and the other either a ward headman or an elder of block—it is not clear which—appointed under one of the same Acts. As I adhere to the opinions expressed in my judgment in the case of *Emperor* v. *Kwe Haw* (1), the only point of law which arises for decision in the present case is whether a headman of a ward or the elder of a block appointed by a Deputy Commissioner under the provision of the Lower Burma Towns Act, 1892, or the Burma Towns Act, 1907, is a respectable inhabitant within the meaning of clause 1 of section 103 of the Code of Criminal Procedure. As the elder of a block is the assistant of the headman of a ward, I think that they may both be put into the same category.

In writing my judgment in the case of *Emperor* v. *Kwe Haw* (1), I expressly confined it to headmen of wards in the city of Rangoon, as they differ materially in their appointments as compared with such headmen appointed for towns outside Rangoon. Headmen of wards in the city of Rangoon are appointed by the Commissioner of Police for the same city where as headmen of wards for towns other than Rangoon are appointed by the Deputy Commissioner. It is clear that for towns other than Rangoon an important factor for holding that such headmen are not such persons as are contemplated by section 103 (1) ceases to exist, for in their appointments, they are independent of the Police. In respect of ward headmen for towns other than Rangoon the question seems to me to be a very difficult one to decide. There is no doubt as to the general respectability of the great majority of ward headmen or block-elders throughout Lower Burma. As regards their appointment and as to who are consulted with respect to it, the practice must vary according to the custom of each Deputy Commissioner. I have known cases in which the Superintendent of Police is consulted in the matter as far as I remember. Again different ward headmen take varying degrees of interest in Police matters. I have known men who practically take no interest in such matters; whereas some others have been most energetic and some of these have made a point of getting certificates from senior officers inclusive of Police Officers relating to the different cases in which they have been concerned and showing the part they have taken and what praise and credit is due to them accordingly. Such men are much to be commended from an executive point of view as it is part of their duty to keep their charges in order as far as the public peace and welfare is concerned; but when the object of the Legislature in requiring witnesses to searches is considered, it becomes questionable as to whether such men would be such witnesses as are contemplated by section 103 (1) of the Code of Criminal Procedure. Where ward headmen evince great

zeal in Police matters the general question of their partiality at once comes into consideration. It is difficult to lay down that whereas one ward headman may be a witness as contemplated by section 103 (1) of the Code of Criminal Procedure, another is not; and it would seem advisable to lay down one general rule for ward headmen and block-elders as a class. It seems to me to be beyond doubt, that it was the intention of the Legislature to ensure that two independent and impartial persons should be required as witnesses to searches so as to guard as far as possible against wrong doing, and in construing this provision of law it would appear to be right to ensure to the subject that the full intention of the Legislature is carried out. In that the duties of ward headmen and block-elders appointed under the Lower Burma Towns Act, 1892, or the Burma Towns Act, 1907, include duties which relate to the prevention of certain offences and the discovery of crime and that it is part of their duty to assist all Officers of the Government in the execution of their public duties, I would hold that they are not such persons as the Legislature contemplated should be called as witnesses within the meaning of section 103 (1) of the Code of Criminal Procedure.

That being so, I would hold that in the present case the presumption under section 7 of the Burma Gambling Act does not arise. Without that presumption, there is not sufficient trustworthy evidence to support a conviction.

I would, therefore, dismiss the appeal.

Fox, C. J.—So far as the question whether the presumption laid down in section 7 of the Burma Gambling Act was properly applicable is involved, this case does not appear to me to be essentially different from the case of *King-Emperor* v. *Kwe Haw* (1). The witnesses to the search by the Police were in this case a headman of a ward and an elder of a block appointed by the Deputy Commissioner of the District. The duties of these Officials are set out in the Burma Towns Act, 1907. One of the duties of a headman of a ward is to communicate to the Police information which he may obtain regarding the commission of offences. He may be required to give information regarding any offence whatever. He is also bound to assist the Police in investigation of offences, to arrest offenders, and to p form many other services in the pul interests. An elder of a block is bou generally to assist the headman of the wa By the nature of their duties such Offi must be brought into close contact with Police and must, as a general rule, act unison with them towards the same en This to my mind disqualifies them from t position of being witnesses to searches the Police.

In considering who were intended to chosen as witnesses by a Police Officer other person authorised to make a sear under section 103 of the Code of Crimi Procedure, consideration cannot be confi to searches under the Gambling Act. T section of the Code contains the gene provisions for searches and applies wh ever the offence may be. It is, therefo of great importance that the intentions the Legislature, as far as they can be gath ed, should be carried out to the fulle extent, especially if the provision requiri any one authorised to make a search in place to take with him two or more respec able inhabitants of the locality to witne the search is one adopted for the bene of the person whose place is to be searche

It could scarcely have been contemplate by the Lgislature that this provision wou be satisfied by the searching Officer takin with him two of his ordinary assistants his work.

It must not be overlooked that the Legi lature has also provided that the perso called to be witnesses of the search should n ordinarily be required to attend the Cou as witnesses of the search. This seems show that what the Legislature aimed was witnesses of not only respectability bu of absolute impartiality so that no reason able person whose place was searched their presence would question the *bona fid* of the finding of articles entered in list signed by them as found on th premises.

In the case of *King-Emperor* v. *Kwe Ha* (1), I stated my views regarding ward head men appointed by the Commissioner Police, Rangoon, not being qualified witnesse to searches. The ward headmen and th block-elders in the present case having th same duties to perform although appoint

ed by a Deputy Commissinor; were, in my opinion, not qualified witnesses to the search. I would, therefore, hold that the presumption under section 7 of the Burma Gambling Act was not applicable and that the convictions by the Township Magistrate were not justified.

I agree in dismissing the appeal.

Appeal dismissed.

(s. c. 4 Bur. L. T. 95.)

LOWER BURMA CHIEF COURT.

CIVIL REVISION No. 139 OF 1908.

September 3, 1908.

Present:—Mr. Justice Lowis.

MAUNG KYAUK GYI—DEFENDANT—APPLICANT

versus

MAUNG LU NYO—PLAINTIFF—RESPONDENT.

Contract Act (IX of 1872), *s.* 23—*Illegal purpose—Contract to accomplish illegal or immoral purpose—Contract void on account of object being unlawful—Recovery of money paid under illegal agreement.*

Where plaintiff paid a sum of money to defendant for an illegal purpose, *viz.*, that he should give false evidence and so obtain the conviction of a person whom the plaintiff was prosecuting, and then after some time sued to recover the money so paid:

Held, that the plaintiff was debarred from recovering the money from the defendant.

The law refuses to lend its aid in enforcing agreements in which immorality forms an ingredient.

Nga Te v. *King-Emperor*, 2 L. B. R. 216; 10 Bur. L. R. 249; 1 Cr. L. J. 730, distinguished.

Maung Tun Myat v. *Maung On Gaing*, L. B. P. J. 477, followed.

Appeal against the decree of the District Court of Henzada, dated the 21st September 1908, passed in Civil Appeal No. 139 of 1909, setting aside the decree of the Township Court of Okpo and granting a decree to the respondent (plaintiff) whose suit was dismissed in Civil Suit No. 395 of 1908.

Mr. *R. N. Burjorjee*, for the Applicant.

Mr. *Kyaw Din*, for the Respondent.

JUDGMENT.—In this case respondent sued appellant for Rs. 290 in the Township Court of Okpo. The Township Court found that respondent had made over certain sums to appellant, but came to the conclusion that they had been made over for an illegal purpose, to wit in order that appellant might help, presumably by giving false evidence, to obtain the conviction of a man named Maung San Nyin (whom respondent was prosecuting for cheating) and dismissed respondent's suit. In appeal the District Court found with the Township Court that the money had been advanced for an illegal purpose, but held that respondent was not thereby debarred from recovering from appellant, and it set aside the Township Court's decree.

It is urged in second appeal in this Court that the District Court's finding was incorrect in law. In coming to its decision the District Court relied on the ruling in the case of *Nga Te* v. *King-Emperor* (1) in which it is laid down that a stake-holder who misappropriates to his own use the stakes deposited with him for a wager is liable to prosecution for criminal breach of trust. The learned Advocate for applicant has pointed out what no doubt is a fact, *viz.*, that the above ruling refers to a state of things to which section 23 of the Contract Act (the section on which the Township Court based its decision) does not apply. The Township Court held that the agreement entered into between the parties was void in view of the fact that its object was unlawful and that, as it was void, nothing paid under it could be recovered by process of law. The learned Advocate for respondent contends that though his client cannot succeed in a suit for the enforcement, or for damages for the breach of the agreement, he can succeed in a suit for the return of the money paid under it. I cannot accede to this proposition. The attitude of the Courts toward transactions of the kind contemplated in section 23 of the Contract Act is, it seems to me, summed up in a passage quoted in the commentary on section 23 in the 9th Edition of Cunningham and Shepherd's Indian Contract Act (p. 100) in which it is said, in connection with social immorality, that the law refuses to lend its aid in enforcing agreements in which it forms an ingredient.

In the present case the agreement sued on was an agreement, express or implied that if the illegal act was not performed or failed of its object (as appears to have happened in the present case) the money paid would be returned, and it is clear that, in these circumstances the illegal act was an ingredient of the agreement. The princi-

(1) 2 B. L. R. 216; 10 Bur. L. R. 249; 1 Cr. L. J. 730.

ple indicated in *Maung Tun Myat* v. *Maung On Gaing* (2) applies, to my mind, clearly in this case. The judgment and decree of lower Appellate Court are set aside and those of the Court of first instance are restored. Each party will bear his own costs throughout.

(2) L. B. P. J. 477.

(s. c. 13 Bom. L. R. 201.)

BOMBAY HIGH COURT.

CRIMINAL REFERENCE No. 107 OF 1910.

March 2, 1911.

Present:—Sir N. G. Chandavarkar, KT., Judge, and Mr. Justice Heaton.

EMPEROR—COMPLAINANT

versus

SULEMAN IBRAHIM NAKHUDA—ACCUSED.

Criminal Procedure Code (Act V of 1898), ss. 215, 347—Order of committal, convenient or indiscreet, cannot be quashed, except on point of law.

An order of committal can only be quashed on a point of law. The order may be convenient or it may be indiscreet, but the High Court will not interfere unless it is illegal.

Criminal reference made by the Sessions Judge of Surat.

Mr. *R. S. Navalkar*, for the Accused.

JUDGMENT.

CHANDAVARKAR, J.—The learned Sessions Judge has sent up this case to us by way of reference and asked us to quash the order of committal on two grounds:—

First, that there is no evidence in the Committing Magistrate's record to sustain the charges under sections 367, 370, 342 and 323 of the Indian Penal Code. That may be so, but that alone is not a ground for this Court's interference at this stage, and quashing the order of committal. The Code provides that a committal shall be quashed on a point of law only. It may be that the prosecution may have evidence to offer in support of the charges in question in the Sessions Court, independently of the evidence recorded by the Committing Magistrate, assuming that the witnesses examined before that Magistrate have said nothing with reference to the offences under those charges. The responsibility is that of the Public Prosecutor; and if the Public Prosecutor thinks that the case ought to be tried and that ought to have an opportunity

of proving those charges, we cannot say that the order of committal ought to be interfered with by this Court at this stage.

Secondly, the learned Sessions Judge is of opinion that the Committing Magistrate has framed charges under those sections for the purposes of the committal. That also is not a ground for quashing the order in the circumstances of the case. There has been a death. The case so far, therefore, is of a serious character; and, upon the materials before us, we cannot presume or assume that the Magistrate's order of commitment is altogether unwarranted, and was made with a view to avoid his own responsibility for the final disposal. The case must go back to the Sessions Court and the learned Sessions Judge will deal with it, after asking the Public Prosecutor, whether he wishes to proceed with it, assuming that there is no evidence to sustain the charges under sections 367 and 370.

HEATON, J.—I agree. I cannot see that the commitment is illegal. It may be convenient or it may be indiscreet, but we are only concerned with the question of illegality. Therefore, I agree with the order proposed.

Order accordingly.

(s. c. 13 Bom. L. R. 203.)

BOMBAY HIGH COURT.

CRIMINAL REVISION No. 420 OF 1910.

March 2, 1911.

Present:—Sir N. G. Chandavarkar, KT. Judge, and Mr. Justice Heaton.

EMPEROR—COMPLAINANT

versus

AMIR BALA—ACCUSED.

Criminal Procedure Code (Act V of 1898), s. 123 (3)—Powers of Sessions Judges and High Courts, their duties—S. 406 inapplicable.

The words of clause 3 of section 123 of the Criminal Procedure Code are wide enough to give discretionary power to a Sessions Judge or High Court, as the case may be, to deal with a case on the merits, and, after giving an accused an opportunity of being heard, to pass such order as the circumstances of the case may require.

An order passed by a Sessions Judge under section 123 of the Criminal Procedure Code cannot be the subject of an appeal to a District Magistrate under section 406 of the Code.

Application for revision of the order passed by the Sessions Judge of Khandesh.

SOMCHAND BHIKHABHAI *v.* CHHAGAN LAL.

Mr. *P. B. Shingne*, for the Accused.

Mr. *G. S. Rao*, Government Pleader, for the Crown.

JUDGMENT.

CHANDAVARKAR, J.—Clause 3 of section 123 of the Criminal Procedure Code provides: —

"Such Court after examining such proceedings and requiring from the Magistrate any further information or evidence, which it thinks necessary, may pass such order on the case as it thinks fit".

The words are wide enough to give discretionary power to the Sessions Judge or the High Court, as the case may be, to deal with the case on the merits and pass such order as the circumstances of the case, in his opinion, may require.

We must, therefore, make the Rule absolute and ask Sessions Judge to deal with the matter, having regard to this order.

HEATON, J.—I agree to the proposed order. Unless the words used in section 123 of the Criminal Procedure Code are intended to confer on Court of Session power to go into the merits in a case of this kind, and, indeed, unless they require it to go into the merits, if any point is raised which involves the merits, I am unable to understand what these words mean. It is true that section 406 provides that an appeal lies to the District Magistrate. But I think that the Sessions Judge is wrong in arguing that although he himself might make an order under section 123, the order requiring security would still be the order of the Magistrate, and would still be open to appeal to the District Magistrate under section 406. It seems to me that when the Sessions Judge has dealt with a case under the provisions of section 123, the order passed by him, whatever it may be, becomes the order in the case; and there is no longer an order by a Magistrate made under section 118, which can be the subject of an appeal to the District Magistrate.

Therefore, the Sessions Court is the only Court which has the power to deal with these cases; and being that only Court it must go into merits if required; and if the Judge is to go into the merits, he is bound, according to the general principles of justice which are applicable in British India, to give the person affected by the order an opportunity of being heard.

Therefore, I consider that the Rule must be made absolute.

Rule made absolute.

(S. C. 13 Bom. L. R. 207.)

BOMBAY HIGH COURT.

CIVIL APPLICATION No. 222 OF 1910.

February 7, 1911.

Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Batchelor.

SOMCHAND BHIKHABHAI—APPLICANT

versus

CHHAGAN LAL KHUBCHAND—OPPONENT.

Civil Procedure Code (Act V of 1908) ss. 92, 93—Collector—Powers cannot be exercised by his subordinates.

The duties which are imposed upon a Collector by the Bombay Government Resolution under section 93 of the Code are duties of a very special nature, and cannot be discharged by his subordinates notwithstanding that they are discharging the functions of a Collector in revenue matters.

Application under Extraordinary Jurisdiction, against the decision of the District Judge, Broach, in Suit No. 10 of 1910.

Mr. *G. K. Parekh*, for the Applicant.

Mr. *L. A. Shah*, for the Opponent.

JUDGMENT.—This suit was filed in the District Court of Broach, ostensibly under the provisions of section 92 of the Civil Procedure Code, by certain persons interested in a certain charity property situate within the jurisdiction of that Court. Being a suit in the *mofussil* the consent of the Advocate-General was not necessary provided the consent of a Collector, or other officer of the Local Government, authorized previously by the Local Government, had been obtained.

The plaint bears the endorsement: "Permission is granted under sections 92, 93 of the Civil Procedure Code. G. Wiles, for Collector."

Now the person authorized by Government Resolution to consent to the institution of suits in the District of Broach is the Collector; and Mr. Wiles, who is the Assistant Collector, appears to have made the endorsement on the assumption that the Collector being ill he was entitled to discharge all his functions.

The duties which are imposed upon Collectors by Government Resolution under section 93 of the Code are duties of a very

special nature, the discharge of which often requires serious consideration, and we have not been referred to any authority to justify the argument that where these duties are imposed upon the Collector they may be discharged by his subordinate.

Objection was taken on behalf of the defendants to the suit as not having been authorized by the proper officer. The District Judge, however, came to the conclusion that because Mr. Wiles, as Assistant Collector, was discharging the functions of the Collector under the provisions of section 11 of the Land Revenue Code in revenue matters, he was, therefore, entitled to discharge his functions with reference to suits filed under section 99 of the Civil Procedure Code.

In our opinion this is an erroneous view, and the learned Judge, in entertaining the suit in face of the objection, acted illegally in the exercise of his jurisdiction.

We accordingly order the Judge to reject the plaint under rule 11, Order VII, of the Civil Procedure Code. The opponents must pay the costs of this application.

Rule made absolute.

(s. c. 13 Bom. L. R. 209.)

BOMBAY HIGH COURT.

CRIMINAL REVISION No. 419 OF 1910.

March 6, 1911.

Present:—Sir N. G. Chandavarkar, KT., Judge, and Mr. Justice Heaton.

EMPEROR—COMPLAINANT

versus

NOOR MAHOMED SULEMAN—ACCUSED.

Penal Code (Act XLV of 1860), ss. 283, 114—Obstruction—Public street—Householder—Reasonable right to carry on trade.

Ordinarily, every shop-keeper has a right to exhibit his wares in any way he likes in his shop, but he must exercise the right so as not to cause annoyance or nuisance to the public.

The manner of the exhibition complained of as a nuisance must be necessary for the purposes of business in the sense that without it the business could not be carried on reasonably.

In a case of doubt or difficulty, the private reasonable right of a house-holder to carry on his business must yield to the public right of user of the street.

Application for revision from conviction and sentence recorded by the Chief Presidency Magistrate of Bombay.

Mr. *Lowndes*, with him Mr. *V. F. Vicaji*, for the Accused.

Mr. *G. S. Rao*, Government Pleader, for the Crown.

JUDGMENT.—The facts of this case are shortly these. The petitioners, manager and servent respectively of a toy shop in Shekh Memon Street, exhibited in the windows of the shop, overlooking the public road, certain clock work toys during the last Diwali festival. The result of the exhibition was that thousands of people collected on the road to witness the toys. The Magistrate finds on the evidence that there were dangerous rushes in consequence; people were knocked down; and great obstruction and danger were caused to those using the road. The petitioners were asked by the Police to stop the exhibition but they would not obey.

There can be no doubt upon these findings on the evidence that there were obstruction, danger and injury to the persons using the public way which amounted to a public nuisance.

The only question is, whether that nuisance was caused by the petitioners.

The efficient cause of the nuisance was the act of the petitioners. It consisted in the manner in which they worked the toys in their shop; their object was to attract a crowd; they knew that a crowd would be, and as a matter of fact was, attracted by what they did, and they must be regarded as having intended that consequence. It follows that the nuisance was caused by them.

But it is urged that what they did was in the course of reasonable user of their business on their own premises. The question of reasonable user is one of time, place, and circumstance. It must be decided with reference to all the facts of the case in which it arises. Ordinarily, every shop-keeper has a right to exhibit his wares in any way he likes in his shop, but he must exercise the right so as not to cause annoyance or nuisance to the public. As was said by Romer, L. J., in *Attorney-General* v. *Brighton and Hove Co-operative Supply Association* (1): "It does not follow that, because the user is necessary or useful for the purpose of carrying on the business, it must of necessity be held to be a

(1) (1900) 1 Ch. 276; 69 L. J. Ch. 204; 81 L. T. 762; 48 W. R. 314; 16 T. L. R. 304.

reasonable user." And the law, as explained by Lindley, M. R., in the same case, is that "in a case of doubt or difficulty, the private reasonable right of a householder to carry on his business must yield to the public right of user of the street."

In the present case, the petitioners were aware that their act was causing danger and obstruction to the public way. They were warned and yet did not desist. And it can hardly be said that the manner of the exhibition complained of as a nuisance was necessary for the purposes of their business in the sense that without it they could not carry it on reasonably.

The Rule must, therefore, be discharged and the conviction and sentences confirmed.

Rule discharged.

(s. c. 13 Bom. L. R. 212.)

BOMBAY HIGH COURT.

ORIGINAL CIVIL SUIT No. 297 OF 1909.

November 22, 1910.

Present:—Sir Basil Scott, KT., Chief Justice,

THE WEST END WATCH CO.—PLAINTIFFS

versus

THE BERNA WATCH CO.—DEFENDANTS.

Trade-mark—Infringement—Trader using his name with the mark—Waiver or abandonment not established—Right to injunction—No property in trade-mark apart from goods—Framing of issues—Practice.

An importer who by advertising and pushing the sale of goods under a particular mark secures a wide popularity for the mark in relation to the goods sold by him, is entitled to the protection of the Court for that mark in the country of importation.

The fact that a person using a word or mark always uses it in conjunction with his own name is not conclusive to show that the word or mark cannot be claimed as a trade-mark, or that he has waived his rights in it as a trade-mark.

Where a trade-mark has, up to the date of suit, been associated in the minds of the customers with a very popular kind of commodity sold by the user of the trade-mark, provided there has been no abandonment, he will be entitled to an injunction against any other person importing and selling the commodity under that trade-mark, notwithstanding that his name has, in addition to the trade-mark, always appeared on each article sold, and is well-known to all dealers.

There can be no property in a trade-mark in gross apart from goods of which it has become the symbol.

The question of abandonment is one of intention to be inferred from the facts of each case

Issues should be confined to questions of law arising on the pleadings and to such questions of fact as it would be necessary for the Judge to frame for decision by Jury in a Jury-trial at *Nis Prius* in England.

The practice of raising a number of issues which do not state the main questions in the suit but only various subsidiary matters of fact upon which the parties do not agree condemned.

Messrs. *Bahadurji* and *Jinnah*, for the Plaintiffs.

Messrs. *R. D. N. Wadia* and *Davar*, for the Defendants.

JUDGMENT.—The plaintiffs sue to restrain the defendants from using and imitating various trade symbols alleged to belong to the plaintiffs and from representing that the defendants' business is the business carried on by the plaintiffs.

At the commencement of the hearing, eighteen issues were proposed, very few of which touched the real question in the suit. The first ten of those issues were founded on various statements in the narrative of facts contained in the plaint. This is in accordance with a practice which has grown up at the Original Side of raising a number of issues which do not state the main questions in the suit but only various subsidiary matters of fact upon which there is not agreement between the parties. The effect is very embarrassing and the practice has often been condemned by trying Judges. In my opinion, issues should be confined to questions of law arising on the pleading and such questions of fact as it would be necessary for the Judge to frame decision by the Jury in a Jury trial at *Nisi Prius* in England.

Having eliminated ten issues, the Court recorded eight, but they do not specifically cover the questions chiefly in issue in the suit, which are, in my opinion, as will appear from this judgment, whether the plaintiffs have abandoned their most popular trade symbol and whether the defendants have improperly represented that their business is the business carried on by the plaintiffs.

At the outset, it is necessary to trace the history of the plaintiffs' firm in relation to the Watch Factory at St. Imier which is now the property of the defendants. In 1884, a watch business, the name of which in 1887 became the West End Watch Co., was started in Bombay by the Swiss Firm of Droz and one Charpie. Droz & Co. were the owners of a watch factory at St. Imier and it was chiefly their watches which were sold by the West End Co. Charpie retired in 1887 from the Bombay Firm which then became the property of Droz & Co., exclusively, and so remained

until 1891 when A. Amstutz was introduced as a partner with Droz & Co. In 1904 Droz & Co., the exclusive owners of the St. Imier Factory, got into difficulties and converted their manufacturing business into a Joint Stock Company under the name of the Fabrique D'horlogerie Berna. The West End Watch Co. supported the flotation by taking up a large number of shares in the new Company.

At the same time, the firm of Droz & Co. retired from the West End Watch Co., and their interest therein was purchased by A, Amstutz and Constant Droz, the younger of the Droz brothers who are interested in this suit.

The result of this arrangement was that the owners of the St. Imier Factory no longer had any interest in the West End Watch Co. but the partners in the latter firm were interested in the factory as large share-holders and by covenant with the Joint Stock Company became entitled to the monopoly of all the products of the Factory sent to India for a period of ten years.

The Joint Stock Factory did not prosper, and in or about December 1907 went into liquidation. The liquidators carried on the business till August 1908 when they agreed to sell it to a new company of which the promoters appear to have been a watchmaker named De Goumois and Louis Droz, the elder of the two Droz brothers above mentioned, who had all his working life been interested or employed in the St. Imier Factory. It is probable that the ill success of the Fabrique D'horlogerie was due to want of support from the Bombay firm upon whose custom they were very dependent. At any rate, the Bombay firm complained in the year 1907 of the watches supplied by the factory and began to import watches largely from other manufacturers, while they ceased giving orders to the St. Imier factory.

In view of the importance of the Bombay connection De Goumois, before buying the factory, wrote to the plaintiffs (Ex. G.) on the 11th of August 1908, as follows:—

"With reference to the conversation I had the pleasure to have the other day with Mr. Amstutz I have the honour to inform you that I am on the point of buying the Fabrique Berna. Before deciding definitively, however, I wish to approach you once more, because I have been able to ascertain that up to the present year you were one of the best clients of this factory.

"I have already given you express assurances as to the improvements which I am anxious to make to the products of the Berna and as your dissatisfaction arises from the defects you have found in those products it appears to me that there should be nothing in the way of our continuing the business relations which you entertained up to recently with the Berna since I give you the assurance that I am able to remedy the defects in question. I am of opinion that the Indian market is necessary to the vitality of the Berna, and I am persuaded that it would be to the mutual interest of both our houses if yours were to resume the old relations with the new house.

"In fact, I would be pleased to know"—

"(*a*) If I can positively count upon you to be my regular customers for the articles which you previously took from the Berna."

"(*b*) From what date you could eventually give me your regular orders."

Amstutz replied, by Exhibit A 4, on the 13th August, that they were willing, in principle, to reserve a part of their orders for the eventual successor of the Berna, but that it would first be necessary for the latter to give an idea of what he was going to manufacture and what improvements he was going to make to the calibres and qualities the West End Watch Co., were taking from the Berna.

In the following month, it appears from Exhibit No. 13 that the relations between De Goumois and Amstutz had become strained in consequence of a dispute as to the right to use the word 'Berna' in connection with the sale of watches in India.

De Goumois had complained to the liquidators, his prospective vendors, that Amstutz had declared he would prevent De Goumois from using the word in India, and the liquidators warned Amstutz that, if he harassed De Goumois in India, they would take severe measures against Amstutz in Switzerland.

To this Amstutz replied that his firm would claim in India by all means the ownership of the word 'Berna' as a trade-mark on the basis of a twenty years' user of the same to designate one of their qualities of watches.

The history of the use of the word 'Berna' in connection with watches sent from St.

Imier to the plaintiffs in Bombay is as follows.

In the year 1887 a trade-mark was designed at the factory at St. Imier, consisting of a bear and flag with the word 'Berna' and was marked on new watches sent to India. The bear was objected to by the West End Watch Co., as not suited to Indian tastes and was quickly abandoned for the Indian trade. The word 'Berna,' however, was used on a certain quality of watch, and in 1901 was included in a new trade-mark, registered by Droz & Co. in Switzerland in that year, consisting of two concentric circles, the inner being occupied by a star and crescent and the outer by the words "Berna" and "Swiss Made." This mark has been transferred to the Swiss Registry to the successive owners of the Factory including the defendants, and the defendants have also registered another mark with concentric circles the inner being occupied with the initials "B W" and the outer with the words 'Berna Watch Co. Swiss Made.'

Watches bearing the word 'Berna' on the dial whether alone or in the star and crescent trade-mark above described were styled Berna watches in the plaintiffs' catalogues, exhibited in this case, for the years 1897 to 1907 inclusive. The watches so designated may be roughly described as the twenty-rupee quality watches.

In the extra edition of the plaintiffs' undated catalogue No. 43, which I take to have been published in the latter part of 1907, the Berna is called the Berna or Service Watch, the alternative designation being explained by the following remark:—

"We take this opportunity of informing our customers that the name 'Berna' will be changed to 'Service' as soon as our present stock of these watches is sold out. The trade-mark will in other respects remain unaltered. This alteration of the name is done to secure a trade-mark which cannot be imitated in India or elsewhere."

Catalogue No. 44 is in the same terms as regards these watches but in Catalogue No. 45, (the succeeding Catalogue relating to watches), which is the last one produced and probably belongs to the latter part of 1908, there is no Berna watch advertised but in its place the 'Secular,' which is introduced with the following remark:—

"The Secular re-places the class of watches which we were formerly selling under the designation of Berna watches as the latter were watches which were designed twenty years ago and had become somewhat out of date."

The change from 'Berna' to 'Service' and 'Secular' is rather differently explained by the plaintiffs and the defendants:—

"9. In the year 1907 the plaintiffs discoverd that the word "Berna" as used in their trade-mark for many years in India had without their knowledge been registered in 1901 by Droz & Co., as a trade-mark in Switzerland and the plaintiffs resolved to change the name of the particular quality of watch marked "Berna" to "Railway Service" and "Secular" and they notified in their catalogues the change of name. The plaintiffs, however, continued to receive and still receive orders for Berna watches. (Plaint.)

"8. The allegations contained in paragraph 9 of the plaint are absolutely untrue. In 1906 when the said Constant Droz was in Switzerland he told Louis Droz, then delegate of the Council of Administration of the said Fabrique Company, that as the word Berna had been the registered trade-mark of the Fabrique Company the plaintiffs had resolved to change the mark Berna on the watches imported by them into "Railway Service" and "Secular." The change was on his instructions accordingly made from the year 1907. (Written statement)."

The plaintiff Constant Droz, however, is not prepared to deny that a conversation, such as is alleged in the written statement and sworn to in evidence by Louis Droz, did take place. Such a conversation is, moreover, consistent as regards the change to 'Service' with the remark in Catalogue No. 43, extra edition.

I have come to the conclusion that real reason of the change was the certainty that the plaintiffs had that they would have to sever their business relations with the Factory at St. Imier [which, it may be noted, is referred to by Amstutz on the 13th August 1908 (Ex. A. 4) as the Berna] and their desire to have a mark for their twenty-rupee quality watch which would not involve them in controversy with the registered owners of the mark 'Berna' in Switzerland.

On the 4th of November 1908, the new Company started by De Goumois under the English name of the 'Berna Watch Co.,'

took an assignment of the factory and its properties, and on the 6th of November Louis Droz, as representative of the new Company, came to Bombay and opened a place of business. He then prepared and issued a circular, dated February 1909, in which, on behalf of the defendant Company, he referred to the plaintiffs as the defendant's agents who had sold 600,000 watches made at the St. Imier Factory in past years and proclaimed that Berna Co.'s watches should no longer be sold by their former sole agents-importers (meaning the plaintiffs), as the defendants had decided to get rid of any middleship and to deal directly themselves. References are given at the close of the circular to every wearer of one of the 600,000 Berna watches in use in India and every maker who has sold one Berna watch.

The immediate result of the circular was the institution, on the 2nd of April 1909, of this suit by the plaintiffs who allege that one of the qualities of their watches was well-known as the Berna watch; that the name Berna came to denote to the public in India and Burma a particular quality of watch imported and sold by the plaintiffs and that, though the name has been changed by the plaintiffs, they have continued to receive orders for Berna watches.

The plaintiffs' case, therefore, as originally framed, was based upon acquisition by user in India of the name Berna as a trade-mark. This is a case which is not affected by the successive registration in Switzerland of the Berna trade-mark as appearing on the plaintiffs' watches by the different owners of the St. Imier factory: See *Rey* v. *Lecouturier* (1).

That the importer, who by advertising and pushing the sale of goods under a particular mark secures a wide popularity for the mark in relation to the goods sold by him, is entitled to the protection of the Court for that mark in the country of importation, even against the producer of the goods, has been recognised by this Court in the unreported case of *Damodar Ruttonsey* v. *Hormusji Adarji* (2) and by the Madras High Court in *Lavergne* v. *Hooper* (3).

Although the word 'Berna' originated with the manufacturers, it is proved that buyers in India were not interested to inquire at what factory imported watches may have been made. Importing firms have acquired reputations by selling and advertising watches of grades suitable to different classes of Indian buyers, and by taking care that all but the very cheapest watches are properly regulated before they pass to the buyers. Amongst importing firms, the plaintiffs' reputation stands at least as high as any. It is contended that the plaintiffs never used the word Berna as a trade-mark because it is always found in conjunction with the name West End Watch Co. This argument is based upon the decision in *Richards* v. *Butcher* (4) where the Court was only concerned with the question whether a word had been "used as a trade-mark" in the sense contemplated in section 10 of the Trade-Marks Registration Act, 1875. That case has no application here. The fact that the user of a word or mark always uses it in conjunction with his own name is not conclusive to show that the word or mark cannot be claimed as trade-mark or that the user has waived his rights in it as a trade-mark. Thus in *Braham* v. *Bustard* (5) and in *Lavergne* v. *Hooper* (3) the successful owner of marks used their own names in conjunction with them, and this is, so far as I am aware, the general practice.

The evidence, I think, establishes that the word 'Berna' had, up to the date of suit, been associated in the minds of watch buyers in India with a very popular grade of watch sold by the plaintiffs, and it follows that, if there has been no abandonment the plaintiffs are entitled to an injunction against any other persons importing and selling watches under that name notwithstanding that the plaintiffs' name has, in addition to the word or trade-mark Berna, always appeared on every one of their watches and is well-known to all dealers.

I propose, therefore, to discuss whether the plaintiffs have abandoned their right in the name Berna as a symbol of a particular quality of watch by them. The matter is by no means settled by a reference to the declaration of Amstutz that his firm would claim in India by all means the ownership of the word Berna as a trade-mark, for

(1) (1908) 2 Ch. 715; 98 L. T. 197; 78 L. J. Ch. 181.
(2) Appeal No. 942 in Suit No. 68 of 1895.
(3) 8 M. 149 at p. 154.
(4) (1891) 2 Ch. 522 at p. 543; 60 L. J. Ch. 530.
(5) (1863) 1 H. and M. 447; 9 L. T. 199; 11 W. R. 661.

there can be no property in a trade-mark in gross apart from goods of which it has become the symbol: See *Thorneloe* v. *Hill* (6). The question of abandonment is one of intention to be inferred from the facts of the case. See *Mouson and Co.* v. *Boehm* (7) and *Larvergne* v. *Hooper* (3).

In the first place, the declaration of Amstutz may be met by the statements in the catalogues to which I have above referred in discussing the use of the word Berna prior to suit.

Passing now to the other evidence on the point, I gather that owing to the conservation of Indian buyers the efforts of the plaintiffsto substitute watches named 'Secular' in place of those named 'Berna' were not at once successful, but the difficulties encountered in carrying out the change have not, so far as I can judge interfered with the plaintiffs' determination to discontinue the use of the word 'Berna.'

Baksh Elahi, the Calcutta dealer, says that when he received orders for 'Berna' or 'Secular' he would send the plaintiffs' watches. He has no Bernas in stock so has to supply Seculars, but they are only taken by the illiterate. Those who can read do not buy Seculars. In 1909 after he had learnt that the plaintiffs had discontinued the issue of Bernas he tried to sell some of the defendants' Bernas to customers asking for Bernas but they would not buy on seeing that the watches were not West End Co.'s Bernas.

The Lahore dealer, Tricumlal Lalla Motilal, proves orders sent by him to the plaintiffs Company as late as the 15th of November 1908 for Berna watches, but he also says that the plaintiffs have for the last two years invariably supplied Seculars or Railway Service in execution of such orders. He would now ask a wholesale dealer asking for Bernas whether he wants West End Co.'s Bernas or Berna Watch Co.'s Bernas.

The Delhi dealer, Dhanamal Goela, proves many orders (Exs. D. and E.) sent for Bernas to the plaintiffs during 1908, 1909 and 1910, but it is only in the 1910 orders that he shows by ordering Berna Secular that he is aware of the new name introduced by the plaintiffs in place of Berna.

The evidence of Mohundas Kamalsey, the other large dealer, is not very intelligible, but he seems to attach great value to the name 'Berna' in connection with the plaintiffs' watches and says he finds it difficult to sell 'Secular' watches to illiterate people, (which is the reverse of Elahi Baksh's experience).

The evidence of the plaintiffs themselves establishes that their large customers, the Traffic Superintendents of the Oudh and Rohilkhand and the N. W. Railways, continued to order 'Berna' watches for guards throughout 1908 and 1909 and into the present year, the orders being almost invariably executed by the supply of the 'Railway Service' watch (See Ex. M. *de bene*).

The last order for 'Bernas' was given by the plaintiff to the St. Imier Factory in 1907, and the date of the last invoice for Bernas sent to the plaintiffs from that factory was 30th June 1908, (see Exhibit N.). The watches so invoiced would be received about September 1908.

Between 1908, and the date of the institution of this suit, 131 orders for Berna watches were satisfied by the supply of Bernas. Between the date of suit and March 1910 only thirty Bernas watches were supplied to wholesale dealers.

On the 24th April 1909, three weeks after the institution of this suit, the plaintiffs received from a dealer at Neemuch an order for twelve 'Berna' watches. Constant Droz then made the following memorandum with regard to it (Exhibit 9):—

"Write Berna not made any more, these (*i. e.*, Railway Service) are the watches we now supply in its stead to all the Railway and Government offices. They are of the most modern construction, etc."

There are, it is said, a few 'Berna' watches still on hand but their number cannot be easily ascertained from the stock-book.

It may, therefore, be taken that the plaintiffs stock of Berna watches is practically finished.

The conclusion at which I arrive from this evidence is, that the plaintiffs for the last

(6) (1894) 1 Ch. 569 at p. 577; 63 L. J. Ch. 331; 8 R. 718; 70 L. T. 124; 42 W. R. 397.

(7) (1884) 26 Ch. D. 398 at p. 405; 53 L. J. Ch. 932; 50 L. T. 784; 32 W. R. 612.

three years both in their dealings with the supplying factory and with their customers evinced very clearly and consistently their intention to abandon the name 'Berna' as a quality mark for their watches, and it follows that they can no longer claim any exclusive title to the use of that name either alone or in a trade-mark with concentric circles.

The plaintiffs' case for relief, however, does not altogether fail with their inability to make out an exclusive title to the words or trade-mark 'Berna'. They complain that the defendants have been representing that they are now carrying on a business which was formerly carried on by the plaintiffs as their agents, in proof of which the circular of February 1909, is referred to. This circular is admittedly indefensible and the defendants have offered to destroy it. The plaintiffs also rely on an advertisement in a Rangoon paper of the 13th November 1909, which was inserted by the defendants' agent Danker and is shown to have had the approval of Louis Droz, the defendants' representative in Bombay. (See advertisement Exhibit A2 and Exhibit Q).

The watch figured in the advertisement is a new wacth introduced recently by the defendants under the name of Berna New D. P. having a new adoptation of an old movement not found in the watches, heretofore, known in India as Berna watches through the business dealings of the plaintiffs.

The advertisement is, however, headed in large type '*The Berna*' and includes a statement as to the official adoption of the watch by certain Railway Companies, a statement which is wholly false as regards the defendants' Berna New D. P. and is copied verbatim from the plaintiffs' unamended catalogue No. 43.

The relation of the defendants and Danker, the Rangoon advertiser, were those of principal and agent. Danker did not buy from the defendants but received watches of which he was bound to remit the proceeds, when sold, at the end of each month. The advertisement though paid for by Danker was approved by Louis Droz who said the defendants would pay Rs. 10 per month towards the costs of the advertisement translated into the Burmese language (see Exhibit Q).

In my opinion, the advertisement is both a direct misrepresentation as to the business and goods of the defendants and a breach of the injunction of the 6th April 1909, whereby the defendants, their servants and agents, were restrained from publishing or representing that the defendants' business has anything whatever to do with the plaintiffs' business.

Other complaints of the plaintiffs relate to the marks known as The West End Co., with-Eagle and the Matchless with Locomotive. As to the first, it is sufficient to say that the evidence does not disclose that the Eagle mark has acquired any reputation among Indian buyers, and that the defendants are only using an eagle mark without the words West End Co. As regards the Matchless with Locomotive, it is common ground that the Locomotive mark is *publici juris* and that the word Matchless was adopted by the plaintiffs as distinctive from the word Maxim which in combination with a Locomotive was a registered trademark of the factory in Switzerland which has now passed by assignment to the defendants. In my judgment no case of passing off has been made out against the defendants in respect of either of these marks.

The plaintiffs also complain that the defendants are imitating the boxes in which the plaintiffs' watches have generally been sold. These are red boxes, having a representation stamped on them of the St. Imier Factory together with reproductions of certain medals awarded at Exhibitions for products of the St. Imier Factory. The evidence does not satisfy me that buyers attach any importance to these boxes. If there were such evidence, it is doubtful if the Court would grant relief to the plaintiffs in respect of them now that their business relations with the St. Imier Factory have ceased. Much time has been consumed in the discussion of various assignments, executed in Switzerland in the years 1901, 1904 and 1908. I do not think they help the plaintiffs' case. The two matters seriously in dispute are the right to the use of the word 'Berna' and the question whether the defendants are or were improperly representing their business to be the business formerly carried on by the plaintiffs. The defendants can use the word 'Berna' in India only if the plaintiffs abandoned its use. Once the abandonment is established, the Swiss assignments, assuming

them to assign the Berna trade-mark to the plaintiffs absolutely, can be of no assistance to them.

I pass a decree for the plaintiff for an injunction restraining the defendant Company, their servants, agents, travellers and representatives respectively, from in any manner representing or causing or procuring to be represented or doing anything which shall lead to the belief that the defendant Company have been or are carrying on the business carried on by the plaintiffs or are the successors in business of the plaintiffs, and from employing, using or circulating or causing to be employed, used or circulated any circulars, notices, or advertisements which shall in any manner represent or lead to the belief that the defendant Company are carrying on or have succeeded to the business of the plaintiffs.

The plaintiffs will have their costs of suit up to and including the first day's hearing, and must pay to the defendants costs of four days' subsequent hearing. Each party must bear their own costs not otherwise provided for.

Suit decreed.

Attorneys for the Plaintiffs: *Captain & Vaidya.*

Attorneys for the Defendants: *Bicknell, Merwanjee & Romer.*

(s. c. 13 Bom. L. R. 230.)

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 962 OF 1909.

February 13, 1911.

Present:—Sir N. G. Chandavarkar, KT., Judge, and Mr. Justice Heaton.

BALKRISHNA WAMANJI GAUANKAR —APPELLANT

versus

SHIVA CHINA MHATRA—RESPONDENT.

Decree—Execution—Application pending—Appeal—Intermediate application barred—Res judicata.

An application for execution of a decree was made in 1903. The Court ordered execution to proceed. The judgment-debtor appealed against the order, which, however, was upheld on the 2nd of August 1905. In the meanwhile, the decree-holder made a fresh application for execution of the same decree in 1904 and this was rejected by the first Court as time barred.

After the order of the Appellate Court on the 2nd August 1905, the decree-holder applied in 1906 for the proceedings in execution to be continued on the application of 1903. The Court ordered a fresh application for execution to be filed, and so, in 1907 a fresh application for execution was made. It was rejected by the Court on the ground that it was barred as *res judicata* by the order of rejection on the application of 1904.

On appeal to the High Court:

Held, that the application for execution must be allowed. The right of the decree-holder to proceed in execution on the strength of the Appellate Court's order in his favour could not be affected by the order of the first Court passed in the *darkhast* of 1904, because the latter was the order of a lower Court and it was passed in a *darkhast* which could not have legal validity so long as the *darkhast* of 1903 was kept alive by proper proceedings.

Second appeal from the decision of the District Judge of Thana, in Appeal No. 51 of 1909, confirming the order passed by the Subordinate Judge of Bassein in *Darkhast* No. 386 of 1907.

Messrs. *D. A. Khare* and *B. V. Desai*, for the Appellant.

Messrs. *G. S. Rao, J. R. Dhurandhar*, for the Respondent.

JUDGMENT.—The present *darkhast* of 1907 has been held by both the Courts below to be barred as *res judicata* by the order of the Subordinate Judge rejecting the previous *darkhast* No. 460 of 1904 on the ground that it was time-barred. Though that might have been if this latter *darkhast* and the order thereon by the Subordinate Judge had stood alone, we have here the fact that, at the time of that *darkhast* and the order, there was an appeal pending in the District Court against the order in the decree-holder's favour directing execution to proceed in *darkhast* No. 5 of 1903. That was an appeal preferred by the judgment-debtor and the Appeal Court upheld the order in the decree-holder's favour on the 2nd of August 1905. The decree-holder had under the appellate decree a right subsisting on that date to proceed in execution under the *darkhast* of 1903. As a matter of fact, he did apply to the Court on the 10th of October 1906. That was an application to take a step-in-aid of execution according to law and it was made within three years immediately preceding the date of the present *darkhast* of 1907. The right of the decree-holder to proceed in execution on the strength of the Appellate Court's order in his favour could not be affected by the order of the Subordinate Judge's Court passed in the *darkhast* of 1904, because the latter was the order of a lower Court and it was passed in a *darkhast* of which could not have

legal validity so long as the *darkhast* of 1903 was kept alive by proper proceedings. Therefore, the order appealed against is set aside and the Subordinate Judge is directed to allow execution in the *darkhast* of 1907. The respondents must pay to the appellant the costs throughout of this *darkhast*.

Order set aside.

(s. c. 13 Bom. L. R. 233.)

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 707 OF 1909.

February 13, 1911.

Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Batchelor.

MANILAL RANCHHOD—APPELLANTS

versus

MOTIBHAI HEMABAI—RESPONDENTS.

Civil Procedure Code (Act XIV of 1882), ss. 268, 274—Execution of decree—Usufructuary mortgage—Attachment and sale of the mortgage debt under section 268 not permissible—Attachment of interest in immoveable property.

In the case of a purely usufructuary mortgage where there is no debt payable by the mortgagor, the procedure by attachment under section 268 is inapplicable. The procedure should be by attachment under section 274 of the interest in immoveable property and its sale in accordance with the provisions of the Code.

Tarvadi Bholanath v. *Bai Kashi*, 26 B. 305, distinguished.

Second appeal from the decision of the Judge of the Small Causes Court; with Appellate Powers, at Ahmedabad, in Appeal No. 216 of 1907, reversing the decree passed by the Subordinate Judge of Umreth, in Civil Suit No. 95 of 1906.

Mr. *G. K. Parekh*, for the Appellants.

Mr. *L. A. Shah*, for the Respondents.

JUDGMENT.—The respondent No. 1 is the assignee of the rights of a mortgagee under a mortgage-bond executed in the year 1894. The bond created a usufructuary mortgage with possession and provided as follows:—

"The field is given in mortgage on receiving on security thereof Rs. 750. The money bears no interest and no rent shall be payable for the field. The period is fixed at ten years. You may cultivate or sub-mortgage the field during this period. I have no right thereto. After the expiration of the fixed period when I re-pay the principal sum on the very day and in the very month in which I have received the sum you may give up the field in *Vaishakh* in that year. You should pay dues, etc., and enjoy the produce If any one causes obstruction or hindrance then I am to be answerable for the amount due in such manner as you may ask me to be answerable."

According to the rulings of this Court, that document created a purely usufructuary mortgage and not a mixed mortgage of the character referred to in *Parasharam* v. *Putlajirao* (1). It created no debt in respect of which the mortgagor could be sued except in the event of breach of the covenant for quiet enjoyment contained in the bond. This being so, there was no debt due from the mortgagor which could be attached under the provisions of section 268 of the Code of 1882. The plaintiffs, however, as the holders of a money-decree against the assignor of the respondent No. 1. purported to attach a debt of Rs. 750, due by the mortgagor to the original mortgagee whose representative was the plaintiffs' judgment-debtor, and having so attached the so-called debt, it was sold in execution and purchased by the plaintiffs.

It is contended on behalf of the respondent No. 1 that the attachment and sale gave the appellants no right to possession of the mortgaged land for which he sues, and that argument found favour with the learned Judge of the lower Appellate Court.

We are of opinion that the lower Court's decision is correct. In the case of a purely usufructuary mortgage where there is no debt payable by the mortgagor, the procedure by attachment under section 268 is inapplicable. The procedure should be by attachment under section 274, of the interest in immoveable property and its sale in accordance with the provisions of the Code.

The Pleader for the appellants has, however, relied upon the decisions of this Court in *Baldev Dhanrup Marvadi* v. *Ramchandra Balvant Kulkarni* (2) and *Tarvadi Bholanath* v. *Bai Kashi* (3) in which the decisions of the Madras High Court in *Appasami* v. *Scott* (4) and of the Calcutta High Court in

(1) 34 B. 128; 4 Ind. Cas. 595; 11 Bom. L. R. 1315.
(2) 19 B. 121.
(3) 26 B. 305.
(4) 7 M. 5.

Debendra Kumar Mandel v. *Rup Lall Dass* (5) were followed.

It is to be observed, however, that the learned Judges in delivering judgment in *Tarvadi Bholanath* v. *Bai Kashi* (3) were careful to point out that their decision was based upon the fact that the mortgagee was a mortgagee under a simple mortgage and was not in possession, and upon that ground the decisions in the other cases which we have referred to may be distinguished from that now before us.

We, therefore, affirm the decree of the lower Appellate Court and dismiss the appeal with costs.

Decree confirmed.

(5) 12 C. 546.

(s. c. 13 Bom. L. R. 237.)

BOMBAY HIGH COURT.

CIVIL APPLICATION No. 221 OF 1910.

February 11, 1911.

Present:—Sir Basil Scott, KT., Chief Justice and Mr. Justice Batchelor.

EKNATH RONOJI FALKE—APPLICANT

versus

RANOJI BAWAJI FALKE—OPPONENT.

Civil Procedure Code (Act V of 1908), O. XXIII, O. XLI, r. 11—Withdrawal of suit—Appeal—Competency of Appellate Court to allow withdrawal after presentation of appeal.

It is beyond the power of an Appellate Court to allow a withdrawal from a suit with leave to file a fresh suit on the same cause of action after the defendant has obtained a decree in his favour.

Application under Extraordinary Jurisdiction against the decision of the District Judge, Sholapur, in Appeal No. 210 of 1909.

Mr. *K. H. Kelkar*, for the Applicant.

Mr. *N. V. Gokhale*, for the Opponent.

JUDGMENT.—The plaintiff brought a suit against the defendant for possession of certain lands alleging that they belonged to him and had been handed over to the defendant on his undertaking to pay Rs. 50 per annum to the plaintiff for maintenance and that the defendant had failed so to do.

The defendant contended that the plaintiff had relinquished his rights in the lands in favour of the defendant. Upon this defence the Subordinate Judge rejected the claim with costs.

The plaintiff preferred an appeal to the District Court, but before the appeal was admitted he made an application under Order XXIII for leave to withdraw the suit and bring a fresh suit. This application was heard and granted by the District Judge without any notice to the defendant. It is contended that the learned District Judge has acted with material irregularity in the exercise of jurisdiction in two particulars. In the first place, his duty upon the presentation of an appeal is laid down by Order XLV, rule 11, from which it appears that he may dismiss the appeal without sending notice to the respondent or he may adjourn the hearing, and, if the appellant does not appear, he may dismiss the appeal. But there is no provision allowing him to entertain an application the effect of which will be to get rid of the decree of the lower Court without any notice to the decree-holder and without any hearing of the appeal, it is also contended that the course taken by the learned District Judge is not sanctioned by the provisions of Order XXIII. The Court is empowered to make an order permitting withdrawal from a suit or abandonment of part of a claim where it is satisfied that the suit must fail. That implies that the suit has not yet been disposed of. But in the present case the suit has been disposed of and the decree has been passed in favour of the defendant.

It is, we think, beyond the power of the Court to allow a withdrawal from a suit with leave to file a fresh suit on the same cause of action after the defendant has obtained a decree in his favour.

We, therefore, set aside the order of the District Judge under Order XXIII and direct him to admit or reject the appeal under the provisions of Order XLI, rule 11.

Rule made absolute with costs.

Rule made absolute.

GURUNATH BALAJI *v.* YAMANAVA NALARAO.

(s. c. 13 Bom. L. R. 240.)

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 677 OF 1909.

February 10, 1911.

Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Batchelor.

GURUNATH BALAJI MUTALIK—

APPELLANT

versus

YAMANAVA NALARAO DIVAN—

RESPONDENT.

Covenant to re-purchase—Mortgage or sale—Time not limited—The covenant purely personal.

The material portion of a document ran as follows:

"I have given the land into your possession; if perhaps at any time I require back the land, I will pay to you the aforesaid Rs. 600, and any money you may have spent on bringing the land into good condition and purchase back the land":

Held, that this was not a mortgage, for no debt existed between the parties to it, but that the transaction was a sale with the option of re-purchase:

Held, also, that the covenant to re-purchase was purely personal.

Second appeal from the decision of the District Judge of Dharwar, in Appeal No. 175 of 1908, confirming the decree passed by the Subordinate Judge of Dharwar, in Civil Suit No. 231 of 1907.

Mr. *K. H. Kelkar*, for the Appellant.

Mr. *G. S. Mulgaokar*, for the Respondent.

JUDGMENT.—We agree with both the lower Courts in holding that the document, Exhibit 9, which is the subject of consideration, is not a mortgage, for no debt existed between the parties to it. It is a sale with an option of re-purchase, and the question now is, whether thirty-five years after its execution the grandson of the original vendor can exercise the option of purchase against the daughter-in-law of the original vendee.

As translated by the Subordinate Judge the material portion of the document is: "I have given the land into your possession; if perhaps at any time I require back the land, I will pay to you the aforesaid Rs. 600, and any money you may have spent on bringing the land into good condition and purchase back the land." The learned Subordinate Judge held that the covenant to re-purchase was purely personal, and we do not think that the language of the document need be strained in any way to arrive at this conclusion. The alternative would be that the covenant is enforceable according to the intention of the parties for all time, a conclusion which would not be favoured by any Court.

KASHINATH *v.* VINAYAK GANGADHAR.

The case is very similar to that of *Stocker* v. *Dean* (1), which was followed by the High Court of Calcutta in *Shreemutty Tripoora Soonduree* v. *Jugger Nath Dutt* (2).

The plaintiff, therefore, has, in our opinion, no right to enforce the covenant and his suit was rightly dismissed with costs.

We affirm the decree of the lower Court and dismiss the appeal with costs.

Decree confirmed.

(1) (1852) 16 Beav. 161.
(2) 24 W. R. 321.

(s. c. 13 Bom. L. R. 242.)

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 70 OF 1910.

February 17, 1911.

Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Batchelor.

KASHINATH RAMCHANDRA POTNIS

APPELLANT

versus

VINAYAK GANGADHAR BHAT—

RESPONDENT.

Dekkhan Agriculturists' Relief Act (XVII of 1879)—Agriculturist—Inamdar—*Assignee of Government revenue.*

The income derived from tenants by an *Inamdar* as assignee of Government revenue cannot be taken into consideration in estimating whether or not he earns his livelihood wholly or principally by agriculture and, therefore, is an agriculturist within the meaning of the Dekkhan Agriculturists' Relief Act.

Appeal against the decision of the First Class Subordinate Judge at Poona, in Miscellaneous Application No. 1 of 1910.

Mr. *K. N. Koyajee*, for the Appellant.

Mr. *P. P. Khare*, for the Respondent.

JUDGMENT.—The question that we have to decide in this case is, whether the income derived from tenants by an *Inamdar* which is to a certain extent attributable to the fact that he is the assignee of Government revenue and, therefore, does not have to pay over a portion of that income to Government but may keep it for himself, can be taken into consideration in estimating whether or not he earns his livelihood wholly or principally by agriculture and, therefore, is an agriculturist within the meaning of the Dekkhan Agriculturists' Relief Act.

The answer to the question depends upon what force is to be attributed to explanation (*b*) of the definition in section 2. That explanation says "an assignee of Government

assessment or a mortgagee is not as such an agriculturist within this definition."

Now, we think, it is clear that if the object of that explanation was to exclude the consideration of the income of a mortgagee as such it must also have been the intention to exclude the consideration of the income of an assignee of Government as such. We have no difficulty in arriving at the conclusion that the object of the Legislature was to exclude mortgagees, to the extent to which their income is derived from their rights as mortgagees, from claiming the special benefit of the Act, and, therefore, we are forced to the conclusion that the Legislature also intended to exclude assignees of Government assessment in that capacity from claiming the benefit of the Act.

In the case before us, therefore, the receipts of agricultural income attributable to the position of the applicant as *Inamdar* must be excluded from consideration; and in this view the conclusion arrived at by the Subordinate Judge that the applicant is not an agriculturist is correct.

We dismiss the appeal with costs.

Appeal dismissed.

(s. c. 13 Bom. L. R. 245.)

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 553 OF 1910.

February 7, 1911.

Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Batchelor.

BAI GANGA—APPELLANT

versus

RAJARAM ATMARAM—RESPONDENT.

Civil Procedure Code (Act V of 1908), O. XXXIV, r. 14—Transfer of Property Act (IV of 1882), s. 99—Rule of procedure—Mortgage-decree—Execution—Sale of property mortgaged—Sale-proceeds insufficient—Balance—Second mortgage between same parties—Redemption decree—Mortgagee applying for sale of second property in respect of the balance of the first mortgage—Sale.

In the year 1897 a decree was obtained upon a mortgage under which the mortgaged property was sold but the sale proceeds proved insufficient to satisfy the judgment-debt. The mortgagee was also the holder of another mortgage executed by the same mortgagors upon other property. One of the mortgagors after the decree had been passed died, and his mother who was the surviving mortgagor obtained a decree for redemption of the second mortgage and an order for payment of the mortgage-debt by instalments, the mortgagee being entitled to a charge on the property until his claim was satisfied.

In August 1908, the mortgagee applied for execution against the second property in respect of the unpaid balance under the decree of 1897.

The Subordinate Judge held that an attachment was permissible even though section 99 of the Transfer of Property Act applied. The District Judge, however, ordered attachment in execution.

On appeal to the High Court:

Held, that the Code of Civil Procedure (Act V of 1908), in so far as it repealed section 99 of the Transfer of Property Act and substituted in its place Order XXXIV, rule 14, merely effected a change of procedure in the manner in which mortgaged property has to be realized in execution of money decrees and, therefore, the statutory rule in force for the purpose of the execution of the unsatisfied portion of the decree of 1897, was the rule contained in Order XXXIV of the present Procedure Code.

Second appeal from the decision of the District Judge of Broach, in Appeal No. 52 of 1909, reversing the decree passed by the Subordinate Judge of Ankleshwar, in *Darkhast* No. 359 of 1908.

Mr. *B. F. Dastur*, for the Appellant.

Mr. *G. N. Thakor*, for the Respondent.

JUDGMENT.—In the year 1897 a decree was obtained upon a mortgage under which the mortgaged property was sold and the sale-proceeds proved insufficient to satisfy the judgment-debt, the balance of Rs. 581 remaining payable according to the terms of the decree by the mortgagors. The mortgagee was also the holder of another mortgage executed by the same mortgagors upon other property. One of the mortgagors after the decree had been passed died, and his mother, who was the surviving mortgagor, instituted a redemption suit to redeem the other mortgage which had not been the subject of the decree and which for the sake of convenience we will speak of as the mortgage of property B. She obtained a decree for redemption and an order for payment of the mortgage-debt by instalments, the mortgagee being entitled to a charge on the property B until his claim was satisfied.

In August 1908 before twelve years had elapsed from the passing of the decree of 1897, the mortgagee applied for execution against property B in respect of the unpaid balance of Rs. 581 payable under the decree.

The execution was resisted and the application came on for argument before the Subordinate Judge on the 3rd of February 1909. He held that an attachment was permissible even though section 99 of the Transfer of Property Act applied.

From his decision there was an appeal to

the District Judge, Mr. Tayabji, who on the 25th of November held that the application for execution was in contravention of the provisions of section 99 of the Transfer of Property Act, and accordingly the *darkhast* was dismissed. Then in April 1910, for reasons which are not apparent to us, he revoked his decision given five months previously on a point of law and came to the conclusion that, although section 99 of the Transfer of Property Act still applied to the case notwithstanding the provisions of the Code of Civil Procedure, Order XXXIX, rule 14, the attachment was nevertheless permissible. He, therefore, reversed his decree dismissing the *darkhast* and directed the property against which execution was sought by the decree-holder to be attached.

Both sides have appealed to this Court, the respondent by way of cross-objection.

The appellant says the learned Judge was wrong in permitting the attachment. The respondent says that the learned Judge should have gone further and permitted a sale.

We are of opinion that the Civil Procedure Code now in force, in so far as it repealed section 99 of the Transfer of Property Act and substituted in its place Order XXXIV, rule 14, merely effected a change of procedure in the manner in which mortgaged property has to be realised in execution of money-decrees, and, therefore, the statutory rule in force for the purpose of the execution of the unsatisfied portion of the decree of 1897, is the rule contained in Order XXXIV of the present Procedure Code. For this reason we think that the respondent is entitled to an order on the *darkhast* that the property attached be sold, and we amend the decree of the District Judge by directing that the property be sold.

The appellant must pay the costs throughout.

Decree amended.

(s. c. 13 Bom. L. R. 251.)

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 697 OF 1909.

February 14, 1911.

Present:—Sir. N. G. Chandavarkar, KT., Judge, and Mr. Justice Heaton.

BAI MACHHBAI—APPELLANT

versus

BAI HIRBAI—RESPONDENT.

Muhammadan Law—Adoption—Inheritance—Converts from Hinduism to Muhammadanism—Burden of proof—Suit for declaration that adoption is invalid.

The Muhammadan Law does not recognise adoption. In the case of converts from Hinduism to Muhammadanism, the presumption is that, as a necessary consequence of conversion, the law of adoption recognised by Hindu Law and usage has been abandoned by them. Those who allege that the usage and law in question has been retained must prove it.

Adoption is not necessarily inheritance or succession although it leads to inheritance or succession.

Second appeal from the decision of the District Judge of Ahmedabad, in Appeal No. 120 of 1907, confirming the decree passed by the Subordinate Judge of Dhandhuka, in Civil Suit No. 256 of 1905.

FACTS.—A Molesalam Girasia died leaving him surviving two widows. One of the widows adopted a boy as son to her deceased husband. Thereupon the other widow filed a suit for a declaration that the adoption was invalid. The suit was valued for Court-fee purposes at Rs. 130, and was instituted in the Court of the second class Subordinate Judge. It was objected on behalf of the defendant that inasmuch as the adoption affected property worth more than Rs. 5,000, the Court had no jurisdiction to hear the case. The objection was overruled by the Subordinate Judge, South Mints, who decided the case in favour of the plaintiff. On appeal the District Judge upheld the decision of the first Court. The defendant appealed to the High Court.

Mr. *G. K. Parekh*, for the Appellant.

Mr. *G. S. Rao*, for the Respondent.

JUDGMENT.—We agree with the District Judge in the view which he has taken both of the question of jurisdiction and of adoption. The materials both in the Court of first instance and in the appeal Court are not such as to warrant our interference with the conclusion arrived at by the District Judge on the question of jurisdiction. The case on that question resembles *Sangappa* v.

Shivbasava (1) and *Bai Rewa* v. *Keshavram Dulavram* (2).

On the question of adoption the burden of proof lay in the first instance upon the appellant. His case is that the Girasias, when they became Mahomedans, carried with them the law of inheritance and succession and that, as part of that law, they also retained the Hindu Law and custom of adoption. But adoption is not necessarily inheritance or succession although it leads to inheritance or succession: The Muhammadan Law does not recognise adoption. The presumption is that, as a necessary consequence of conversion to Muhammadanism, the law of adoption recognised by Hindu Law and usage had been abandoned by the *Girasias*. Therefore, those who allege that the usage and law in question had been retained must prove it. The decree must be confirmed with costs.

Decree confirmed.

(1) (1889) P. J. 98.
(2) (1895) P. J. 228.

(s. c. 13 Bom. L. R. 256.)

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 139 OF 1910.

February 20, 1910.

Present:—Sir N. G. Chandavarkar, KT., Judge and Mr. Justice Heaton.

VYANKAPPACHARYA SHRINIVASACHARYA—APPELLANT

versus

YAMNASANI RADHASANI—RESPONDENT.

Vendor and purchaser—Duty of purchaser—Vendor not in possession—Vendee failing to make inquiries—Bound by title of the person in possession.

It is the duty of a vendee, not merely to rely upon the paper title disclosed by the sale-deed in favour of the vendor, but also to make inquiries of the person in actual possession of the property sold as to the title of that person. If the vendee fails to make any inquiries of the person in possession he would be bound by such title as the said person possesses.

Second appeal from the decision of the District Judge of Bijapur, in Appeal No. 41 of 1909, confirming the decree passed by the Subordinate Judge of Bagalkot, in Suit No. 187 of 1908.

Mr. *N. V. Gokhale*, for the Appellant.

Mr. *V. R. Sirur*, for the Respondent.

JUDGMENT.—This was a suit to recover the property in dispute from the defendant on the allegation that it originally belonged to one Solbanna, who sold it on the 4th of July 1903 to Guracharya by Exhibit No. 11; that Guracharya having died in 1905 it descended to his widow Laxmibai; that she sold it, on the 2nd of October 1907, to the plaintiff by a sale-deed (Exhibit No. 12).

The defendant who was in actual possession pleaded that she was the owner of the property, and that Guracharya's purchase (Exhibit No. 11) was *benami* for her, because she having been in his keeping, he had purchased the property for her, in his name, with her own money.

In the Court of first instance the issues raised were,—Whether the defendant had purchased the house in suit from Solbanna with her own money and got from him the sale-deed (Exhibit No. 11) in Guracharya's name *benami* for her? That issue was found in the affirmative The second issue was,—Whether the plaintiff had notice of that fact? And the Court found that the plaintiff had no notice. The third issue was,—Whether the plaintiff was the owner of the house in suit? The Court found that the plaintiff was not the owner, and that, therefore, the plaintiff was not entitled to the relief which he claimed either by way of possession or mesne profits.

The plaintiff appealed. The lower Appellate Court agreed with the Court of first instance on all the questions of fact. And, with reference to the plaintiff's notice of Guracharya's *benami* purchase, that Court observed that "the plaintiff must be held to have had constructive notice of whatever rights actually vested in the defendant because the defendant was the person in possession, although as a matter of fact there was no direct evidence of knowledge."

It is contended before us that this view of the learned District Judge is erroneous in law. It is true that the plaintiff had no notice of the defendant's ownership; and that the plaintiff was misled by the fact that the sale-deed (Exhibit No. 11) was in Guracharya's name, and that on his death, it was in the custody of his widow Laxmibai. So far the plaintiff had reason to believe that the property belonged to Guracharya, and he could have successfully urged estoppel as against the defendant but for another principle of law. It is found by the Court below that the property was in the actual possession of the defendant at the date of the plaintiff's purchase. It

was, therefore, the plaintiff's duty, not merely to rely upon the paper title disclosed by the sale-deed, Exhibit 11, but also to make inquiries of the defendant in actual possession as to her title. Therefore, so far as the defendant was concerned, the plaintiff having failed to make any inquiries of her was bound by such title as she possessed. This is the law expounded in *Kondiba* v. *Nana* (1), and it applies to the facts of this case. The plaintiff fails because he omitted to make the inquiries which he was bound to make to perfect his own title and by his own negligence exposed himself to the risk of purchasing property which in reality belonged not to his vendor but to the defendant.

The decree must, therefore, be confirmed with costs.

Decree confirmed.

(1) 27 B. 408; 5 Bom. L. R. 269.

(s. c. 13 Bom. L. R. 259.)

BOMBAY HIGH COURT.

FIRST CIVIL APPEAL No. 150 OF 1910.

February 9, 1911.

Present:—Sir N. G. Chandavarkar, KT., Judge and Mr. Justice Heaton.

THE COLLECTOR OF AHMEDABAD—APPELLANT

versus

LAVJI MULJI—RESPONDENT.

Land Acquisition Act (I of 1894)—Compensation amount deposited in Court—Taken out by claimant—Reduction of amount in appeal—Refund of the excess amount—Interest—Inherent power of Court.

Where a party has wrongly taken from the Court moneys deposited in Court by his opponent, that Court has inherent power to enforce a refund of the amount with interest.

Mookoond Lal Pal v. *Mahomed Sami Meah*, 14 C. 484, at p. 486 and *Govind Vaman* v. *Sakharam Ramchandra*, 3 B. 42 at p. 43, referred to.

First appeal from the decision of the District Judge of Ahmedabad, in *Darkhast* No. 12 of 1910.

Mr. *G. S. Rao*, Government Pleader, for the Appellant.

Mr. *N. K. Mehta*, for the Respondent.

JUDGMENT.—The question for determination in this case is, whether interest ought to be allowed to Government on the moneys which, having been deposited by them in the District Court, were withdrawn by the claimant under the award in his favour made by that Court under the Land Acquision Act but reversed in appeal by this High Court. The learned District Judge has held that Government are not entitled to interest on the ground that the award of interest is in the discretion of the Court, and that having regard to the decision of this Court which, in reversing the award of the District Court, directed each party in the acquisition proceedings to bear his own costs, it must be presumed that this Court did not intend the sum wrongly withdrawn by the claimant to carry interest with it. Undoubtedly, the award of interest is, generally speaking, a matter of the Court's discretion except where by law it is made obligatory. And the question is whether, in the circumstances of the present case, it is reasonable to award interest. It is a rule of law that where a party has wrongly taken from the Court moneys deposited in Court by his opponent, that Court has inherent power to enforce a refund of the amount with interest: see *Mookoond Lal Pal* v. *Mahamed Sami Meah* (1) and *Govind Vaman* v. *Sakharam Ramchandra* (2). In the present case the amount which was deposited with the Court by Government was taken away by the respondent because that amount had been settled by that Court to be the amount of compensation to which the respondent was entitled under the Land Acquisition Act. The High Court in appeal reduced the amount to which the respondent was entitled. Under these circumstances, the respondent must be held to have had the benefit of the money belonging to Government in excess of that to which the High Court held him to be entitled. That benefit is represented not only by the excess amount wrongly taken by the respondent from the District Court but also by the amount of interest which it carried with it.

It was urged before us that this being the case of an award under the Land Acquisition Act and not a decree, the right of restitution claimed by Government cannot rest on the section of the Code of Civil Procedure which allows a refund of moneys received by a judgment-creditor under a decree subsequently reversed or

(1) 14 C. 484 at p. 486.
(2) 3 B. 42 at p. 43.

amended. But, assuming that the Code does not apply, the decisions above cited show that the right rests on the inherent power of the Court to enforce the refund.

The order of the District Judge disallowing interest is set aside and Rs. 57-5-4 is awarded to Government as interest on the amount of Rs. 538-0-3.

The respondent must pay the costs both of this appeal and of the *darkhast* in the Court below.

Order set aside.

(s. c. 64 P. L. R 1911.)

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 935 OF 1907.

February 16, 1911.

Present:—Sir Arthur Reid, KT., Chief Judge, and Mr. Justice Rattigan.

Musammat BUA DITTI—PLAINTIFF—APPELLANT

versus

WARIAM SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Laches—Suit filed with great delay—Custom—Hindu Law—Succession—Daughter—Self-acquired property.

A suit by the daughter of a deceased proprietor based on right of succession for possession of immoveable property which the defendants, collaterals of the deceased, have held for 11½ years, cannot be defeated merely on the ground of great delay in bringing it.

Collaterals are not entitled, under the Hindu Law or custom, to succeed to self-acquired property in the presence of a daughter.

Second appeal from the decree of the Divisional Judge, Amritsar, dated the 15th day of July 1907, reversing that of the Sub-Judge, 1st class, Amritsar, dated the 22nd April 1907, decreeing plaintiff's claim.

Pandit *Sheo Narain*, for the Appellant.

Bhagat *Gobind Das*, for the Respondent.

JUDGMENT.—The property in suit in this case must, in view of the admissions of the defendants, be taken to be the self-acquired property of the late Jiwan Singh. It is also an admitted fact that if plaintiff can establish her plea that she is a daughter of the said Jiwan Singh, her title to the property must prevail, both under Hindu Law and under the ordinary rules observed by agricultural tribes in this Province. The sole question then before us is, whether plaintiff has succeeded in proving that she is the daughter of Jiwan Singh. Upon this point the Courts below have differed. The Subordinate Judge was of opinion that the plaintiff's relationship was established, but the Divisional Judge felt some difficulty in accepting that finding, and held that the matter could not be said to have been proved with the degree of certainty the case "requires."

After hearing arguments, we are of opinion that the finding of the Subordinate Judge was right. It seems to us that the question was practically determined in 1895 when the present defendants instituted a suit for possession of this property against certain mortgagees who held the property under a mortgage effected by *Musammat* Raj Devi, the widow of Jiwan Singh. In that case the question arose, whether the mortgage was effected for legal necessity, and one of the items of the alleged consideration related to expenses said to have been incurred by the widow in connection with the marriage expenses of her daughter Bua Ditti. Present plaintiff's name is Bua Ditti and she claims to be the daughter referred to in that case. Now, it is obvious that if Bua Ditti, (who is admittedly the same person as the Bua Ditti of the previous suit), was not the daughter of Jiwan Singh, the present defendants would have contested that item on the ground that the widow was not justified in expending money belonging to Jiwan Singh's estate upon the marriage expenses of a girl who was only his step-daughter. But no such plea was prepared and the objection that was taken to the item was that Jiwan Singh had in his own life-time effected the marriage of his daughter. After very elaborate inquiry, it was found that this was the case and the present defendants succeeded in proving their case against the mortgagees. It is urged that the plea which they raised in regard to the item in question was as effectual against the mortgagees as the plea that the so-called "daughter" was really no daughter at all might have been. But we can hardly believe that the collateral relations of Jiwan Singh would have contested the item on the ground upon which they did contest it, had they at that time felt that they were in a position to show that the "Bua Ditti" was merely Jiwan Singh's step-daughter. At all events it may fairly be inferred from

their plea that they then had no reason to question the fact that "Bua Ditti" was the daughter of the late owner of the property. Their plea practically admitted this fact and the only question then was, whether "Bua Ditti" as Jiwan's daughter, had been married in the life-time of her father or after his death. Had it been at that time a matter of common knowledge that Bua Ditti (who is throughout the proceedings in that suit referred to as Jiwan Singh's daughter) was merely the step-daughter of the deceased, we cannot believe that the objection would not at once have been taken that *Musammat* Raj Devi had no "necessity" to spend money from Jiwan Singh's estate upon the marriage of her deceased husband's step-daughter.

The oral evidence in this case is conflicting and is of very little value, and the only point that can be urged against the plaintiff is her delay in suing. Unfortunately, she did not appear in the witness-box to explain this delay, but there may well be many causes for it. Defendants cannot possibly contend that her inaction in any wise estops her from preferring the present claim, for they have certainly not been prejudiced by the fact that since 11½ years they have been enjoying the income of property to which plaintiff is the legal heir. Any sum that they may have spent in their previous litigation with the mortgagees must have been long since recovered by them from such income.

In our opinion it is proved that plaintiff is the daughter and heir of Jiwan Singh and we, therefore, accept this appeal and reversing the decree of the Divisional Judge, we restore that of the Subordinate Judge. Respondents must pay costs throughout.

Appeal accepted.

(s. c. 65 P. L. R. 1911.)

PUNJAB CHIEF COURT.

CIVIL REVISION NO. 31 OF 1911.

February 1, 1911.

Present:—Mr. Justice Johnstone.

Lala GHURKU MAL AND OTHERS—PETITIONERS

versus

Musammat DURGA DEVI—RESPONDENT.

Revision—Civil cases—Power of Chief Court—(Act XIX of 1841)—Proceedings under s. 3*—Declaration—Solemn affirmation by agent.*

Ordinarily, the Chief Court ought not to interfere on the revision side in cases under Act XIX of 1841, but where plainly an erroneous order has been passed, which is likely to seriously prejudice a party and to cause serious embarrassment and difficulty in the future, intervention is right and proper.

A statement on solemn affirmation by the agent of a *pardanashin* lady is a sufficient 'declaration' within the meaning of section 3 of Act XIX of 1841.

Where it was shown that the defendant had in a very high-handed manner taken forcible possession of a furniture shop and there was every likelihood of his proceeding to greater lengths unless sharply checked:

Held, that the District Court was right in taking action under the Act.

Musammat Jagoji v. *Manmohan Nath*, 7 P. R. 1904; 37 P. L. R. 1904; *Rajji* v. *Lal Chand*, 138 P. R. 1906; 116 P. L. R. 1908, referred to.

Petition, under section 70 (*a*) and (*b*) of Act XVIII of 1884, as amended by Act XXV of 1899, for revision of the order of the District Judge, Amritsar District, dated the 17th December 1910, accepting the application for probate.

Mr. *Petman*, for the Petitioners.

Mr. *Beechey*, for the Respondent.

JUDGMENT.—In this case Mr. Beechey has raised a preliminary objection that no revision lies, not so much that it would be illegal for this Court to interfere on the revision side, as that it should not so interfere, because, the case being a summary one under Act XIX of 1841, the remedy by regular civil suit is open to the petitioners.

He admits that there is on his side no direct authority, but he puts forward *Joti Mal* v. *Coates* (1), in which it was ruled that this Court would not revise a decision under section 283, Civil Procedure Code, (1882) and also *Hansa* v. *Ram Singh* (2) and *Hakim* v. *Ralya* (3). There is no doubt that the general tenor of recent authority is that, ordinarily, the exceptional power given to this Court on the revision side will not be used

(1) 15 P. R. 1901; 80 P. L. R. 1901.
(2) 36 P. R. 1902; 22 P. L. R. 1902 (F. B.).
(3) 125 P. R. 1907; 80 P. W. R. 1907.

when another convenient remedy exists; but as regards this very Act we have a ruling, *albeit* an old one, in which this Court plainly asserted its right to revise a decision of a lower Court, *viz.*, *Gorakh Nath* v. *Bishember Nath* (4). The correct doctrine appears to me after perusal of the rulings already mentioned and also those noted below* to be that this Court should not *ordinarily* interfere on the revision side in cases under this Act, but that, where an erroneous order has plainly been passed, likely seriously to prejudice a party and likely to cause serious embarrassment and difficulty in the future, intervention is right and proper. Taking, for the sake of argument, the assertions of petitioners as correct, I am of opinion that this is such a case, I, therefore, overrule the objection.

Taking the grounds for revision in turn, I find Mr. Petman means by the first the absence of the "solemn declaration" by the complainant required by section 3 as part of the indispensable conditions precedent to the taking of action by the Original Court. The complainant is *Musammat* Durga Devi and there is no "solemn declaration" by which I understand a statement on solemn affirmation or oath, by her, but only an application in writing. But there is such a declaration by Sardar Bahadur Dial Singh, she being a *parda-nashin* lady and he her agent. In my opinion this was sufficient, and I overrule this ground.

The next ground contains the contention that, though the application itself did not extend to the property in possession of the petitioners before Relu Mal's death, the lower Court's order includes such property. In connection with this Mr. Petman refers to the preamble of the Act which shows that the Act gives jurisdiction only as regards property of which the deceased person died *possessed*; and he complains that the Court's final order includes all the property claimed by applicant respondent except four shops (Nos. 337—340) and a *baithak*, though the curator's lists show that much more than this was really not in possession of Relu Mal at time of death. (The 5 parcels of property excluded were excluded because Relu Mal's own suit for them under section 9, Specific Relief Act, a suit unfinished at date of his death, shows that they were certainly not in his possession then).

In my opinion, this objection is not well-founded. To the curator petitioners tried to make out that they were in possession of 57 houses and shops. Of these, most, he says, were in ruins and in actual possession of no body, and only 28 capable of such possession. Though the curator put what petitioners claimed in a separate list, he did not find that they were in their possession; and, as a matter of fact, the Court has held that they were not so. Petitioners produced some 10 or 12 leases in their favour as regards some of these, four being of the four shops already stated as excluded in the final order. The Court made no mistake; it did not instruct curator to take possession of any houses not in possession of Relu Mal at time of his death. These remarks dispose also of ground No. 3.

As regards ground No. 4 I cannot find any obvious injustice done to petitioners in regard to the calling of evidence. Mr. Beechey refers me to the Court's order of 24th August 1910, and this, with other orders, satifies me on the point.

Next, Mr. Petman contends, and this, perhaps, should have been discussed under ground No. 1, that there was no real danger from his client's action and so the Court should have refused to interfere under the Act. But I find that the Court has not at all transgressed the maxims laid down in *Musammat Jagoji* v. *Manmohan Nath* (5), *Rajji* v. *Lal Chand* (6), for petitioner No. 1 in a very high-handed manner took forcible possession of a furniture shop and there was every likelihood of his proceeding to greater lengths unless sharply checked—see evidence of the *nazir*.

In connection with this Mr. Beechey attempts to show that under the Act the Court can deal with all the property of a deceased person; that the citation, when issued, operates to remove in law the possession of persons holding any and all of that property, and that, therefore, it is not necessary to decide

(4) 66 P. R. 1882.

*Satoke v. Gopal Sahu, 34 C. 929; 12 C. W. N. 65; *Indra Chand* v. *Ghaneshyem*, 9 C. L. J. 210; 4 Ind. Cas. 52; *Papamma* v. *Collector of Godavari*, 12 M. 341.

(5) 7 P. R. 1904; 37 P. L. R. 1904

(6) 133 P. R. 1906; 116 P. L. R. 1908.

what was and what was not held by Relu Mal when he died. I find great difficulty in assenting to this proposition, the result of which would be, *inter alia*, to give an applicant under the Act rights to achieve by summary process results totally denied to the deceased himself, had he survived. I need not, however, give a decision on the point, for I am with Mr. Beechey apart from this contention.

Proceeding to ground No. 5I note that the finding is that Relu Mal and Ghurku Mal (petitioner No. 1) were not members of a joint Hindu family, but at most partners in one drapery shop. This finding was arrived at in a reasonable way and I will not discuss it.

Certain documents put in by petitioners below were denounced as forgeries, and Mr. Petman says this view was unreasonable and against the evidence; but the only point taken is that they were produced in the criminal case before the Magistrate Dina Nath and not there denounced by Relu Mal. This is manifestly an insufficient reason for upsetting the finding of the Court below as to the nature of these documents. There is some force in the argument, no doubt; but I do not think I should, on a mere question of fact, revise that finding on such a ground.

Lastly, Mr. Petman points out that the Will was never properly proved, as only a copy was sent with the interrogatories to the witnesses. Mr. Beechey says he cannot answer this because the contention nowhere appears in the revision petition. I exclude the contention.

For these reasons, I dismiss the petition with costs.

Petition dismissed.

(s. c. 67 P. L. R. 1911.)

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL NO. 1335 OF 1910.

December 15, 1910.

Present:—Mr. Justice Shah Din.

JIWAN MAL AND OTHERS—PLAINTIFFS—APPELLANTS

versus

JAMNA DAS—DEFENDANT—RESPONDENT.

Hindu Law—Adoption, kritrima—*Succession—Right of adopted son to succeed collaterally—Custom—Appointment of heir.*

Under Hindu Law it is only when an adoption in the *dattaka* form takes place that the adopted son has the right of collateral succession. In the case of a customary or *kritrima* adoption an adopted son succeeds ordinarily to the estate of his adoptive father only, as the relationship between the two is purely a personal one.

Baijnath v. *Shamboo Nath*, 113 P. L. R. 1908; 53 P. W. R. 1908, referred to.

Second appeal from the order of the Divisional Judge, Sialkot Division, dated the 21st December 1908, reversing that of the Munsif, 2nd Class, Gujranwala, dated the 12th March 1908, decreeing plaintiff's claim.

Bhagat *Go ind Das*, for the Appellant.

Pandit *Ram Bhaj Datta*, for the Respondent.

JUDGMENT.—The facts are very fully stated in the judgments of the Courts below and need not be recapitulated here. The sole question for decision before me is, whether the respondent Jamna Das, as adopted son of his grandfather, Ram Chand, is entitled to succeed collaterally in the latter's family. After hearing arguments on both sides, I think that this question must be answered in the negative. The learned Divisional Judge has held that the adoption of Jamna Das by Ram Chand did not take place in the *dattaka* form, and that one of the elements essential to an adoption in the *kritrima* form was also wanting. This shows that, according to the Divisional Judge, the adoption in question was not one made with the due observance of the formalities prescribed by Hindu Law. In this conclusion I entirely agree, as it appears to me that though the parties are not agricultural Hindus and are admittedly governed by Hindu Law and not by custom, the adoption of Jamna Das took the form rather of an appointment of heir than of a formal adoption sanctioned by Hindu Law involving the transplantation of the adopted son from his natural family into that of his adoptive father. In Civil Appeal No. 1282 of 1882 this Court held that the adoption of Jamna Das took place with some formality and was valid "according to tribal custom," in other words, that Jamna Das' adoption was a Punjab customary adoption and did not conform to the requirement of either the *dattaka* or the *kritrima* form as laid down by Hindu Law. It is not disputed that if the adoption did not take place according to the *dattaka* form, Jamna Das would not succeed collaterally in his adoptive father's family, and it would be for Jamna Das to

prove that he could so succeed. Whether the adoption in question is treated as a Punjab customary adoption or as a *kritrima* adoption, in both cases there is no change in the adopted son's family and no relationship with the adoptive father's collateral relation is established, [see the decision of this Court in *Baij Nath* v. *Shamboo Nath* (1)]. The Divisional Judge is not right in holding that under the Hindu Law an adopted son is ordinarily entitled to succeed collaterally for it is only in the case of an adoption taking place in the *dattaka* form that the adopted son has the right of collateral succession, an adopted son who is adopted in the *kritrima* form ordinarily succeeding only to the estate of his adoptive father as the relationship between the two is a purely personal one.

I hold, therefore, that in this case the *onus* lay upon the respondent Jamna Das of proving that he was entitled to succeed collaterally to the property left by *Musammat* Narain Devi.

The next question for decision is, whether he has succeeded in discharging that *onus*. He has produced only two witnesses in support of his claim, and admittedly none of them gives any instance in support of the alleged right of collateral succession. The fact that the respondent has succeeded to a part of the estate left by *Musammat* Karam Devi in this family, is not of very great value as an instance of collateral succession in support of the alleged custom. The particulars of that succession are not established, and it is admitted that the respondent did not receive his alleged share of *Musammat* Karm Devi's property situate in Gujranwala and Lahore. The fact that the plaintiffs-appellants allowed him to succeed to the Sialkot property does not create an estoppel against them so far as regards the respondent's right of collateral succession and it may be that there were special reasons why no objection was raised to his obtaining possession of part of *Musammat* Karam Devi's property in Sialkot.

For the above reasons, I hold that the respondent Jamna Das has failed to prove that he is entitled to succeed to any part of the property left by *Musammat* Narain Devi, and accepting this appeal I reverse the decree of the lower Appellate Court and restore that of the first Court. The appellants will have their costs throughout.

Appeal accepted.

(1) 113 P. L. R. 1908; 53 P. W. R. 1908.

(s. c. 70 P. L. R. 1911.)

PUNJAB CHIEF COURT.

CIVIL REVISION No. 1573 OF 1909.

January 5, 1911.

Present:—Mr. Justice Johnstone.

Musammat ZAIB-UL-NISSA—PLAINTIFF—APPELLANT

versus

Musammat GHULAM FATIMA—DEFENDANT—RESPONDENT.

Limitation Act (IX of 1908), s. 2, Sch. I, Art. 164—Ex parte *decree—Application to set aside—Applicability of Act.*

Article 164 of the First Schedule of the Limitation Act, IX of 1908, applies to an application to set aside an *ex parte* decree made after that Act came into force, even if the decree was passed before the Act came into force. Section 3 of the Act clearly lays down that the provisions of the Act apply to all suits, appeals and applications filed after the coming into force of the Act.

Petition, under section 70 (*a*) of Act XVIII of 1884 as amended by Act XXV of 1899, for revision of the order of the Munsif, 1st Class, Lahore, dated the 30th June 1909, setting aside the *ex parte* decree.

Mr. *Shah Nawaz*, for the Petitioner.

Mr. *Vishnu Singh*, for the Respondent.

JUDGMENT.—There can be no doubt that, if the present law of limitation, Article 164, Schedule I, Act IX of 1908, is applied, the application of 16th April 1909 to set aside the *ex parte* decree of 4th December 1908 is barred by time. But it is contended for respondent that inasmuch as the *suit* was instituted and decided in 1908, *i. e.*, before the new limitation law came into force, the old law applies, under which the application would be in force. I can find no adequate authority for this contention. It seems to me that section 3, Act IX of 1908, is quite clear. The "application" here was "made" after this new Act came into force and this is sufficient.

I allow the revision and set aside the order setting aside the *ex parte* decree. That decree is hereby restored, with costs throughout.

Petition accepted.

RAJBANS BHARTHI *v.* KARYA BHARTHI.

(s. c. 8 A. L. J. 286.)

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 143 OF 1901.

May 26, 1903.

Present:—Sir John Stanley, KT., Chief Justice, and Mr. Justice Burkitt.

RAJBANS BHARTHI AND OTHERS—DEFENDANTS—APPELLANTS

versus

KARYA BHARTHI—PLAINTIFF—RESPONDENT.

Sanyasis—*Succession to* Mahantship—*Custom—Burden of proof—Election as* Mahant—*Jurisdiction of Court to interfere—Nomination of successor to successor for a* mahant.

Amongst *Sanyasis* it is usual for a *mahant* to appoint his successor, and the nomination must be made during the life-time of the *mahant*. When there has been no such nomination, an election must be held and the election confirmed by the neighbouring *mahants* and members of the sect.

Where a person claims a *mahantship* he must, in order to succeed, prove the custom of the *Math* whereby he is entitled to recover the office and the property appertaining thereto. A claimant who fails to prove his installation or confirmation is not entitled to a decree for the office and property against a person alleging himself to have been a *chela* who, whether with or without title, is in possession.

Genda Puri v. *Chatarpuri*, 9 A. 1; 13 I.A. 100; *Atma Nund* v. *Atma Ram*, (1864) S. D. A. N. W. P. Vol. I, 309; *Nirunjun Barthee* v. *Padaruth Barthee* and *Khooshai Barthee*, 1 S. D. A. N. W. P. 512, referred to.

Where the neighbouring *mahants* elect a person as *mahant* of a certain *Math* according to custom, a Court cannot set aside such election.

A *mahant* has no right to nominate a successor to his successor.

First appeal from a decree of the Subordinate Judge, Gorakhpur.

Messrs. *T. Conlan*, *J. N. Chaudri* and *Sundar Lal*, for the Appellant.

Messrs. *Moti Lal Nehru* and *Madan Mohan Malaviya*, for the Respondent.

JUDGMENT.—The suit out of which this appeal has arisen was brought by the plaintiff, who claims to be the *Mahant* of a *Math* situate in the village of Kanchanpur in the District of Gorakhpur for recovery of certain villages and shares in villages and other property belonging to the *math*. The first defendant, Rajbans Bharthi, is a rival claimant to the *mahantship*, and the other defendants are one a lessee, and the other lessee and mortgagee of portions of the property of the *math* who derive their title under Rajbans Bharthi. The *math* belongs to the *Sanyasi Nihang* (celebates) and the properties which the plaintiff seeks to recover admittedly belongs to the *math*. Th earliest *mahant* of whom mention has been made is Puttan Bharthi. He was succeeded by his *chela*, Hardayal Bharthi, who in turn was succeeded by Padarath Bharthi. Padarath Bharthi was murdered by his *chela*, one Ajurdhi Bharthi who is now undergoing a sentence of transportation for life for his crime. On the death of Padarath Baharthi Khushal Bharthi succeeded to the *mahantship*. He had two disciples, namely, the defendant, Rajbans Bharthi, and one Bachchu Bharthi. Owing to alleged misconduct on the part of Rajbans Bharthi, he was not installed as *mahant* on the death of Khushal Bharthi, but the junior disciple, Bachchu Bharthi, was selected in his place. The plaintiff's case is, that he was *chela* of Bachachu Bharthi, and after his death was nominated and duly installed as *mahant*. The defendant, on the other hand, denies that the plaintiff was a *chela* of Bachchu Bharthi or that he was ever duly elected or installed as *mahant*, and says that he himself was 14 days after the death of Bachchu Bharthi duly elected and installed upon the *gaddi* as *mahant*.

On the issues framed in the Court below our attention has been particularly drawn in his appeal to two only. These issues are—(1) whether the plaintiff was a *chela* of Bachchu; and (2) whether the plaintiff was made *mahant* in accordance with the established custom and practice, or whether the defendant was installed as *mahant* in accordance with such custom and has been in possession of the property of the *math* as *mahant* since the death of Bachchu Bharthi? On both these issues the learned Subordinate Judge found in favour of the plaintiff. There are some facts which preceded the death of Bachchu Bharthi to which it may be well here to refer. Khushal Bharthi executed a Will on the 9th of August 1882, appointing his successor to the *mahantship*. In that Will is a recital that the testator had become very old and blind and unable to walk, and that he could not look after the business of the *ilaka* and household affairs. It recites that his disciple, the defendant Rajbans Bharthi, was an able and qualified man and that he (the testator) had no other disciple than him. He then by the Will directed that Rajbans Bharthi should after his death get mutation of names affected in his favour

in respect of all his moveable and immoveable property and should be the owner of the *gaddi* and become the *mahant*. After the execution of this document, Rajbans Bharthi appears to have become displeased, or to have had some difference with Khushal Bharthi; it may be that he was guilty of some misconduct unbecoming a disciple—for we find that a year after the execution of this Will Khushal Bharthi executed another Will which is dated the 8th of August 1883. It appears that the testator was totally blind at the date of the execution of this Will and, therefore, largely dependant on others. Considering the language of this Will, we are disposed to think that it was not altogether the work of Khushal Bharthi himself. It recites that during the testator's illness Rajbans Bharthi had had a document drawn up, "the contents of which were bad" and having told the testator that it was a Will, had had it registered on the testator's admission. Then it recites that Rajbans Bharthi was "a very bad character"; that he does not serve devotees and perform service and cannot be allowed to remain in the place. After these recitals and a recital that Bachchu Bharthi is a good man and always engaged in devotion the testator directed that after his death Bachchu Bharthi should be the absolute owner of the whole of his property and perform the worship and service of the *gaddi*. Then followed a declaration that the testator should, during his life, be the proprietor of anything, and after his death Bachchu Bharthi and his disciple, if any, should be the absolute owners of the whole of his property. The testator thereby also cancelled the Will of the 9th of August 1882. A month after the execution of this second Will Khushal Bharthi executed a deed of gift in favour of Rajbans Bharthi, in which a different reason is assigned for his change of mind in respect of the succession to the *math* from that which appears in the second Will. In this document the Will of the 9th of August 1882, is recited, the reason assigned for its execution being not any misconduct on the apart of Rajbans Bharthi but a disagreement between Khushal Bharthi and him. The recital in the document runs as follows:—"Owing to some disagreement I cancelled and quashed the said Will by the Will executed in favour of Goshain Bachchu Bharthi, my disciple and heir". In this deed of gift, after a recital that some arrangement should be made for the maintenance of Rajbans Bharthi, Khushal Bharthi gives to him 32 *ighas* and 12 *dhurs* of land as his absolute property. On the death of Khushal Bharthi, Bachchu Bharthi succeeded to the *mahantship* under the Will of the 8th of August 1883, and continued to be *mahant* up to the time of his death on the 14th of April 1894. According to the plaintiff's case, Bachchu Bharthi adopted him as a disciple when he was of the age of 8 or 9 years, and upon Bachchu Bharthi's death he was elected and installed as *mahant* at the thirteenth day ceremony when he was of the age of 12 or 13 years. The case of Rajbans Bharthi is, that the plaintiff was neither a disciple of Bachchu Bharthi nor was he ever installed in accordance with the custom prevailing in regard to the election of *mahant* of the *sanyasi* sect. On the contrary, he alleges that he himself was duly elected and installed as *mahant* at a meeting convened and held on the 14th day after the death of Bachchu Bharthi.

It appears that no sooner had Bachchu Bharthi died than disputes arose between the plaintiff and the defendant, Rajbans Bharthi. There was a disturbance over the disposal of the corpse of the *mahant*, each party claiming the right to dispose of it. To prevent disturbances the local Police Officer summarily made over the body to the plaintiff to be disposed of in the usual way by throwing it into the river. It may be well here to state what occurred as regards mutation proceedings on the death of Bachchu Bharthi. On the 2nd of June 1894, the plaintiff, under the guardianship of one Ghurupuri, who was his natural father presented an application in the Revenue Court for removal of the name of Bachchu Barthi and substitution of his own name as owner of the village Kanchanpur and other property beloging to the *math* of Kanchanpur. In that application the death of Bachchu Bharthi is stated, and it is alleged in it that Bachchu left the applicant as his disciple and heir, and that since Bachchu Bharthi's death the applicant had been in possession of the property and had performed the funeral ceremonies of the deceased. It is to be observed that in this application no mention whatever is

made of the alleged installation of the applicant as *mahant* of the *gaddi*. This is a remarkable omission if the plaintiff's case be true, that he was installed as *mahant* on the 13th day (April 27th) after the death of Bachchu. The defendant, Rajbans Bharthi, filed an objection to this application on the 23rd of June 1894, in which after several recitals the following statements appear: "Upon the death of his fellow disciple, Bachchu Bharthi, this objector performed funeral ceremonies and gave a *bhandara*, and all the *mahants* of the *Ilaka* of District Gorakhpur having assembled together, gave the sheet of a *mahant* to this objector by reason of his being a competent disciple and a fellow disciple of the deceased, and by reason of his being in possession of the property and a lawful heir. This objector has been in possession of all the *milaks* of the deceased and so forth. The objector then submits that he is entitled to have his name recorded in the *Khewat Pattidari* statement as owner in the place of Bachchu Barthi, deceased." We find from this document that the defendant, Rajbans Bharthi, set up his election and installation as *mahant* within a very short period after the death of Bachchu Bharthi. The proceedings in the Revenue Court (where the possession of the appellant was found to be clear and undisputed) terminated in favour of the appellant under a compromise which had been made between Rajbans Bharthi and the plaintiff, through his father and guardian, Ghurupuri. This was apparently arrived at with the concurrence of some at least of the *mahants* of the neighbourhood. The compromise refers to a deed of the 2nd of May 1894, which it describes as a deed of inheritance and declares to be binding on both parties. This document is incorrectly described, as an agreement, it is in reality a sort of solemn declaration of good intentions on the part of Rajbans Bharthi. In it he states that "with the advice of *mahant punches*, tenants and servant of Bachchu Bharthi, he had been invested with the sheet of a *mahant* to-day," that he had made the plaintiff Karia Bharthi his disciple, and that after his own death, Karia Bharthi should be the owner of the *gaddi*. He gives assurances of his future good behaviour and a promise to act in certain matters on the advice of two *mahants*, named respectively Sheosaran Bharthi, *mahant* of the *gaddi* of Kotwa and Sarabdawn Bharthi, *mahant* of Bhardia, a resident of Badhiamal and a *muafidar*. The document also contains the statement that Rajbans Bharthi had given the 32 *bighas* and 12 *dhurs* of land which he acquired under the deed of gift from Khushal Bharthi to Jageshar and Rameshar, his sons and Sheodin Barthi who was a *chela* of Rajbans Bharthi for maintenance. Of this so-called agreement the plaintiff says in paragraph 8 of the plaint that the defendant, Rajbans Bharthi, "dishonestly executed an agreement on the 2nd of May 1894, according to his own wish and desire, and thereby declared the plaintiff his disciple. On the strength of the said agreement, the defendant first party, took an objection on the 23rd June 1894, to the entry of the name of the plaintiff for which an application was made by Ghurupuri, on the 2nd June 1894. Subsequently the defendant, first party, dishonestly and in collusion with Ghurupuri, aforesaid, filed a petition of compromise on the 27th June 1894, and caused his name to be entered in the revenue papers. All these proceedings were taken fraudulently during the time the plaintiff was a minor." The plaintiff here charges not merely the defendant but his own father, Ghurupuri also, with fraud and collusion. We fail to find any evidence on the record to support these charges. It is difficult to understand what motive Ghurupuri could have had for supporting the claims of the defendant Rajbans to the detriment of his own son's interests. In his evidence the plaintiff admits that there was no disagreement between him and his father. He says that he first heard of the compromise when mutation of names was effected, but admits that he made no inquiry as to why his father had executed the compromise. "There was never," he says, "any disagreement between Ghurupuri and me, but when my father made the compromise he was my ill-wisher. My father has done no other act which might show that he is an ill-wisher." The arrangement so entered into, whether it was binding or not upon the plaintiff was acted upon; the name of the defendant was recorded as owner and he has continued to collect the rents and manage the properties of the *math* up to the present time. The plaintiff endeavours to explain the fact that Rajbans had the control and management of property by the assertion that 4 or 5 days

after the *tirahwin* ceremony he appointed Rajbans as his agent. He says, "I appointed Rajbans 4 or 5 days after the *tirahwin* ceremony. My servants and not I sent for Rajbans. Gamandi Lal and Chandiman asked me to send for Rajbans saying that he would do work. Then he was sent for and kept. Gamandi Mal and others said that Rajbans was a clever man and that he would make a good manager. I inquired nothing about Rajbans. But my servants said that he was a bad character." This seems to us a somewhat strange story, and particulary so when it is borne in mind that the plaintiff and Rajbans had but a few days before had a dispute over the disposal of the body of Bachchu Baharthi and were not on good terms. Is it not an after-thought invented to account for the undeniable fact of appellant's possession of the *math* property for so many years? We shall refer to this matter later on. Now, it is clear from the evidence that on the death of Bachchu Barthi two candidates were put forward for the *mahantship*—one the plaintiff, a lad of 12 or 13 years, who is a nephew and is alleged to have been a disciple of Bachchu Baharthi, and who was supported by a small coterie of *mahants*, the other the defendant, Rajbans Bharthi who had been a former disciple of Khushal Bharthi and who from the evidence had the support of a considerable number of influential *mahants*. We think that it is just possible that some of the plaintiff's supporters may have taken time by the forelock and gone through the form of installing the plaintiff on the *gaddi* on the occasion of the thirteenth day ceremony and forestalled the supporters of Rajbans who only assembled and installed him on the succeeding day. The initiation of a child of the tender age of seven or eight years as a disciple and the installation as *mahant* of the same child when he was of the age of but 12 or 13 years and could not possibly understand the duties and responsibilities of an ascetic and a *mahant* probably struck some of the wiser heads among the electoral body as being absurd, if not farcical. Seeing this they, in all probability, we think, arranged the compromise the terms of which appear in the document of the 2nd of May 1864. This, we believe to be the real genesis of the so-called agreement of the 2nd of May. The neighbouring *mahants*, conscious that the plaintiff-respondent Karya had some claim to the *gaddi*, and at the same time unwilling to put a mere boy into such a responsible position, and finding ready to their hands in the person of the appellant one who also had some claims as *chela* of a former *mahant*, but before doing so made terms with him both as to his successor and as to the manner in wich he should conduct himself in the office. On his accepting those terms they installed him. And we may remark those terms were in every way most proper, and such as would naturally be imposed by *mahants* anxious for the well-being of the Kanchanpur shrine. As to the date (May 2nd) that clearly was the date on which the "agreement" was engrossed on stamp paper. It had evidently been drawn up on April 28th, as appears from the recital that appellant had "to-day" been invested with the sheet of a *mahant*. Under the circumstances, the agreement which the defendant sets up was not unnatural, namely, that Rajbans should succeed to the *mahantship*, make the plaintiff his *chela* and nominate the plaintiff as his successor. We may here observe that it is most unfortunate that the learned Subordinate Judge did not exercise his powers and enforce the attendance at the trial as witnesses of Ghurupuri, the father of the plaintiff, and Sheosaran Bharthi and Sarabdawan Bharthi, who are alleged to have been mainly instrumental in carrying out the compromise. The evidence of the two *mahants* was of especial importance as they were the persons by whose advice the appellant, according to the "agreement" was to be guided and whom he therein empowers to punish him for disobedience. It appears that at the instance of the defendant, warrants had been issued for these parties but they failed to attend. An application was made to the Court for the issue of a proclamation under section 168 of the Code of Civil Procedure, to secure their attendance, on the ground that their evidence was material and they were intentionally avoiding giving evidence. This application was resisted by the Pleader for the plaintiff on the ground that the postponement of the trial for the purpose of obtaining the attendance of these witnesses "was sought simply with a view to harass and put the plaintiff to expense." The learned Subordinate Judge yielded to the argument of the plaintiff's

Pleader and passed the following order on the application, "as with reference to the statements of the Pleaders for the parties no reasonable ground appears for issuing a proclamation, it is ordered that this petition be disallowed." He does not find that the application was made for the purpose of harassing the plaintiff and of putting him to expense. In fact, he gives no intelligible reason for his refusal. Undoubtedly, these three persons were material and necessary witnesses and ought to have been examined. Ghurupuri, the father of the plaintiff, as his guardian, entered into the compromise. He could have informed the Court of all the circumstances connected with it. He is, we are now told, dead, so that his evidence cannot be procured. The oppositions offered by the plaintiff to the application for the issue of proclamation leads us to suppose that the plaintiff did not believe that the evidence of these witnesses would be favourable to him. We have considered whether, even now, we should not direct the examination of the other persons above-named; but having regard to all the circumstances, we are disposed to think that it would not now be desirable to adjourn the hearing of this appeal for the purpose of obtaining the evidence of these witnesses assuming that they are now to be found.

Before we proceed to consider the evidence which has been adduced on behalf of the respective parties, let us first see what is alleged to be the rule for the election of *mahants* of the *math* in question. In the second paragraph of the plaint the plaintiff states the rule thus:—

"The rule for nominating a *mahant* is that one who is nominated by the *mahant* for the time being from among his disciples becomes the *mahant* after him. If the *mahant* for the time being dies without nominating any one as his representative then after his death the *mahants* and *faqirs* of the sect and the *raises* of the neighbourhood and disciples of the deceased *mahant* appoint as his successor one of his disciples who may be qualified, and if there are no qualified disciples, then another person of the family who may be qualified."

The case for the plaintiff is that of the ten groups which make up the sect of the *Sanyasis*, the Bharthi group alone in this case was capable of electing a *mahant*, and that the principal *mahants* of that group did elect and install the plaintiff as *mahant*. It was also contended on behalf of the plaintiff that if there be a disciple of the deceased *mahant*, such disciple must ordinarily be elected *mahant*. It was not contended that such disciple must, under any circumstances, be so elected. As evidence of the rule, the plaintiff relies on the evidence of one Partab Bharthi who is the *mahant* of Rampurmatia, and is said to be acquainted with the *math* at Kanchanpur and its rules. In the course of his evidence he says, Karia Bharthi was installed as *mahant* on the thirteenth day after the death of Bachchu Bharthi. A *bhandara* (feast) was given on account of the *tirahwin* ceremony of Bachchu Bharthi. A *bhandara* can be given at any time after the *tirahwin* at pleasure. The *bhandara* on account of the *tirahwin* is given in pursuance of a religious custom. All the ten classes (that is the ten classes of *Sanyasis*) attend the other *bhandara*, but the *tirahwin* is attended only by one's own class."

The learned Pleader for the respondent relied upon several authorities, and amongst others the decision in *Atma Nund* v. *Atma Ram* (1), as supporting this view. In this case it was held that a right of inheritance to the estate of a deceased *Guru*, much less of a division of property left by him, whether hereditary or self-acquired, amongst his *chelas*, does not exist but the right of succession depends upon the nomination made by the deceased *Guru* which is generally confirmed by the *mahants* or principal persons of the sect in one neighbourhood at the time of their assembling for the performance of the funeral obsequies of the deceased. The learned Judges in that case so held relying upon a *bawasta* obtained from the Hindu Law officer of the Court, and upon several precedents of the Sadar Dewani Adalat they say in the course of their judgment:—

"The right of succession depends upon the nomination made by the deceased *Guru* which is generally by the *mahants* or principal persons of the sect in the neighbourhood at the time of their assembling together for the purpose of performing the funeral obsequies of the deceased, on which occasion they proceed to instal the *chela* nominated by the deceased with the usual ceremonies unless they saw reason for setting aside the nomination

(1) (1864) S. D. N. W. P. Vol. I, 309.

or no successor should have been appointed by the deceased, in either of which cases they make an election of their own, selecting from among the pupils of the deceased the one who may appear the best qualified to be his successor."

The same rule was laid down in reference to the very *math* which is the subject-matter of the present appeal in the subsequent case *Nirunjun Barthee* v. *Padaruth Barthee* and *Khooshal Barthee* (2). In their judgment in that case Batten and Spankie, JJ., say:—

"With the circumstances of this case and with the precedents before us, there can be no doubt that amongst *Sanyasis* it is usual to appoint *mahants* and that there must be nomination during the life-time of the *mahant* or when there has not been such nomination, there must be election and confirmation by the neighbouring *mahants* and members of the sect."

In the case of *Genda Puri* v. *Chatar Puri* (3), their Lordships of the Privy Council held that a claimant to a *mahantship* in order to succeed must prove the custom of the *math* entitling him to recover the office and the property appertaining to it, and that a claimant who failed to prove his installation or confirmation was not entitled to a decree for the office and property against a person alleging himself to have been a *chela* who whether with or without title, was in possession. "In determining" they say, "who is entitled to succeed as a *mahant* in such a case as the present: the only law to be observed is to be found in custom and practice which must be proved by testimony, and the claimant must show that he is entitled according to the custom to recover the office and the land and property belonging to it. The infirmity of the title of the defendant who is in possession will not help the plaintiff as the Subordinate Judge seems to have thought."

In a *khewat* of the village of Kanchanpur for the year 1293 *Fasli* (1885-1886) (No. 42 C. in the record) the custom as regards the appointment of *lambardar* is thus stated,—

"The disciple who will be installed to the *gaddi* by his *guru* dies without installing any one to the *gaddi* in his life-time, all the *atits* (ascetics) and *raises* of the surrounding places shall assemble at the time of the *bhandara* (feast) and shall install to the *gaddi* the disciple whom they consider fit. The disciple so appointed shall also be appointed a *lambardar*. The rest of the disciples so long as they live together and bear a good character, shall get maintenance but in case of separation they shall get nothing."

According to this the election is not confined to the *Mahants* of any particular group, but extends to all the *atits* and *raises* of the surrounding places. As appears by a judgment of the 3rd of December 1892, of the Subordinate Judge of Gorakhpur in a suit which was brought by *Nirunjun Barthee* v. *Padaruth Barthee* and *Khushal Barthee* (2) for the establishment of the right of the plaintiff to inherit the property of the *math* in question in the defence set up by the defendant Padarath the custom as to the appointment of *Mahants* was thus stated:—

"The custom is that the disciple or the disciple of a disciple who is declared by the *Mahant* himself in his life-time to be his successor who, after the death of his spiritual guide, is declared *mahant* by the *mahants*, becomes the *Mahant* and owner of the property."

We may here say that no clear and reliable evidence to establish the custom has been given. There is nothing to show the local area which is to furnish the persons entitled to take part in the election and installation. There is nothing to satisfy us as to the number of electors requisite to form a quorum, nor does it appear how the election and installation is to be carried out when the *mahants* who form the electoral body are divided in opinion in the choice of a candidate. In the present case whatever was the local area which provided the electorate, it is clear that the electors were not unanimous in their choice of a *mahant*.

[After discussing the evidence his Lordship proceeded:—] We are disposed to think upon the entire of the evidence that what we may term a sort of a hole-and-corner installation was hurriedly gone through, but we are far from being satisfied that the plaintiff was duly installed in accordance with the custom of the sect. It must be borne in mind that this suit, for what we may

(2) (1864) 1 S. D. A. N W. P. 512.
(3) 9 A. 1; 13 I. A. 100.

call the "temporalities" of this *math*, can succeed only if the respondent proves that he has been only installed according to custom. The suit does not ask for a declaration that he ought to have been installed. There is, moreover, no satisfactory evidence before us as to the usage prevailing in regard to the appointment of *mahants*. In his plaint the plaintiff, as we have pointed out, alleges that the *mahants* and *fiqirs* of the sect (*i.e.*, *Sanyasis*) the *raises* of the neighbourhood and disciples of the deceased *mahant* appoint a successor and, as a matter of fact, according to the plaintiff's evidence, and that of Prag Bharthi, Gya Gir, who does not belong to the Bharthi group, took part in his election. This is not consistent with the contention put forward by his learned Advocate that the *mahants* of the Bharthi group alone form the electoral body. Whether, however, the electorate is confined to *mahants* of the Barthi group or includes *mahants* of the entire sect, it appears to us from the evidence that a valid installation of the plaintiff has not been proved. Having regard to the fact that the plaintiff was at the time of the alleged installation a youth of the tender age of 12 or 13 years, it would be a surprise to find that any persons to whom belonged the duty of electing the head of a religious institution of the kind would support such an election. As was said by the learned Judges who adjudicated in the case of *Mahant Ramji Dass* v. *Lachhu Dass* (4), in which the election to a *mahantship* of a youth under 16 years of age was attempted to be supported.

"A boy *mahant*, a superior of a religious institution of ascetics who has not attained even his 16th year the age of majority, according to the Hindu Law, is a sight of an unusual occurrence."

The learned Subordinate Judge upon the main issue in the case devoted a large portion of his judgment to an endeavour, as we have said, to show that the defendant was of such immoral and bad character as to be, ill-suited and unfit for the position of *mahant*, and that no *mahant* having any voice in the election to the *mahantship* could possibly have supported his election. There seems to be no doubt upon the evidence that a number of years ago the defendant incurred the displeasure of Khushal Bharthi, this may have been due to the fact that he was unduly attentive to a woman who was not his wife. It is alleged by one of the witnesses that he kept a mistress. Assuming that he did a number of years ago thus offend against the rules of morality and was in the eyes of a virtuous sect such as the *Sanyasis*, an unworthy disciple, it may well be that he recognized this error, and in the years which intervened between the time of his laps and the death of Bachchu Bharthi become a reformed character and that his offence was condoned. The only evidence to which we have been referred in which the character of the defendant is impeached goes to show that he was a married man and also kept a mistress. Of course, as a married man, he would not be eligible for election to the *gaddi* of a *math* of celebates, unless he abandoned his wife and family. On giving up, however, his wife and family and ceasing to be a house-holder, there would upon the evidence be no obstacle to his election. If the *Mahants* of the neighbourhood considered him a fit and proper person for the office, it is not for this or any other Court of law to turn itself into a Court of morals and review the decision of the electoral body. That the defendant had been a disciple of Khushal Bharthi is admitted and that he was installed on the *gaddi* on the 14th day after the death of Bachchu Bharthi, the evidence leaves no doubt upon our minds. Whether or not that installation was valid is another question. A number of *mahants* were examined, all of whom say that they were present and took part in his installation. Of these, *Mahant* Harihar Daval Gir the *Mahant* of a *math* at Lachhmanpur, which is distant two *kos* from Kanchanpur, says in his evidence that the defendant, Rajbans Bharthi, was made a *mahant*, after consultation in regard to the contents of the agreement which was subsequently drawn up (that is, the so-called "agreement" of the 2nd of May 1894), and on this occasion he says the plaintiff was made a disciple of the defendant. He says that it was at the instance of the *mahants* who were present, that the defendant made the plaintiff a disciple in order that a former disciple of the defendant, Sheodin Bharthi, who had proved up worthy,

(4) 7 C. W. N. 45.

might not subsequently claim the property. The following other *Mahants* also depose to the installation, namely, *Mahant* Sidh Gopal, *Mahant* of Takia Dehrara; *Mahant* Raj Ballabh Gir, *Mahant* of Ratanpura, Chandrabhan Gir, *Mahant* of Narkattia, Molan Gir, *Mahant* of Barwa, Narsing Gir, *Mahant* of Gopalpur. These all say that they were present and took part in the installation of the defendant, and that on that occasion the plaintiff was made a *chela* by the defendant. In addition to these Ajmerepuri *Mahant* of Balwa gives corroborative evidence. According to his evidence, he pays Rs. 24,000 a year as Government revenue. The property, therefore, which belongs to his *math*, must be of considerable value. The evidence of these witnesses was supported by two Brahmans namely, Gajadhar Pande, the hereditary priest of the Kanchanpur *math* and Gokul Dube. Gajadhar Pande, who is a Pandit living in a village adjoining Kanchanpur, says that on the day of the *bhandara* ceremony of Bachchu Bharthi, the defendant, was appointed *Mahant*, that he (the witness) went there on that day and conducted the worship, he being the hereditary *purohit*, (priest) of the Kanchanpur *math*. We have not the slightest reason to doubt the truth of the evidence given by these witnesses. They could have no motive, so far as we can discover, and none has been suggested, for conspiring together to make a false case for the defendant. Whether they were entitled to elect and install the defendant, it is not necessary for us now to determine. The importance of their evidence lies in the fact that a large number of *mahants* of the *Sanyasi* sect in the neighbourhood of Kanchanpur did not take part in any installation of the plaintiff, but, on the contrary took part in the installation of the defendant who is and has been since the death of Bachchu Bharthi the recorded owner of the property and in receipt of the rents and profits of it. The learned Subordinate Judge has fallen into an error in the following passage of his judgment. He says, "As the *mahant* is the absolute owner of the property as long as he is in the office and as he has an absolute power to declare a successor in his life-time as is admitted in the pleadings, the plaintiff, if he be the *chela* of Bachchu Bharthi, is entitled to succeed him to the office of *mahants* under the terms of the Will mentioned above (*i. e.*, the Will of Khushal Bharthi, dated the 8th of August 1883)." This is not correct, as Khushal Bharthi had clearly no right to nominate a successor to Bachchu Bharthi. The mere fact that the plaintiff was the *chela* of Bachchu Bharthi if he was a *chela*, does not of itself entitle him to succeed in this suit. He must also prove that the *mahants* of the sect duly installed him as *mahant* according to custom.

Upon the whole of the evidence, we are disposed to think that the plaintiff was made a disciple of Bachchu Bharthi, but that in consequence of his youth and incapacity a number of the *mahants* who were qualified to elect and install a *mahant* for the *math* at Kanchanpur, considered him unfit for the office, that a few partisans supported his election and possibly carried out a hurried installation, that on the following day the defendant was installed as *mahant* by his supporters, he having in the meantime accepted the terms stated in the document of the 2nd of May 1894, to which we referred. That the defendant was appointed agent and manager by the plaintiff, as alleged by the plaintiff, we have no hesitation in characterising as anything short of a falsehood. The defendant undoubtedly had his name recorded in the record of rights by virtue of the compromise entered into between him and plaintiff's father and in virtue of it and also of his installation as *mahant*, took and held possession of the property of the *gaddi* in his own rights as *mahant* and received the rents for his own use. We do not say that the compromise was binding upon the plaintiff, he being then a minor, but the *onus* lay heavily upon him of proving by satisfactory evidence what the custom and practice is in regard to the election of a *mahant* and of showing that he was validly elected and installed. It may possibly be that the defendant's title is weak and infirm, but this will not avail the plaintiff if he fails to establish his own title. He has, in our opinion, wholly failed to do so, and the appeal must, therefore, be allowed. We set aside the decree of the learned Subordinate Judge and dismiss the plaintiff's suit with costs, both in this Court and in the Court below.

Appeal decreed.

RAMLAL BALARAM *v.* EMPEROR.

(s. c. 8 A. L. J. 302.)

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 752 OF 1910.

February 3, 1911.

Present: Mr. Justice Richards.

RAMLAL BALARAM—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Evidence Act (I of 1872), s. 63 - Secondary evidence—Whether newspaper is secondary evidence of a letter not found and not proved to have been written by accused.

Secondary evidence cannot be given of a document which has not been proved to have been written by the accused or even to have existed.

A copy of a newspaper publishing a defamatory letter cannot be used as secondary evidence to prove a letter which has not been found and has not even been proved to have been written by the accused.

Application for revision against an order of the Sessions Judge of Cawnpore.

Mr. *Purshottam Das Tandon*, for the Appellant.

Mr. *Arrindel*, for the Crown.

JUDGMENT.—The accused has been convicted under section 500, Indian Penal Code, and sentenced to two months' simple imprisonment and a fine of Rs. 200. The alleged defamation is contained in a letter which appeared in a paper called *Deshsewak* which was published in Nagpur in the Central Provinces. Both the Courts below held that the charge was proved against the accused. The latter now comes to this Court in revision and contends that the case was not proved and that there was no jurisdiction to hear the case in Cawnpore. Whether or not the accused is responsible for the letter in question, it seems to me that the Court might well hold that it was defamatory. The object of it appears to be to advertise the Union Indian Sugar Works and their products at the expense of the Cawnpore Sugar Works and their products by insinuating that the product of the Union Indian Sugar Works was pure particularly from a Hindu point of view while the product of the Cawnpore Sugar Works was impure. The real question, however, is not whether the letter was defamatory, but whether or not the charge was brought home to the accused. The letter purports to be a letter written by a person who had some recent dealings with the Union Indian Sugar Works and their agents and who had purchased sugar from them. It is proved that the accused had dealings of this nature at the very time. It is not an unnatural inference that the writer of the matter which appeared in the newspaper knew that the accused or some other person had been making purchases of sugar from the Union Indian Sugar Works about this period. It is also proved that the accused was interested in the Union Sugar Mill. It must be carefully borne in mind, however, that the present charge is not against *Deshsewak* newspaper or any one connected therewith. The charge is that Ramlal Balaram, accused, wrote the letter which appeared in the newspaper and was thereby guilty of an offence punishable under section 500, Indian Penal Code. There is no proof of any kind that a letter was written by any one, far less it is proved that the accused wrote it. Both the learned Magistrate who tried the case and the Sessions Judge who heard the case on appeal, seem to have thought that a copy of the newspaper containing the libel could be used as secondary evidence, because after search being made in the office and the premises of the newspaper no letter was found. In this they were clearly wrong. It is impossible to say that secondary evidence could be given of a document which was not even proved to have been written by the accused or even to have existed. In my opinion it is absolutely clear that whatever ground for suspicion there may have been that the accused wrote the letter, the proof of his having done so falls altogether short. I allow the application, set aside the conviction and sentence, acquit the accused and direct that he be set at liberty and also order that the fine, if paid be refunded.

Conviction set aside.

GHULAM MUSTAFA *v.* EMPEROR.

(s. c 68 P. L. R. 1911.)

PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 689 OF 1910.

January 30, 1911.

Present:—Mr. Justice Kensington and Mr Justice Rattigan.

GHULAM MUSTAFA CONVICT—APPELLANT

versus

EMPEROR—RESPONDENT.

Penal Code (Act XLV of 1860), *ss.* 395, 396 *and* 400 *—Dacoity—Habitual association for purposes of committing dacoity—Criminal Procedure Code (Act V of* 1898), *s.* 239 *– Joint trial –Same transaction - Sentence.*

Fourteen persons were tried at one trial and convicted of an offence under section 400, Indian Penal Code, for having formed a gang for the purpose of habitually committing dacoity. Between the 7th March 1908 and 15th December 909, four serious dacoities were committed at four different places and in two of these, dacoity was accompanied by murder. The accused, it was alleged by the prosecution and found proved, took part in one or more of these dacoities:

Held, that the joint trial of all the accused for the offence under section 40 , Indian Penal Code, though not illegal, was improper. It would have been better to try separately the accused persons for having committed offences under sections 396 and 397, Indian Penal Code, in respect of dacoities in which it was alleged they took part.

If it is established that a gang, however small in number, was formed for the purpose of habitually committing dacoity, all persons who thereafter joined that gang in one or more cases come within the purview of section 400 of the Indian Penal Code.

In cases under section 400 of the Indian Penal Code against a gang consisting of desperate men prepared to proceed to all lengths in carrying out their crimes, the heaviest possible sentences should be passed. In awarding sentences the Court ought to consider not so much whether particular offenders were concerned in only one or more of the dacoities committed by the gang, as whether it was clearly established that they did in fact join a recognised gang.

Appeal from the order of the Additional Sessions Judge, Jullundur Division, dated the 7th October 1910, convicting the appellant.

Khwaja *Kamal-ud-Din*, for the Appellant.

Lala *Lachmi Narain*, for the Government Advocate, for the Respondent.

JUDGMENT.—We have before us a series of eight appeals covering the whole fourteen persons convicted by the Sessions Court under section 400, Indian Penal Code, and variously sentenced to imprisonment and transportation. The Counsel engaged on behalf of different appellants have argued their cases separately but for the most part on the same lines, and it will be convenient to deal with the whole of the appellants by one order.

The learned Sessions Judge has been faced with a most formidable task owing to the manner in which the prosecution have elected to deal with a series of grave offences. We think that we are within the limits of fair criticism in pointing out that the course adopted has been excessively inconvenient, and in some respects hard upon the appellants. Briefly, it may be noted that four serious dacoities took place between the 7th March 1908 and 15th December 1909, two in the Hoshiarpur District, one in the Ludhiana District and one in the Patiala State. In two of these cases, the dacoity was accompanied by murder. In one, namely of Bassimada in Hoshiarpur, the plunder is said to be worth some Rs. 20,000 in value and in all the amount of booty obtained was very large. There was, for a long time, no effective clue to the crimes but in January 1910 certain statements were made by two brothers, named Pritam Singh and Harnam Singh of a village Siana in the Garhshankar *Tahsil* of the Hoshiarpur District, which ultimately led to these men being treated as approvers, and to a more or less complete discovery of all the offenders concerned. So far as we can gather, there was no immediate difficulty in then trying the four cases separately as against the particular persons implicated in each case, and if this course had been adopted, there can, we think, be little doubt that convictions would have been obtained under sections 395 and 396, Indian Penal Code, against nearly all the men prosecuted with the result that they would have received punishments of transportation for life, and in some cases sentences of death. For some reason, which we are unable to discover from the record, it was determined not to proceed in this way by separate trials, but to lump the whole of the cases in one prosecution under section 400, Indian Penal Code. This has involved a portentous trial extending over some six weeks, exclusive of three weeks required to prepare a judgment, and the compilation of an enormous record which it is exceedingly difficult to deal with in any reasonable space. Masses of evidence have been recorded about each of the separate dacoities. Speaking generally, there has

been much confusion in the marshalling of the evidence. We do not say that either the prosecution authorities or the Sessions Judge are to blame for this confusion. It was almost inevitable from the way in which the trial was conducted. But we must point out that some of the persons accused, who were believed to have been engaged in only one or more of the four crimes, were put to great difficulty in managing their defence. It was impossible for the Counsel engaged by them to attend continously throughout so lengthy a trial on the chances that questions affecting their immediate clients might arise from day to day, and it was difficult for the Sessions Judge to keep in touch with the voluminous evidence produced before him, and see that only so much was taken as was directly required for purposes of the trial.

When it came to compiling his judgment the Sessions Judge felt himself obliged to proceed on the basis of describing each of the separate cases fully, and determining the guilt of the offenders largely according to whether they participated in one or more of the separate offences. He was, moreover, obliged to leave out of account the very serious matter that in two cases murder was committed, or at any rate, if not actually obliged to do so, he has to some extent taken that course. We can see no advantage in this joint trial, and, on the other hand, we have ourselves experienced the same difficulties as the Sessions Judge evidently felt in dealing with such a confused mass of material.

In saying this we are not blaming the Sessions Judge in any way. On the contrary, he has taken the greatest possible trouble to elucidate the whole series of offences and generally to cope with the difficulties of the trial. He has recorded a very lengthy but very clear judgment, which enables us to deal with the facts somewhat briefly. We should, however, have much preferred to be dealing with the individual cases and had we been doing so, we should probably have come to the conclusion that heavier sentences were required in the case of some of the appellants.

The main argument before us, which goes to the root of the case, is that section 400 of the Indian Penal Code has been misapplied; that no inquiry has been held into the individual dacoities, and that there is no proof of habitual association on the part of the appellants. In the course of this argument, a number of rulings both of this Court and of other Courts have been referred to, but we do not think it necessary to discuss the rulings *seriatim*. The facts of each case have to be considered on their merits and we do not desire to attempt to lay down any general proposition, but we think that we are on firm ground in saying that if it can be established that a gang, however, small in number, was formed for the purpose of habitually committing dacoity, all persons who thereafter joined that gang in one or more cases come within the purview of section 400, Indian Penal Code. In the present case, there is ample evidence that certain persons, including the approvers and one Ishar Singh, absconder, deliberately formed the plan of committing dacoity on a very extensive scale. Among these persons was one Nagina Singh, appellant, whose confession, dated the 16th March 1910, pages 970 to 1011 of the record, is very instructive. It shows that the scheme was hatched while this man was working in Fiji and New Caledonia apparently in 1906 07. On return to the Punjab about the spring of 1907, the matter was carried further and from time to time there were consultations and more or less ineffective attempts to commit dacoity. During this period of several months, a number of conspirators became known to each other and communicated their views to others who would be likely to join them. We take it as proved that a gang was definitely formed in 1907 for the purpose of habitually comitting dacoity, and was looking out for suitable opportunities. The objects of the persons so associated were well-known to those with whom they entered into communication and steps had already been taken to procure arms. Any one who joined in the operations when once they were seriously started, must have known perfectly well what he was doing, and the fact of joining even on one occasion only is sufficient to establish the offence provided for by section 400.

As is usual in such cases, the case against individual offenders depends on:—

(1) the statements of approvers;

(2) other confessions, no doubt, made by

persons who hoped thereby to obtain promise of pardon, and

(3) evidence as to the recovery of stolen property either directly from the offenders or from those to whom they gave a clue.

We propose first to deal with Nos. (1) and (2) taken together.

As already noted, the first genuine clue to the crimes was obtained in January 1910 when the approvers came forward. News rapidly spread that these men were turning informers and many of the appellants then took the common course of making full confessions on their own account in the hope of saving themselves. We do not find that any sort of promise of pardon was held out to these men such as would vitiate their confessions and so far as we can test the confessions they have every appearance of being genuine. In particular the two appellants, Charan Singh and Bhan Singh, are brothers. Of these Charn Singh made a confession recorded on the 25th March 1910 by Mr. Shaw at Jullundur, pages 1036—1045 of the record; while the very next day his brother Bhan Singh similarly confessed to a Patiala Magistrate as at pages 1047 1069 of the record. These two confessions when compared suggest to us the absolute impossibility of anything approaching to a concocted story, though Charan Singh's is the more detailed version of the two and he alone supports Nagina Singh's story of the primary association of the brothers with him in Fiji or New Caledonia. Charan Singh was already in custody in a separate case in which he has been since convicted, and could have had no recent access to his brother. The two confessions were taken on consecutive days at places far apart. We cannot believe that any amount of tutoring beforehand would have enabled these two brothers to learn up their stories with all the implicity of detail involved in such a way as to avoid serious discrepancies. We take it that all the confessions, which we have read, are substantially correct and on essential points they agree with the statements of the two approvers. There is so much remarkable corroboration of the approvers in these confessions that we cannot doubt the general correctness. When it came to considering how far the various articles of stolen property which had been recovered from individual appellants could be accepted as having been properly identified, we sent for the whole of the numerous exhibits in the case. These arrived during the course of the hearing of the appeal, which was prolonged over several days, and we are astonished to see what a huge collection of silver and gold articles and other property was laid out for our inspection. All these exhibits had been very carefully numbered and marked and no difficulty was experienced in picking out the particular articles identified in each case. We then went through the evidence as regards each appellant testing it by reference to the exhibits in question. In nearly every case we found that the property recovered by or through the appellants was easily capable of identification and could, indeed, hardly be mistaken by its owners. To a very large extent this procedure cleared up such doubts as we might otherwise have had if we had depended upon nothing but the judgment of the Sessions Judge. We should spin out our own judgment to interminable length if we went through in detail, the numerous points which were observed and discussed in the course of the hearing, as regards this part of the case. We need only say that as regards nearly all of the appellants, property discovered through them is ample corroboration of the approvers' statements. There are, it is true, a few exceptions and these we will deal with later on.

By far the most serious of the offences committed was the dacoity at Bassimada on the night of the 19th January 1909. This was the case in which some Rs. 80,000 worth of property is said to have been carried off and we do not think that the amount was very much exaggerated. The owner of the property Haji Muhammad was mortally wounded by the dacoits in their eagerness to get him to point out where the property was concealed. He was a very wealthy man and an astrologer from Hyderabad, Deccan, who had very recently returned to his village. Four of the present appellants, besides the two approvers, have been found by Mr. Harris to have taken part in this dacoity. A good deal has been said to us to show that this is wrong, on the ground that Haji Muhammad's dying declaration of the

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20th January 1909 and a statement by his near relative, Maula Bakhsh (now P. W. No. 54), went to show that they implicated Qasim Ali, *lambardar*, and two men of a neighbouring village Sitaur, the suggestion then being that the offenders all belonged to the immediate neighbourhood. We have carefully considered this point and called for the record of the previous case in which Qasim Ali and eight others were sent up for trial on the 25th February 1909. This is a case in which Maula Bakhsh gave evidence before. The whole of the men then accused were discharged by Lala Achhru Ram on the 21st April 1909, and after hearing the evidence and the Magistrate's decision, we are satisfied that both Haji Muhammad and Maula Bakhsh made a mistake in good faith regarding the two or three offenders whom they thought they recognised. The clue given by them seems to have been clearly mistaken, and on the available evidence, the Magistrate's order of discharge was quite justified. We do not think that the mere fact of an erroneous clue having been followed in the first instance is an indication that the approvers have now told a made-up story. The original clue was disbelieved by the Magistrate, and rightly so. Under these circumstances, we attach no particular importance to the dying declaration of Haji Muhammad treating him as having been mistaken in his identification of certain men, and treating Maula Bakhsh as having merely repeated what he understood Haji Muhammad to say without definite knowledge of his own to go on. We cannot take this previous case as in any way clearing the present appellants, now that a complete chain of evidence has been obtained against them. On the other hand, the evidence then given by Maula Bakhsh as to the main features of the dacoity is in accordance with the story now told by the approvers.

The above is all that need be said about the more general aspects of the case. We now proceed to briefly deal with the appellants separately. It is convenient to give here the following summary showing in which of the dacoities Mr. Harris has found each of them to be engaged:—

Dacoity Committed.	Serial number of each appellant as given in the Sessions Court List.																	
	1	2	4	5	6	7	11	12	13	14	15	16	17	18	Pritam Singh approver.			
Mirzapur																		
Bassimuda																		
Panjgirain																		
Chaurian																		

1. Rahman (1) is clearly proved to have been engaged in the Bassimuda dacoity by means of the diamond (Exhibit 22) traced to him through witnesses Nos. 78—80 and 94. This diamond is a valuable stone easily identifiable. We have no doubt that he joined the gang at Bassimuda, and probably at Chaurian also, though, as he has made no confession and as no property was recovered from him in the Chaurian case, we speak somewhat less positively as to that.

2. Kehr Singh (2) was formerly a sepoy in the 25th Punjabis. A quantity of property has been recovered from him clearly indicating his complicity in three of the dacoities, and he also made a full confession on the 24th March 1910, pages 903—940 of the record.

3. Bulanda (4) confessed to the Chaurian

dacoity, pages 959—966, and a quantity of the stolen property, some of it identifiable, was recovered from him.

4. Nagina Singh (5) confessed on the 16th March 1910, pages 970—1011, and much of the property recovered from him admits of no doubt as to its identification.

5. Megha (7) confessed to the Mirzapur dacoity on the 26th March 1910, pages 1016—1029, and the gold necklace traced to him is easily identifiable.

6. Charan Singh (11), and (7) Bhan Singh (12). We ha e already referred to these two brothers. No property has been recovered from them, but we attach great weight to their confessions, as already mentioned, and we have no doubt that they both were concerned in the Mirzapur dacoity.

8. Gulab Singh (14) made no confession but the property recovered from him establishes his connection with the Bassimuda dacoity, and we have no doubt also that he joined at Chaurian, though the large lump of silver recovered from him in connection with that case is not capable of specific identification.

9. Labh Singh (15). The valuable property recovered from this man completely establishes his connection with the Panjgirain case.

10. Ragga (16) was also concerned in the Panjgirain case only. He made no confession but the property recovered from him includes a number of articles more or less easily identifiable.

11. Mit Singh (18) confessed to the Chaurian dacoity on the 11th April 1910, pages 1086—1121, and the jewellery recovered from him includes many articles as to which there could be no possible mistake. This man belongs to the 26th Punjabis and was on leave at the time.

The above eleven men have, in our opinion, failed to clear themselves on appeal. We deal with their cases somewhat briefly as Mr. Harris has stated the case against each so fully that we need not go into further detail. We have verified the evidence as regards each of them and found it on the whole quite convincing. There remain the cases of three other men to be now discussed.

12. Ghulam Mustafa (13) has made no confession and the only property recovered from him consists of some pearls as to the identification of which we are distinctly doubtful. Mr. Harris, nevertheless, found that he joined in three of the dacoities upon evidence as to personal identification which may be open to some question. We have considered the case of this man with great care and are satisfied that he joined the gang. In particular, we think that Mr. Harris has gone wrong in finding that he was not concerned in the Mirzapur case also. The very strong evidence of Girdhari, witness No. 9, appears to have been overlooked. Girdhari had every reason for being able to recognise Ghulam Mustafa, and we should ourselves have accepted his evidence as sufficient corroboration of the approvers on this point.

13. Nizam (17). This man also made no confession and the property recovered from him in the Panjgirain case is only a common *loi* not easily identifiable. He is believed to have been engaged at Chaurian also, but there again no property was recovered from him. We consider that his case stands on much the same footing as Ghulam Mustafa's and that he might very well have been held concerned in the Mirzapur case also on the strength of the evidence of Girdhari, witness No. 9. We are satisfied that he joined the gang.

14. Diwan Singh (6). This man has made no confession and is believed to have joined in the Mirzapur case only. The very small amount of property recovered from him is of a common pattern, not easily identifiable. He appears to us to have been convicted mainly on the ground that he pointed out a well where a sword was found, supposed to have been used by one of the dacoits. The man is a cousin of Nagina Singh, the most prominent of the offenders in that case, and our impression is that he has been dragged into the case more on that account than because there is any really trustworthy evidence against him to support the approvers. We do not say with a positive certainty that Mr. Harris is wrong in his conclusion, but we think that there is a larger element of doubt about him than about any of the other appellants, and that, on the whole, he should be given the benefit of this doubt. We direct that Diwan Singh's appeal be accepted and that he be acquitted and released.

As regards all the remaining thirteen appellants, we uphold the convictions. In the matter of sentences, we are not prepared to interfere in any way. In our opinion, the grounds upon which Mr. Harris has given

more severe sentences in some cases and less severe in others were not altogether sound. The question which we should have considered was not so much whether particular offenders were concerned in only one or more of these dacoities, as whether it was clearly established that they did in fact join a recognised gang. If they did so, we can see no reason why the maximum sentence of transportation for life permissible by section 400, Indian Penal Code, should not have been enforced against all persons convicted. The gang consisted of desperate men prepared to proceed to all lengths in carrying out their crimes, and the heaviest possible sentences were thoroughly deserved. There is no sort of reason for reducing any of the sentences which have been actually imposed, and our only reason for not taking measures with a view to enhancement is that, as already observed, we consider the course taken by the prosecution to be not altogether justifiable and to have been distinctly inconvenient in its results. We do not think that further action should be taken against men who have been unnecessarily subjected to the strain and expense of so heavy a trial.

We, therefore, confine our action to simply dismissing the appeals of thirteen of the appellants, while we acquit one man only, namely, Diwan Singh, son of Suba.

(s. c. 69 P. L. R. 1911.)

PUNJAB CHIEF COURT.

CIVIL REVISION No. 746 OF 1909.

December 15, 1910.

Present:—Mr. Justice Shah Din.

JAHANGIR—DEFENDANT—PETITIONER

versus

GANDA SHAH, PLAINTIFF AND ANOTHER—DEFENDANT—RESPONDENTS.

Hindu Law—Joint family consisting of father and son—Payment of debt made to son - Discharge of debt.

Where in the case of a Hindu joint family consisting of a father and son, debts due to the family are paid sometimes to the father and sometimes to the son, the payment of a debt to the son would absolve the debtor from liability in respect of such debt.

Application, under section 70 (*a*) of Act XVIII of 1884, as amended by Act XV of 1899, for revision of the order of the District Judge, Campbellpore, dated the 11th November 1908, reversing that of the Munsif, 2nd Class, Pindigheb, dated the 20th August 1908, dismissing the claim.

Messrs. *Pestonji Dadabhai* and *Devi Dial*, for the Petitioner.

JUDGMENT.—No one appears for the respondents who have been duly served and I proceed to hear the case *ex parte*. I have referred to the record and heard Mr. Pestonji Dadabhai in support of the grounds for revision, and I think that this petition must be accepted. The plaint, dated the 30th March 1904, in the suit entitled *Ganda Shah* v. *Bhagwan Das*, the statement of the plaintiff Ganda Shah, dated the 26th February 1908, in the case of *Ram Das*, appellant v. *Ganda Shah*, respondent, and the plaintiff's statement in the present suit, dated the 18th August 1908, prove beyond doubt that the plaintiff and his son, Ram Chand, were members of a joint Hindu family, both at the time when the bond sued upon was executed by the petitioner and when the plaintiff brought the present suit against him. The statement of Ram Chand, dated the 18th August 1908, supports the same conclusion. It also appears from the record that debts due to the family have been paid sometimes to the father, Ganda Shah, and sometimes to Ram Chand, the son. That being so, the petitioner was fully justified in paying the debt in dispute to Ram Chand, and Ram Chand admits that he did receive the payment. As Ram Chand had been examined in the Court of first instance, the District Judge was hardly justified in taking down his statement a second time in his own Court, and I am not disposed to place much reliance upon that part of his statement in the District Judge's Court in which Ram Chand tries to make out that he has misappropriated part of the monies realised from the debtors of the family.

I hold, therefore, that, in the circumstances of the case, the payment made by the petitioner to Ram Chand was a good payment in discharge of the debt due to the plaintiff's joint family, and accepting this revision, I dismiss the suit with costs throught.

Petition accepted.

TAJA KHAN *v.* MUHAMMAD KHAN.

(s c. 71 P. L. R. 1911; 66 P. W. R. 1911.)

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 183 OF 1909.

February 3, 1911.

Present:—Mr. Justice Johnstone.

TAJA KHAN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

MUHAMMAD KHAN AND OTHERS—DEFENDANTS—RESPONDENTS.

Contribution—Res judicata—*Question left open by Court—Limitation—Starting point of limitation—Limitation Act (XV of* 1877, *Sch. II, Art.* 49.

In a suit for contribution, the plaintiffs alleged that in execution of a decree they were made to pay to a creditor whom they and the defendants owed money jointly not only what was due by them but also the share which the defendants were liable to contribute. In the suit in which the decree was obtained against all the parties to the present suit, the creditor had stated that the present defendants had made certain payments to him on their own account. But the present plaintiffs denied this and urged that the creditor was in collusion with the present defendants and the Court, without deciding the point, passed a decree for the balance that was admitted to be due to him. The defendants pleaded in the present suit that the former judgment operated as *res judicata*, and the present suit was barred by limitation:

Held, that the pleas had no force for,—

(1) the Court in the former suit had left the question of liability of the parties *inter se* open, and

(2 limitation began to run against the present plaintiffs from the date on which, having paid off the whole of their own share, they began to pay the share of the defendants.

Second appeal from the order of the Divisional Judge, Rawalpindi Division, dated the 12th November 1908, reversing that of the District Judge, Attock District, dated the 28th May 1908, decreeing plaintiffs' claim.

Mr. *Pestonji Dadabhai*, for the Appellants

R. S. Lala, *Sukh Dial*, for the Respondents.

JUDGMENT.—This is a suit by two of four joint debtors who assert that they have paid off the whole of the debt, against the co-debtors for contribution.

The plaintiffs' story is that they and defendants Nos. 1 and 2 were engaged in a certain litigation and that they borrowed money therefor from one Ram Dial, defendant No. 3, since deceased; that Ram Dial thereafter sued plaintiffs and defendants Nos. 1 and 2 for about Rs. 1 222 and obtained a decree with costs: that this decree for a total sum of Rs. 1,406-6-0 was executed against the plaintiffs alone and the whole sum was recovered from them, and that defendants Nos. 1 and 2 are liable to pay half the amount of that decree, *i. e.*, Rs. 703-3-0, to which plaintiffs add Rs. 364-15-0 interest, the total claim being Rs. 1,068-2-0. Defendants plead that the first three items in the plaint, aggregating Rs. 695 2-0, are barred by time; that they are only liable for 2/5ths of the money, and that they have paid that amount to Ram Dial. The first Court held that no part of the claim was barred by limitation, that the defendants have not shown that they have paid off any part of the debt due to Ram Dial, that no part of the plaintiffs' claim is subject to the rule of *res judicata*, and that no interest should be allowed to the plaintiff. Further, the Court held that the defendants are liable only for 2 5ths and not for one-half. It, therefore, gave plaintiff a decree for Rs. 562-8-0 only.

The defendants appealed to the Divisional Court, which took an entirely different view and dismissed the plaintiffs' suit with costs. Plaintiffs have now filed a further appeal in this Court.

In my opinion, the real facts of the case are these. Ram Dial in suing the parties stated that Rs. 2,128 was due to him; that defendants Nos. 1 and 2 had already paid him Rs. 854-6-0; that he had received some further payments by way of interest, and that Rs. 1,222 was the balance due. To this the present plaintiffs plead that defendants Nos. 1 and 2 had never paid anything to Ram Dial; that only Rs. 1,222 was due at all, and that Ram Dial and defendants Nos. 1 and 2 were in collusion in respect of the allegation that defendants Nos. 1 and 2 had paid Rs. 854-6-0. In its final order, the Court in the previous case clearly stated, at the end of its judgment, that "defendants can settle their amounts due from each other among themselves privately or by suit." I think that the first Court is correct in holding that the previous Court left open the question of the apportionment of the amount decreed between the parties, and that, therefore, no question at issue in the present case is *res judicata* as against the plaintiffs, *i. e.*, that Court did not hold as against plaintiffs that defendants Nos. 1 and 2 had really paid Rs. 854-6-0. I also find that, up to the 22nd May 1906, plaintiffs had only paid off in all Rs. 7-0 to Ram Dial. I also find that plaintiffs are not entitled to more than 2/5ths by way of contribution from defendants Nos. 1 and 2. Plaintiff admit this before me.

In these circumstances, it seems to me that the first Court's decision is correct and the lower Appellate Court's is wrong.

As regards limitation, the law is clear. The Article applicable to the case is Article 99 of the Indian Limitation Act. The share for which the plaintiffs are liable to Ram Dial was about Rs. 844, and the time begins to run against plaintiffs from the date on which, having paid off the whole of their own share, they began to pay the share of defendants Nos. 1 and 2. Now, we have seen that up to the 22nd May 1906, which was only about 17 months before the suit was brought, the plaintiffs had only paid Rs. 700, *i e.*, they were still paying their own share and the time had not then begun to run against them. It is, therefore, clear that no part of the suit is barred by time.

As regards the claim of defendants Nos. 1 and 2 that they have paid Rs. 854-6-0, I can find no proof whatever, nor has their Counsel pointed out any evidence on the file on the subject. The burden of proof was certainly on them, and they have not discharged it. The first Court clearly held they had not proved the point. The learned Divisional Judge seems rather to have thought that it was not necessary for them to prove it, and that, inasmuch as Ram Dial claimed Rs. 2,128 and admitted payment of Rs. 854-6-0 by defendants Nos. 1 and 2, this admission of Ram Dial's counts as a payment by defendants Nos. 1 and 2, but the learned Judge seems to have forgotten that the present plaintiffs have all along protested that the alleged payment was a fiction, and was the result of collusion between Ram Dial and those defendants, and it seems clearly to me that, though Ram Dial's admission might bind himself, it certainly cannot bind the plaintiffs in the present suit.

For these reasons, I agree with the first Court, and I accept the appeal and restore the decree of the first Court, at the same time directing that defendants Nos. 1 and 2 should pay the whole costs of plaintiffs in the lower Appellate Court and in this Court.

Appeal accepted.

(s. c. 72 P. L. R. 1911; 14 P. W. R. 1911 Cr.)

PUNJAB CHIEF COURT.

CRIMINAL REVISION No. 1696 OF 1910.

February 18, 1911.

Present:—Mr. Justice Kensington.

RATTAN SINGH—CONVICT—PETITIONER

versus

EMPEROR—ACCUSED—RESPONDENT.

Penal Code (Act XLV of 1860), s. 193—Perjury—Criminal Procedure Code Act V of 898), s. 195—Sanction to prosecute—Incorrect statement in answer to irrelevant question—Intention—Mistake.

A witness was prosecuted and convicted for having made a false statement in which he disclaimed knowledge of a report previously made by a *zaildar* in another matter two months previously. He had then made a statement to the *zaildar* in an inquiry under section 202 of the Criminal Procedure Code, ending in dismissal of the complaint under section 203. When called to account later on, he at once admitted that he had made a mistake:

Held, that the conviction must be set aside. In such cases sanction to prosecute should not be given. The answer given by the witness may have been literally true. He could not be punished for not giving a more detailed answer even if he remembered the circumstances of the *zaildar's* inquiry, which he might well have forgotten for the moment when confused by questions having no immediate bearing on the point as to which he was being examined. If the Court thought that there was a suppression of truth on the witness' part, it ought to have cleared the matter up at once by giving him an opportunity of explaining more fully and pointing out that he seemed to be making a mistake. There was clearly no intention of giving false evidence. Intention was the essence of the offence and could not be presumed in this case.

Petition for revision, under section 439 of the Criminal Procedure Code, of the order of the Sessions Judge, Ludhiana Division, dated the 6th December 1910, confirming that of the Magistrate 1st class, Ludhiana, dated the 24th November 1910, convicting the petitioner.

Lala *Lajpat Rai*, for the Petitioner.

JUDGMENT.—The petitioner, a *lambardar*, aged 28, was on the 24th November 1910 convicted under section 193, Indian Penal Code, and sentenced to 3 months' imprisonment, in respect of an alleged false statement made to a *Tahsildar*, Magistrate on the 5th April, in a case in which the person then accused was discharged.

The present prosecution was sanctioned by the District Magistrate on the 19th August 1910 on a report made by the *Tahsildar*, who did not recommend prosecution, saying that the matter would be better dealt with by executive orders.

GOKUL CHAND *v.* RAJJI.

The learned Sessions Judge, on appeal by the petitioner, has held that the District Magistrate's sanction was *ultra vires*, but [presumably with reference to section 537 (*b*), Criminal Procedure Code] he has dismissed the appeal. The finding that the sanction was *ultra vires* seems to me clearly wrong. The District Magistrate has, no doubt, inadvertently held that the case was before him under section 476 of the Code, and was so far in error, but the anction given was covered by the terms of section 195 (1) (*b*) and was open to no objection on the ground of substantial irregularity beyond that it did not sufficiently comply with the provisions of section 195 (4), a matter which is cured by section 537.

There is consequently no preliminary legal difficulty affecting the conviction, but on the merits there is a good case for interference on revision. The lower Courts have taken too narrow a view of the matter.

The only false statement alleged against the petitioner is, that he disclaimed knowledge of a report previously made by a *zaildar* in another matter on the 6th February. The petitioner had then made a statement to the *zaildar* on an inquiry under section 202, Criminal Procedure Code, ending in dismissal of a complaint under section 203. It is open to question whether petitioner really knew what report was sent by the *zaildar*, and his answer to the irrelevant question put to him on the 5th April may well have been literally true. He cannot be punished for not giving a more detailed answer even if he remembered the circumstances of the *zaildar's* inquiry, which he may well have forgotten for the moment when confused by questions having no immediate bearing on the point as to which he was being examined as a witness.

If the Magistrate thought there was a suppression of truth on the witness' part, he ought to have cleared the matter up at once by giving him an opportunity of explaining more fully, and pointing out that he seemed to be making a mistake. The reason why no such opportunity was given evidently is, that the Magistrate attributed no immediate importance to the matter. The answer did not affect the case before him and was not worth following up.

I cannot understand how, under these circumstances, either prosecution or conviction have been held to be justified. There was clearly no intention of giving false evidence. Nothing turned on the evidence, and at the most the petitioner made a mistake, probably through misunderstanding owing to the way in which the question was put. When called to account later on, he at once admitted that he had made a mistake and the matter should, in fairness to him, have been allowed to drop. Intention is the essence of the offence and certainly cannot here be presumed.

The revision is accepted. The conviction is set aside. Petitioner is acquitted and discharged from the bail to which he was admitted by order of 10th December 1910.

Petition accepted.

(s. c. 73 P. L. R. 1911; 67 P. W. R. 1911.)

PUNJAB CHIEF COURT.

CIVIL REVISION NO. 24 OF 1910.

February 20, 1911.

Present:—Mr. Justice Kensington.

GOKUL CHAND AND OTHER—DEFENDANTS—PETITIONERS

versus

Musammat RAJJI AND OTHERS PLAINTIFFS—RESPONDENT.

Custom—Alienation—Sale Suit by reversioner contesting sale for want of necessity—Consideration consisting mainly of debts due on mortgage not assailable on account of law of limitation—Conversion of sale into mortgage.

The plaintiffs, reversioners, sued for a declaration that a sale for Rs. 850 effected on the 21st March 1896 was null and void, having been made without necessity. The consideration for the sale was Rs. 800, due on a previous mortgage of 3rd October 1892, and Rs. 50 cash. It was pleaded that the suit was barred by limitation and the sale was binding on the reversioners as there was necessity for the sale and the consideration was wholly paid. The claim was decreed and the decree was upheld on appeal by the lower Appellate Court:

Held, that the sale as such could be impugned, the plaintiffs' suit being so far in time, but they were not entitled to a decree in full. The sale being set aside, the defendants were entitled to fall back on the previous mortgage in respect of which mutation took place in January 1893 more than 12 years before suit. A declaratory suit was time-barred as regards the mortgage under Punjab Act 1 of 1900. The mortgage must stand, however questionable the consideration may have been

Khiali Ram v. *Gulab Khan*, 70 P. W. R. 1908 *Muhammad Azim* v. *Muhammad Ji*, 7 P. R. 1898, referred to.

Held, also, that although the consideration to the extent of Rs. 800 could not be objected to, the sale

was liable to be converted into a mortgage for Rs 800.

Petition, under section 70 (*a*) and (*b*) of Act XVIII of 1884 as amended by Act XXV of 1899, for revision of the order of the Divisional Judge, Jhelum, dated the 2nd June 1909, confirming the order of the District Judge, Gujrat, dated the 13th May 1907, decreeing plaintiffs' claim.

Lala *Lajpat Rai*, for the Appellants.

Mr. *Nanak Chand*, for the Respondents

JUDGMENT.—This is a declaratory suit by reversioners in respect of a sale for Rs. 850 effected on the 21st March 1896. The consideration for the sale was Rs. 800 due on a previous mortgage of 3rd October 1892, and Rs. 50 cash.

The lower Courts have rightly held that the sale as such can be impugned, the plaintiffs' suit being so far in time, but they are clearly wrong in holding that plaintiffs are then entitled to a decree in full. The sale being set aside, the defendants are entitled fall back on the previous mortgage, in respect of which mutation took place in January 1893, more than 12 years before suit. A declaratory suit is time-barred as regards the mortgage under Punjab Act I of 1900 and the mortgage must stand, however, questionable the consideration may have been. The law on the point is quite clear, and if any authority is required, it is sufficient to refer to the Full Bench decision of 26th June 1906 (C. A. No. 348 of 1905), not so far reported *Khiali Ram* v. *Gulab Khan* (1), and to *Muhammad Azim* v. *Muhammad Ji* (2).

It is then argued for the defendants that as the sale transaction holds good for Rs. 800 out of the nominal consideration of Rs. 850, the sale should be upheld in full, it being contrary to practice for this Court to interfere when only a trifling part of the consideration can be objected to. There would ordinarily be some force in this plea, but both the lower Courts have found as a fact that the additional Rs. 50 in 1896 was unnecessary, and I am not prepared to interfere with the finding on revision. Moreover, the whole circumstances of the alienation were so suspicious that I decline to do more for the defendants than is absolutely required by law.

The revision is accordingly allowed and in place of the decrees given by the lower Courts for cancellation of the sale *in toto* the plaintiffs are now given a decree declaring that the sale transaction of 1896 shall so far as they are concerned be treated as a mortgage for Rs. 800. The result is that, for practical purposes, the plaintiffs lose their case owing to their great delay in suing. They will, therefore, pay three-fourths of the defendants' costs in all Courts including this Court. Pleader's fee Rs. 32.

(1) 70 P. W. R. 1908.
(2) 7 P. R. 1898.

(s c. 74 P L. R. 1911.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 296 OF 1910.

March 2, 1911.

Present:—Mr. Justice Johnstone.

KARM ILAHI AND OTHERS—DEFENDANTS—APPELLANTS

versus

HIRA AND OTHERS—PLAINTIFF AND DEFENDANTS—RESPONDENTS.

Pre-emption—Lis pendens—*Sale by vendee to person having equal right with the pre-emptor on latter's filing suit Punjab Pre-emption Act (II of 1905), s. 14—Vendor's right to select pre-emptor.*

Where on a pre-emptor filing a suit for pre-emption, the vendee sells the property to a person who possesses equal right of pre-emption, the doctrine of *lis pendens* does not apply, if the right of the subsequent vendee subsists at the date of sale to him, and is not time-barred, for no new right is created by the sale. In such cases, the provisions of section 14 of the Punjab Pre-emption Act may be used by the Court trying the case.

Mahmud Khan v *Khuda Baksh*, 26 P. R. 1908; 145 P. L. R. 1908; 39 P. W. R. 1908, followed.

Faiyaz Husain Khan v. *Prag Narain*, 29 A. 339; 5 C. L. J. 563; 17 M. L. J. 263; 9 Bom. L. R 656; 2 M. L. T. 191; 10 O. C. 314; 4 A. L. J. 344; 11 C.W.N. 561, not followed.

Appeal from the order of the Divisional Judge, Ludhiana Division at Ferozepore dated the 2nd November 1909, reversing that of the Additional District Judge, Ludhiana, dated the 2nd December 1908, dismissing the plaintiff's claim.

R. S. Pandit *Sheo Narain*, for the Appellants.

Mr. *Duni Chand*, for the Respondents.

JUDGMENT.—On the 27th November 1906, the husband of defendant No. 1 sold the land in dispute to defendant No. 2, Rs. 1,150 being entered in the deed as the price, and an endorsement on the deed showing that this sum was actually paid in the presence of the Sub-Registrar. The plaintiff sued for pre-emption by presenting his

plaint to the District Judge on the 13th November 1907. It was returned to him for presentation in the Court of M. Niaz Din, before whom the plaint was presented on the 20th November 1907. On that same date, defendant No. 2 re sold the land to defendants Nos. 3 to 5, and the question for decision in the present case is really only this, namely, whether defendants Nos. 3 to 5, whose pre-emptive rights are equal to those of the plaintiff, can set up against the plaintiff's claim the sale to them effected on the 20th November 1907. The Divisional Judge, Mr. Rose, before whom this case had come, held that the doctrine of *lis pendens* applied and so *accepted the appeal* and remanded the case for decision of the remaining issues, but at the same time ordered a return of the remand by a certain date and fixed a date for the final hearing of the appeal. It thus becomes a little doubtful whether the Divisional Judge intended to remand the case under rule 23 or 25 of Order XLI of the Civil Procedure Code. Upon the return of the remand, the new Divisional Judge, Mr. Ellis, taking the remand as one under rule 23 aforesaid, felt himself bound by his predecessor's decision that the rule of *lis pendens* applied. He, therefore, simply decided that the sum of Rs. 1,150 was fixed in good faith and accepted the appeal accordingly.

The vendees, defendants Nos. 3 to 5, have now appealed to this Court. Some doubt had been expressed at the time of admission of this case whether an appeal lay or not, but it seems to me that an appeal does lie and respondents' Counsel admits that this is so. The first Divisional Judge, in deciding the question of *lis pendens*, relied upon *Faiyaz Husain Khan* v. *Prag Narain* (1), but, in my opinion, I must follow the ruling in *Mahmud Khan* v. *Khuda Bakhsh* (2). On the 20th November 1907, when defendants Nos. 3 to 5 made their purchase, they still had time to sue for pre-emption. Their right to sue for pre-emption existed before the 13th November 1907, the date of the institution of plaintiff's suit, and, therefore, on the 20th November 1907, as their right was still subsisting, it cannot be said that by making the purchase any new right was created in their favour. This is a distinction pointed out in the Punjab ruling aforesaid. The Courts below have only really decided two questions, namely, the question of *lis pendens* and the question of the price to be paid by the plaintiff for the bargain. In my opinion, the former has been wrongly decided as I have already explained, and, therefore, remand is necessary. Before me Mr. Duni Chand for respondents argued that the second sale was a mere fiction. It seems to me that probably this is a question that ought to be inquired into, and there remain several issues drawn up by the first Court, on which no finding has been given. I, therefore, accept the appeal and, setting aside the order of the learned Divisional Judge, remand the case for decision according to law, remarking only that, inasmuch as plaintiff and defendants Nos. 3 to 5 appear to be an equality in the matter of pre emptive right, apparently the Court below will have to use section 14 of the Punjab Pre-emption Act in disposing of the case finally.

Stamp on appeal will be refunded but other costs would be costs in the case.

Appeal accepted.

(1) 29 A. 839; 11 C. W. N. 561; 4 A. L. J. 344; 5 C. L. J. 463; 9 Bom. L. R. 656; 2 M. L. T. 191; 10 O. C. 314; 17 M. L. J. 263.

(2) 26 P. R. 1908; 145 P. L. R. 1908, 39 P. W. R. 1908.

(s. c. 8 A. L. J. 309.)

ALLAHABAD HIGH COURT.

FIRST APPEAL FROM ORDER No. 109 OF 1910.

February 15, 1911.

Present: Sir John Stanley, Kt., Chief Justice and Mr. Justice Banerji.

BHAGWAN SAHAI AND OTHERS—DEFENDANTS—APPELLANTS

versus

HARCHAIN AND OTHERS—PLAINTIFFS—RESPONDENTS.

Registration—Evidence—Admissibility Compromise filed in a mutation proceeding but not acted upon and not registered—Whether admissible in evidence—Registration Act III of 1877), *s.* 17.

A compromise dealing with property exceeding Rs. 100 in value was entered into between the parties to a mutation proceeding. Subsequently, one of the parties repudiated the compromise and the Revenue Court, therefore, ignored it in its mutation order. The compromise was not registered:

Held, that, in a subsequent civil suit, the compromise was not admissible in evidence to prove the agreement set out in it. The admission of such a compromise in evidence would contravene the provisions of the Registration Act as neither the compromise, nor

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any of its terms, was embodied in any decree or order.

Sadaruddin Ahmad v. *Chhajju*, 31 A. 13; 5 A. L. J. 717; A.W.N. (1908) 264, Ind Cas. 558; *Kashi Kumbi* v. *Sumer Kumbi*, 32 A. 206, 7 A. L. J. 204, 5 Ind: Cas. 234, referred to.

First appeal from an order of the District Judge of Meerut.

Dr. *Satish Chandra Banerji* (with him Mr. *Harendra Krishna Mukerji*), for the Appellants.

Dr. *Tej Bahadur Sapru*, for the Respondents.

JUDGMENT.—This is an appeal from an order of remand passed under Order XLI, rule 23, of the Code of Civil Procedure. The suit was one for a declaration that the plaintiffs are entitled to retain possession of certain immoveable property, and, in the alternative, if they were found not to be in possession that possession may be delivered to them. The property exceeds Rs. 100 in value. It belonged to one Gulzari Lal. Upon his death his daughter, *Musammat* Sujan, succeeded to it. On her death in 1907, the plaintiffs applied for mutation of names in their favour, as did also the father of the defendants. A compromise was entered into between the parties on the 8th of February 1908, whereby it was agreed that portion of the property should pass into the hands of the father of the defendants and the remaining portion into the hands of the plaintiffs. The father of the defendants subsequently repudiated this compromise. An application was made to the Revenue Court for mutation, and that Court ignoring the compromise ordered mutation in favour of the defendant's father. Hence the present suit.

In their claim, the plaintiffs alleged that *Musammat* Sujan, the daughter of Gulzari, was the last owner of the property, and was the plaintiffs' cousin by family relationship and was in possession of the property as daughter in a Hindu family and had a life-interest in it. A reference was then made to her death, and in the second paragraph of the plaint, the plaintiffs say that on the death of *Musammat* Sujan a dispute arose between the plaintiffs and the father of the defendants, and that an application for mutation of names was presented on behalf of both parties in the Revenue Court; that the plaintiffs alone claimed the whole property of Gulzari on the one hand and the father of the defendants alone claimed the whole property on the other hand. Then reference is made to the compromise to which we have referred. The compromise was tendered in evidence in the first Court but it was rejected on the ground that, not being registered and the property being of the value of Rs. 100 and upwards, it was not admissible in evidence, and holding that the plaintiffs' suit was based upon this compromise alone, that Court dismissed the plaintiffs' claim *in toto*, without giving the plaintiffs an opportunity of establishing their title to the property or portion of it as the reversionary heirs of Gulzari.

An appeal was preferred to the lower Appellate Court. That Court held that the compromise was admissible in evidence, notwithstanding the fact that it was not registered. The learned Judge says: - "I find that the compromise petition in suit did not require to be registered and was admissible in evidence," and that "the lower Court improperly held that the test was whether the compromise was incorporated in the decree, and that this was not the test of admissibility." That Court accordingly remanded the suit to the Court of first instance for determination on the merits. This appeal was then preferred.

As regards the admissibility in evidence of the compromise, the learned District Judge was, in our opinion, entirely in error. Neither the compromise, nor any terms of the compromise, was embodied in any decree or order, and to admit such compromise in evidence is entirely in contravention of the provisions of the Registration Act. If authority were needed for this, it is to be found in the Full Bench case of *Sadaruddin Ahmad* v. *Chhajju* (1). There it was held by a Full Bench, of which both of us were members, that a compromise entered into between the parties to mutation proceedings before a Court of Revenue which purported to modify the conditions of a pre-existing mortgage upon the basis of which mutation was sought, could not be allowed to take effect in opposition to the distinct terms of a registered instrument of mortgage. In the subsequent case of *Kashi Kumbi* v. *Sumer Kumbi* (2), a

(1) 31 A. 13; 5 A. L. J. 717; A. W. N (1903 264 1 Ind. Cas 558.

(2) 32 A. 206; 7 A. L. J. 204; 5 Ind. Cas. 234.

KURA SINGH *v.* CHHALLU.

Bench of this Court, of which one of us was also a memder, held, in a case in which the parties to a suit filed a compromise which, in addition to setting forth the rights of the parties as to the property in suit, went on to provide that if either party sold his share of the property, the other party should have a right to pre-empt, and in which the decree based on the compromise was silent as to the right of pre-emption, that the compromise required registration, and not being registered could not be used to support a suit for pre-emption. In the judgment in that case the authorities are dealt with. In that case some of the terms of the compromise were embodied in a decree but the provision as to pre-emption was nowhere mentioned in the decree. In the present case no portion of the compromise is embodied in any decree or order. On the contrary the order of mutation entirely ignored the petition of compromise. Clearly, therefore, this petition was not admissible in evidence to prove the agreement set out in it. The lower Appellate Court was, we think, justified in remanding the suit but not upon the ground on which it was remanded. The Court of first instance ought under the circumstances to have heard the case upon the merits and tried the question of title set up by the respective parties irrespective of the compromise.

For these reasons, the order of remand of the Court below was rightly passed and the Court of first instance must try the question of title set up by the respective parties. We accordingly dismiss the appeal but under the circumstances the costs will abide the event.

Appeal dismissed.

(s. c. 8 A. L. J. 329.)

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 947 OF 1910.

February 24, 1911.

Present:—Sir John Stanley, KT., Chief Justice, and Mr. Justice Banerji.

KURA SINGH AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

CHHALLU—DEFENDANT—RESPONDENT.

Agra Tenancy Act (II of 1901), ss. 10, 202—Exchange—Ex-proprietary tenancy—Suit for possession in Civil Court—Defendant pleading tenancy—Procedure.

By virtue of section 10 of the Agra Tenancy Act, 1901, no ex-proprietary tenancy arises where there is an exchange of *Zemindari* between co-sharers.

Where in a suit for possession in a Civil Court, the defendant pleads that he held the land as a tenant, the Court of first instance is bound to follow the procedure laid down in section 202 of the Agra Tenancy Act, II of 1901, and to require the defendant, by order in writing, to institute within three months a suit in the Revenue Court for the determination of the question whether the defendant is plaintiff's tenant or not.

Second appeal from a decree of the Additional Judge of Meerut, reversing a decree of the Additional Subordinate Judge of Meerut.

Mr. *M. L. Agarwala*, for the Appellants.

Mr. *Baldev Ram Dave* (for Mr. *Sundar Lal*), for the Respondent.

JUDGMENT.—The suit out of which this appeal has arisen was brought by Duli Chand, now represented by the appellants, for possession of certain agricultural lands. It appears that the parties were co-sharers in certain *zemindari*, and under an arbitration award the *zemindari* was partitioned. The lands in question fell to the share of Duli Chand. He brought a suit in the Civil Court for proprietary possession of those lands and for ejectment of the defendant. The Subordinate Judge, in whose Court the suit was instituted, by his decree, dated the 10th of November 1902, granted to Duli Chand a decree for proprietary possession of the land. The defendant appealed to the District Judge and contended that the land had been his *sir* land before partition, that he had acquired the rights of an ex-proprietary tenant in regard to it and that he could not be ejected from it by a decree of the Civil Court. The learned Judge was of opinion that the decree of the first Court only granted to the plaintiff proprietary possession of the land and that it could not be determined in that suit whether the defendant had acquired the rights of an ex-proprietary tenant. The learned Judge observed, however, in his judgment that as there was an exchange between co-sharers, the defendant could not, under any circumstances, claim the rights of an ex-proprietary tenant. This view of the learned Judge was, in our opinion, right. By section 10 of the Tenancy Act, where there is a transfer by private alienation, no rights of ex-proprietary tenants accrue if the alienation is by gift or by exchange between co-sharers. Here there

was evidently an exchange between co-sharers, and, therefore, under the provisions of section 10, no rights could accrue to the defendant as an ex-proprietary tenant in respect of land held by him as *sir*. Holding the view which we have mentioned above, the learned Judge dismissed the appeal of the defendant. The decree obtained by Duli Chand was put into execution and he obtained possession of the property. It is admitted that he took actual possession of it; whether he obtained it by execution of the decree or subsequently is immaterial. The defendant on being dispossessed brought a suit in the Revenue Court under section 79 of the Tenancy Act for recovery of possession alleging himself to be the ex-proprietary tenant of the land. His suit was decreed. Hence the present claim for possession.

The Court of first instance decreed the claim but the lower Appellate Court dismissed it, holding that the decision of the Civil Court in the former suit brought by the plaintiff operated as *res judicata*. This view of the learned Judge is, in our opinion, erroneous and the learned Vakil for the respondent has not tried to support it. In the former suit, as we have pointed out above, the Appellate Court clearly abstained from determining whether the defendant was liable or not to be ejected from the land. Therefore, the decision in the previous suit cannot operate as *res judicata* in this case.

As, however, the suit related to agricultural land and the defendant pleaded that he held such land as the tenant of the plaintiff, section 202 of the Agra Tenancy Act applied and the Court, in which the suit was brought was bound to require the defendant by order in writing to institute within three months a suit in the Revenue Court for the determination of the question, whether the defendant was the plaintiffs' tenant or not. This the Court of first instance did not do.

Mr. Baldev Ram, for the respondent, contends that the decision of the Revenue Court in the suit brought by the defendant to recover possession is *res judicata* between the parties, and the procedure laid down by section 202 need not be adopted. We express no opinion on the question whether when a suit is brought in the Revenue Court by the defendant in accordance with the provisions of section 202 the decision in a former suit brought in the Revenue Court would or would not have the effect of *res judicata*. We think the Court of first instance was bound to follow the procedure laid down in section 202, and this must now be done. We accordingly discharge the decree of both the Courts below and remand the case to the Court of first instance with directions to re-admit the suit under its original number in the register and adopt the procedure laid down in section 202 of the Agra Tenancy Act. The appellant will have the costs of this appeal. All other costs will follow the event.

Appeal allowed.

(s. c. 37 P. W. R. 1911; 111 P. L. R. 911.)

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 1134 OF 1909.

January 5, 911.

Present:—Mr. Justice Johnstone.

PIRBHU DIAL—PLAINTIFF—APPELLANT

versus

RISAL SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Mortgage—Interest—Endorsement of payment of mortgage-money—Registration—Registration Act (III of 1877, s. 17.

An endorsement on a mortgage-deed merely acknowledging receipt of the mortgage-money is not compulsorily registrable under section 17 of Act XVI of 1908. Such an endorsement is at most a memorandum containing a hint that redemption has been effected but it does not contain the contract of redemption.

In a mortgage suit, a mortgagee is entitled to a decree allowing him to recover interest on the amount decreed from the date of suit upto date of realization.

Second appeal from the order of the Additional Divisional Judge, Delhi Division, dated the 11th June 1909, modifying that of the District Judge, Delhi District, dated the 22nd March 1909, decreeing the claim.

Mr. *Abdul Kader*, and Rai Bahadur Bakshi *Sohan Lal*, for the Appellant.

Mr *Nand Lal*, for the Respondent.

JUDGMENT.—The first Court gave plaintiff a decree for Rs. 1,500 to be recovered from three houses mortgaged and other ancestral property of judgment-debtors, defendants Nos. 1 and 2, but without costs; and the suit as against defendant No. 3 was dismissed with costs.

The learned Divisional Judge on appeal modified the decree by allowing interest to plaintiff from date of suit to two months from date of his (Divisional Judge's) order.

THAKAR SINGH *v.* ISHAR SINGH.

The facts and pleadings are sufficiently set forth in the judgment of the first Court.

Here the first question is whether the endorsement on the first mortgage-deed required registration or not. I think it did not. It does not state that the fourth house is redeemed; but merely that the Rs. 400 has been received. No doubt it *suggests* redemption; but it does not contain the contract of redemption and at most is a memorandum containing a hint that redemption has been made.

Apart from this, there is ample evidence that the fourth house was redeemed in the admissions contained in the subsequent deeds and in the statements of defendants Nos. 1 and 3.

Ground No. 3 has not been argued before me. Ground No. 4 is quite beside the mark, and so is ground No. 5. Counsel has not been able to show how it affects the case before me. As regards ground No. 6, I think interest should have been allowed up to realisation.

The order as to costs is fully justified. I accept the appeal, add to the decree interest to date of realisation (and not only for two months from date of lower Appellate Court's order) and direct that here the parties except Bulaki do bear their own costs; but appellant will pay Bulaki's costs here also.

Appeal accepted.

(s. c. 43 P. W. R. 1911; 113 P. L. R. 1911.)

PUNJAB CHIEF COURT.

CIVIL REVISION No. 387 OF 1910.

November 17, 1910.

Present—Mr. Justice Johnstone.

THAKAR SINGH—PLAINTIFF—PETITIONER

versus

ISHAR SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Hundi—*Interest—Costs—Finding of fact by a Small Cause Court—Negotiable Instruments Act (XXVI of 1881), s. 80—Provincial Small Cause Courts Act (IX of 1887), s. 25.*

In the absence of any cogent reason, a Court is bound under section 80 of Act XXVI of 1881 to award interest at 6 per cent per annum on a *hundi* from the date of its execution to date of realization.

A judgment of a Small Cause Court disallowing without reasonable grounds costs to a successful party is against law.

If there is no irregularity in the proceedings, a finding of fact by a Small Cause Court, arrived at after considering all the evidence in the case, cannot be interfered with on revision even if the Chief Court is able to arrive at a different conclusion.

Petition, under section 25 of Act IX of 1887, for revision of the order of the Judge, Small Couse Court, Amritsar, dated the 18th December 1909, decreeing plaintiff's claim in part.

Lala *Hukam Chand*, for the Petitioner.

Pandit *Ram Bhaj Datta* and Lala *Bhagwan Dass*, for the Respondents.

JUDGMENT.—In this case the Small Cause Court Judge has decided that while plaintiff is entitled to Rs. 400 upon the *hundi* in suit, defendant Guran Ditta, is not one of the parties liable, and the plaintiff is not entitled to interest and costs. He has also decided that Guran Ditta himself should not get his costs. The plaintiff has come up to this Court on the revision side and Guran Ditta has also filed a cross revision in which he asks for costs and damages.

One of the findings of the Court below is that Guran Ditta, was not a member of the firm, Harnam Singh-Ishar Singh, and that he singed the *hundi* merely as a writer. As to whether he is a partner in that firm, there is a good deal to be said on both sides. Particularly, in my opinion, there is much for the argument that he was a partner at the time, when this *hundi* was written. But, after all, the Small Cause Court Judge considered all the evidence and came to a finding and I can find nothing irregular about the proceedings, I, therefore, do not think that I should interfere with regard to this issue.

Taking up next Guran Ditta's revision, in which he asks for costs and damages, my opinion is that he is not entitled to either. There is no doubt that, whether he was a partner or not, he was very much mixed up with the affairs of the firm which he, to a large extent, seems to have carried on, and further, in signing his name at the foot of the *hundi*, he wrote nothing to make it appear that he was not exactly on a level with the other signatory, *viz.*, Harnam Singh.

This being so, Guran Ditta has himself to blame for plaintiff's having impleaded him as defendant. I, therefore, dismiss Civil Revision No. 2484 of 1910 with costs.

To return to the other revision, No 387 of 1910, there remains the question whether the plaintiff is entitled to interest and to costs. The Small Cause Court Judge seems to have overlooked section 80 of Act XXVI of 1881. I can see no reason whatever why interest at 6 per cent. per annum should not

have been allowed from the date of the *hundi* to date of realisation of Rs. 400; and in the same way, I see no reason why plaintiff should not have his costs against defendants Nos. 1, 2 and 3. I allow this revision and direct that the decree be modified accordingly. Defendants Nos. 1, 2 and 3 will pay plaintiff's costs.

Revision accepted.

(s. c. 22 P. R. 1911.)

PUNJAB CHIEF COURT.

FIRST CIVIL APPEAL No. 357 OF 1910.

November 25, 1910.

Present: - Mr. Justice Shah Din and Mr Justice Chevis.

Mahant KIRPA SINGH—DEFENDANT—APPELLANT

versus

MAYA RAM—PLAINTIFF AND ANOTHER—DEFENDANT—RESPONDENTS.

Pre-emption—Custom—Mohalla Sathan, *in Lahore City—Conversion of house into* Dharmsala *subsequent to date of sale Character of property at date of sale—Punjab Pre-emption Act II of* 1905), *s.* 13 *(2).*

The custom of pre-emption in respect of houses obtains in *Mohalla Sathan* in the City of Lahore

The character of the property at the date of sale determines the question whether sub-section 2 of section 13 of the Punjab Pre-emption Act applies to the property or not. If at the date of the sale, the property sold is a house, it is quite immaterial for the purposes of the sub-section whether subsequently to that date the house was converted into and used as a *Dharmsala*.

Second appeal from the decree of the Divisional Judge, Lahore Division, dated the 28th January 1908.

Messrs *Oertel* and *Sohan Lal*, for the Appellant.

Lala *Daurka Das*, for the Respondents.

JUDGMENT.—This appeal and Civil Appeal No. 555 of 1908 are cross-appeals and will be disposed of by one judgment.

The suit out of which these appeals have arisen was brought by the plaintiff Maya Ram, for possession by pre-emption of a house situate in *Mohalla Sathan* in the city of Lahore which had been sold under a registered deed, dated the 8th January 1906, to the defendants *Musammat* Jai Kaur and Bhai Swan Singh; for Rs. 1,300. The plaintiff's suit was resisted by the vendees on various grounds, which it is unnecessary to set out at this stage of the proceeding. The main pleas taken were,—

(1) that the custom of pre-emption did not prevail in *Mohalla Sathan* in which the house in dispute is situate;

(2) that the plaintiff had no right of pre-emption in respect of the property in dispute;

(3) that the price entered in the sale-deed was fixed in good faith and was paid in full.

Upon the pleadings of the parties, nine issues were framed by the first Court, and it held—

(1) that the custom of pre-emption prevailed in *Mohallah Sathan*;

(2) that the plaintiff had failed to prove that he could claim pre-emption on the ground of vicinage;

(3) that the house in dispute, having been purchased for the purpose of being converted into a *Dharamsala* and having been so converted within one month from the date of the purchase, could not be made the subject of pre-emption;

(4) that the price entered in the sale-deed had not been fixed in good faith, and that its market value was Rs. 1,1 7 11-0. Upon these findings the plaintiff's suit was dismissed.

On appeal by the plaintiff-pre-emptor, the Divisional Judge held, disagreeing with the first Court,—

(1) that as the plaintiff's house touched the house in dispute at the back, he was entitled to pre-emption on the ground of adjacency, and

(2) that at the time of sale the building in dispute was not a *Dharamsala* but a house, the mere fact that it was converted into a *Dharamsala* subsequently did not extinguish the plaintiff's right of pre-emption in respect of it.

The learned Judge further found that the market-value of the house was, as held by the first Court, Rs. 1,117- 1-0, and he disallowed the value of the alleged improvements amounting to Rs. 60 effected by the vendees since the date of sale. The Divisional Judge accordingly decreed the plaintiff's claim conditional on payment of Rs. 1,117-11-0 by the plaintiff.

The plaintiff and the vendees have preferred further appeal to this Court. The plaintiff's appeal (No. 555 of 1908) relates only to the question of the market-value of the house, which it is contended is not more than Rs. 800 while the vendee's appeal (No. 357 of 1908) impugns all the findings recorded against them

by the lower Appellate Court. In connection with this latter appeal Mr. Oertel has contended before us—

(1) that the custom of pre-emption is not proved to exist in *Muhalla Sathan*,

(2) that as the building in dispute was purchased for the purpose of being used as a *dharamsala* and was so used immediately after the purchase was made, under section 13, sub-section 2, of the Punjab Pre-emption Act no right of pre-emption can exist in respect of it

(3) that if the plaintiff had a right of pre-emption, he must pay Rs. 1,300 which it is urged is the market-value of the house in suit.

After hearing Mr. Oertel, we think that none of these three contentions has any force, and that the findings arrived at by the lower Appellate Court are correct. As to the first contention, it is noteworthy that, before the sale in dispute was actually made, the vendors served the plaintiff with a notice saying that as he had a right of pre-emption in respect of the house in question he was at liberty to purchase it, failing which they would sell it to the present vendees. This notice shows that the plaintiff's right of pre-emption was fully recognised by the vendees. Apart from this, however, there are on the record no less than six judicial decisions which prove the existence of the custom of pre-emption in *Muhalla Sathan*, in which admittedly the house in dispute is situated, and there is not one single instance in which in any pre-emption suit it was held by a Court of Justice that the custom of pre-emption did not exist in the said *Muhalla*. We have, therefore, no hesitation in overruling the first contention.

The second contention was not very seriously pressed, and it could not well be pressed, considering that under sub-section 2 of section 13 of the Punjab Pre-emption Act the plaintiff's right of pre-emption obviously did exist in respect of the building in dispute, if at the time of the sale thereof, it was not a *dharamsala* but a house. If at the date of sale it was a house, it was perfectly immaterial for the purposes of the said sub-section whether subsequently to that date it was or was not converted into and used as a *dharamsala*. It is the character of the property sold at the date of sale which determines the question whether sub-section 2 aforesaid applies to it or not, and it is not disputed by Mr. Oertel that at that date the building in dispute was a house and not a *dharamsala*. The second contention also, therefore, fails.

As regards the third contention, it is not disputed that the payment of Rs. 1,300 to the vendors is not proved. That being so, the market-value of the house had to be ascertained. A competent local Commissioner was appointed to assess the value of the house and his report that the value was Rs. 1,117-11-0 has been accepted by both the Courts as correct. The value of the alleged improvements by the vendees has, we think, been rightly disallowed, as those improvements were made in spite of a written protest by the pre-emptor. We, therefore, overrule the third contention.

As a result of the above findings this appeal is dismissed with costs.

We now come to the Cross-Appeal No. 555 of 1908. Lala Dwarka Das for the pre-emptor tried to find fault with the market-value of the house as assessed by the local Commissioner on the ground that the rates of building material upon which that value was based were those current at the time when the report was made and not at the time of the sale. He urged that, between the date of the sale (January 1906) and the date of the local inquiry (August 1907), the rates in question must have risen considerably and that, therefore, the sum of Rs. 1,117-11-0 could not represent the correct market-value of the house at the date of the sale. The alleged rise in the rates was not, however, expressly made the subject of objection to the Commissioner's report in the first Court, and we cannot make such an assumption in favour of the pre-emptor. Both the Courts below have concurred in accepting the local Commissioner's estimate as correct and no sufficient reason has been shown why we should disturb that concurrent finding. We accordingly maintain the decree of the lower Appellate Court and dismiss this cross-appeal with costs.

Appeal dismissed.

BAWA SINGH *v.* LACHMAN SINGH.

(S. C. 24 P. R. 1911.)

PUNJAB CHIEF COURT.

CIVIL REVISION APPEAL No. 908 OF 1909.

February 9, 1911.

Present:—Mr. Justice Chevis.

BAWA SINGH—DEFENDANT—PETITIONER

versus

LACHMAN SINGH AND OTHERS—PLAINTIFFS RESPONDENTS.

Civil Procedure Code (Act XIV of 1882), *s.* 206—*Order directing amendment—Decree—Appeal—Revision—Appeal from amended decree—Plea of non-conformity with compromise—Merits of the decree*—Haqiyat, *meaning of—House property included.*

An order under section 206, Civil Procedure Code, 1882, directing amendment of a decree, not in conformity with the judgment, is not a decree and is consequently not appealable.

Nalinakshya Ghosal v. *Mafakshar Hossain*, 28 C. 177, *Khan Shirin* v. *Nasir Khan*, 101 P. R. 1888; *Brojo Lal Rai* v. *Tara Prosanna Battacharji*, 3 C. L. J. 188; followed.

Visvanathan v. *Ramanathan*, 24 M. 646, dissented from

But when a decree has been amended, the amended decree can be attacked on the merits by way of appeal.

Brojo Lal Rai v. *Tara Prosanna Battacharji*, 3 C. L. J. 188, followed.

A petition for revision lies against an order directing amendment.

The plea that a decree does not accord with the compromise, on which the judgment was based, is an attack on the amended decree on the merits and can only be taken in appeal and not in revision.

Brojo Lal Rai v. *Tara Prosanna Battacharji*, 3 C. L. J. 188, followed.

The word *haqiyat* means rights in immoveable property and though it is as a rule used in connection with landed property, there is nothing to prevent its application to house property also.

Petition for revision of the orders of the Munsif 1st Class, Amritsar, dated the 17th August 1908, and 7th December 1908.

Mr. *Roshan Lal*, for the Petitioner.

Mr. *Duni Chand*, for the Respondents.

JUDGMENT.—In a case pending between the parties a written compromise was put in, according to which the plaintiffs were to take one-third of the land of the late Mala Singh, but out of that one-third defendants were to have 4 *kanals* of land of superior quality on account of expenses of the case; plaintiffs were also to get one-third of the house property.

The parties were then questioned on the terms of the compromise, and they confirmed it, as regards the land, but apparently no question was put to the defendants as regards the house property.

The judgment, dated 30th May 1905, which followed, was for one-third of the *haqiyat* of Mala Singh, deceased. The judgment went on to say that plaintiffs should take one-third of the land but out of it should give back 4 *kanals* of land of superior quality to the defendants.

The decree of the same date is merely for one-third of the landed property, less 4 *kanals*. The decree makes no mention of the house property.

On application for amendment, the Court, on 17th August 1908, amended the decree, extending it so as to include one-third of the house property.

The defendant apply to this Court for revision. A preliminary objection is raised that as the amended decree is open to appeal no application for revision can be entertained.

Visvanathan Chetty v. *Ramanathan Chety* (1) certainly seems to support this objection, but *Nalinakshay Ghosal* v. *Mofakshar Hossain* (2) lays down that an order passed under section 206 of the Civil Procedure Code (Act XIV of 1882) amending a decree not in conformity with the judgment is not appealable. This last ruling is approved in a later Calcutta ruling, *Brojo Lal Rai* v. *Tara Prosanna Battacharji* (3), which, however, goes on to say that an amended decree is appealable as a decree. The combined effect of the Calcutta rulings is, so I understand, that there is no appeal against the amendment itself, but that when a decree has been amended the amended decree may be attacked *on the merits* by way of appeal. There is also a Punjab ruling, *Khan Shirin* v. *Nasir Khan* (4), which lays down that the mere order directing amendment is not a decree and is not appealable. This ruling, in my opinion, agrees with the Calcutta ruling, and so I follow the Calcutta ruling and not the Madras one, and hold that a revision lies in the present case and not an appeal.

The question on revision is, whether the amendment of decree brings the decree into conformity with the judgment. For defendant it is argued that the judgment does not cover the house property and that the original decree was in accordance with the judgment and could not be amended. But

(1) 24 M. 646.
(2) 28 C. 177.
(3) 3 C. L. J. 188.
(4) 101 P. R. 1888.

the judgment awards plaintiffs one-third of the *haqiyat*, and, after consulting my learned colleague, Shah Din, J., I am of opinion that the word *haqiyat* means *rights in immoveable property*, and that though it is as a rule used in connection with landed property there is nothing to prevent its application to house property also. In the present case one-third of the house property was included in the plaint and also mentioned in the written compromise, and though the statements of defendants when questioned as to the compromise, contain no reference to the house property, it cannot be said that these statements contradict the written compromise so far as the house property is concerned; all that can be said is that the statements do not confirm the written compromise in this respect. So, in my opinion, the word *haqiyat* used in the judgment cannot be taken to cover the land alone. I am of opinion, therefore, that the judgment covers the house property also, and that the amended decree is, and the original decree is not, in conformity with the judgment. This application for revision must, therefore, fail.

Counsel for defendants next argues that the judgment and amended decree are not in accordance with the cempromise, and that the plaintiffs were not entitled to one-third of the house property according to the compromise. This is a matter on which I express no opinion; the plea that the decree does not accord with the compromise is an attack on the amended decree on the merits and, following *Brojo Lal Rai* v. *Tara Prosanna Bhattacharji* (3), I hold that the decree can be attacked on the merits only in appeal and not in revision.

I dismiss this application, but pass no order as to costs, as it seems to me that the whole trouble is due to the Court's omission to question all the parties as to that part of the written compromise which deals with the house property.

Revision rejected.

(s. c. 8 P. W. R. 1911 Cr.)

PUNJAB CHIEF COURT.

CRIMINAL REVISION No. 495 OF 1910.

June 11, 1910.

Present:—Sir Arthur Reid, KT., Chief Judge.

FATTA—ACCUSED—PETITIONER

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Costs—Adjournment—Revision—Criminal Procedure Code (Act V of 1898), ss. 344, 439, 526.

The order of a Criminal Court directing an accused person to pay costs of adjournment under section 344 of the Criminal Procedure Code, 1898, on an application made by the former under section 526 of the said Code, is obviously improper and unjustifiable and, though not appealable, is liable to be set aside on revision by the High Court.

Browne v. *Chanda Singh*, 6 P. R. 1906 Cr.; 4 Cr. L. J. 78, followed.

Case reported by the District Magistrate, Ferozepore, with his No. 1155 of 1st April 1909.

FACTS.—The accused put in an application in the lower Court to have the case transferred to the Court of Tahsildar, or to allow him time for a week in order to enable him to get the case transferred. The lower Court finding this application vexatious allowed him a week but ordered him to pay Rs. 25 to each of both the complainants for the adjournment.

GROUNDS.—The law certainly seems to allow costs as much to the complainant as to the accused in case of an adjournment. In the present case the Court awarded somewhat heavy costs in granting an adjournment under section 526, Criminal Procedure Code, thinking, and perhaps rightly, that the application was uncalled for and vexatious. Still, the accused was only exercising a right given him by law and I do not think that costs should have been awarded. There is authority, *vide Browne* v. *Chanda Singh* (1), for holding that in any case costs should not be awarded against an accused person. I submit the case to the Chief Court for revision.

Overlooking the fact that the order was not appealable I accepted the appeal and remitted the fine. This order was *ultra vires*.

Mr. *Gokal Chand*, for the Complainant.

ORDER.—The case was eventually transferred from the Court of the Magistrate who awarded costs for the adjournment and

(1) 6 P. R. 1906 Cr., 4 Cr. L. J. 78.

the accused were discharged, the parties being referred to a civil suit.

The Magistrate's award of costs was obviously improper and unjustifiable and is hereby set aside.

Revision allowed.

(s. c. 9 P. W. R. 1911 Cr.; 3 P. R. 1911 Cr.; 87 P. L. R. 1911.)

PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 440 OF 1910.

December 9, 1910.

Present:—Sir Arthur Reid, KT., Chief Judge, and Mr. Justice Rattigan.

MASTI AND OTHERS—CONVICTS—APPELLANTS

versus

EMPEROR—PROSECUTOR—RESPONDENT.

Culpable homicide—Murder—Riot—Unlawful assembly armed with dangs—*Intention—Penal Code (Act XLV of* 1860), *ss.* 141, 146, 149, 300, 302, 304, 325.

Where five or more persons assemble together armed with *lathies* and some of them attack their opponents while the others, who at first kept in the background, proceed to assault their opponents' helpers, the legal consequence would necessarily be:

(1) that they constituted an unlawful assembly within the meaning of section 141, Indian Penal Code,

(2) that every one of them was guilty of rioting under section 146 as soon as one or more of them used violence in prosecution of their common object,

(3) that all members of the assembly would be guilty of an offence committed in prosecution of their common object by any member of such assembly, and

(4) that on account of their being armed with *lathies* they knew that they were likely to commit an offence of at least grievous hurt.

The first part of section 304 of the said Code is intended to include only those cases in which the act of the accused would be culpable homicide not amounting to murder, but for the fact that it was committed in circumstances which render one or other of the exceptions to section 300 applicable.

Appeal from the order of the Sessions Judge, Attock Division, dated the 9th June 1910.

Lala *Chuni Lal*, for the Appellants.

JUDGMENT.—This and Criminal Appeal No. 441 of 1910, relate to the same facts and in this judgment we shall dispose of both appeals.

The appellants in Criminal Appeal No. 440 of 1910, (1) Masti, (2) Bakhra, son of Chubra, and (3) Bakhra, son of Mahammad, have been convicted by the Sessions Judge, Attock Division, of an offence under sections 147 and 304 (1st part), Indian Penal Code, and have been sentenced to transportation for life. Before proceeding, we might here remark that section 147 is probably a clerical mistake for section 149. The appellants in the connected appeal have been convicted under section 149, 325, Indian Penal Code, and have been sentenced each to two years' rigorous imprisonment (including 3 months' solitary confinement). In addition, all the appellants have also been convicted of another offence of rioting and of causing grievous hurt on the same day, and for these offences, under sections 149, 325, Indian Penal Code, have been further sentenced to two months' rigorous imprisonment each. From these sentences they have appealed to this Court, and we have heard their respective Counsel at some length. There can be no doubt that on the 13th July last when the *girdawar kanungo* (Lala Shanker Das) and the *patwari* (Ata Muhammad), went with the deceased Lal to demarcate certain boundaries in Rakh Bakhra an assault was made upon Lal and his friends. The appellants (with the exception of Khudayar, Ditta, Ghanya and Dalla who plead *alibis*) admit that an affray took place on that day and that they were present at the time, and it is beyond all question that the unfortunate Lal received such severe injuries that he died four days afterwards, *i. e.*, on the 17th February 1910. Naturally, the prosecution and the defence are at variance as to the details of this affray, but we have no hesitation in agreeing with the Sessions Judge and the Assessors that the aggressors were the appellants and that it was they who attacked Lal and his party. It seems to us that the two witnesses for the prosecution Lala Shanker Das, the *girdawar kanungo* and Ata Muhammad, the *patwari*, are entirely independent and impartial witnesses whose evidence can be accepted as a fair and true account of what occurred. They depose that, in the first instance, Masti and the two Bakhras came up, accompanied by the other appellants (who, however, kept in the back ground) and that the three former entered the enclosure where Lal and his party were sitting and violently assaulted Lal, and that thereafter all the appellants proceeded to assault the other friends of Lal who were coming up. Briefly summarised, this is the gist of their evidence and if that evidence is true, the legal consequences would necessarily be (1) that the appellants constituted an unlawful assembly within th

meaning of section 141, Indian Penal Code, (2) that every one of them was guilty of rioting under section 146, as soon as Masti or one of the Bakhras used violence in prosecution of the common object of the assembly, and (3) that all members of the assembly would be guilty of any offence committed in prosecution of that common object by any member of such assembly if they knew that such offence was likely to be so committed.

In the present case the common object of the appellants was to prevent by force the demarcation of the boundaries; they all went armed with *dangs* and *lathis* and every one of them must have known that it was likely that Masti and the two Bakhras, when the latter entered the enclosure, would assault Lal. In the circumstances we think the Sessions Judge was fully justified in holding that all the appellants were guilty of rioting and that the appellants in the connected appeal must be held responsible for the offence of causing grievous hurt, inasmuch as they knew that Masti, and the two Bakhras, had entered the enclosure armed with *lathis* with the intention of committing an assault on Lal. There are, no doubt, one or two small discrepancies in the prosecution evidence but they appear to us in no wise to militate against the general truth of the story as told by the two officials who were present on the occasion. Nor do we see any reason to doubt the evidence that all the appellants were present at the time when these occurrences took place. The *alibis* set up by Khudayar, Ditta, Ghanya and Dalla are palpably false and have rightly been rejected by the Sessions Judge and the Assessors, and the appellants have been satisfactorily identified.

The result is that we consider the convictions of the appellants in the connected appeal under sections 149 and 325, Indian Penal Code, fully justified as regards both the assault on Lal and his party and the subsequent assault on Fatteh Khan and others. We accordingly maintain their convictions and sentences in respect of both these offences.

The appellants in this appeal, *viz.*, Masti and the two Bakhras, have been convicted (1) of offences under section 304, *first part* and section 149, Indian Penal Code, and as regards these offences have been sentenced to transportation for life, and (2) offences under sections 149, 325, Indian Penal Code, for the assault upon the party composed of Fatteh Khan and others, and for the latter offences they have been sentenced to two months' rigorous imprisonment each. With the latter sentences we see no reason to interfere. But we cannot understand how the learned Sessions Judge arrived at the conclusion that the offence committed by these appellants with regard to Lal fell under the provisions of the *first part* of section 304. The three appellants affected by this sentence did, no doubt, urge that they were acting in self-defence, but it is clear from his judgment that the Sessions Judge does not find that any of the exceptions specified in section 300 of the Code is applicable to their case. On the contrary, his finding is entirely of opinion that in a case of this kind, if the prisoner had no intention to cause death or to cause such bodily injury as he knew to be likely to cause death or that death would probably ensue, but yet intentionally inflicted injuries which were likely to cause death, the offence is one which falls within the purview of the *first part* of section 304 of the Code. This is an entirely erroneous view of the law. The *first part* of section 304 is intended to include only those cases in which the act of the accused preson would be culpable homicide amounting to murder, but for the fact that it was committed in circumstances which render one or other of the exceptions to section 300 applicable. It is clear that the Sessions Judge did not intend te find the appellants in this appeal guilty of murder but upon a strictly literal interpretation of his conclusions we would per force have to find that they were guilty of this offence. He obviously meant to convict them under the second part of section 304, but in that event the maximum sentence should have been ten years' imprisonment.

In our opinion, though the assault on Lal was most violent, it is possible that the three appellants did not intend to cause his death, or such bodily injuries as were likely to cause his death. But in assaulting him, as they did, they must have known that they were likely to cause his death and they, therefore, committed an offence punishable under the second part of section 304. Their act comes very near to murder, but we give them the benefit of the doubt. We accordingly alter the conviction in respect

of this offence to one under section 304 (2) of the Indian Penal Code, and reduce the sentences of Masti and the two Bakhras to ten years' rigorous imprisonment (with three months' solitary confinement) in each case. In all other respects the appeals are rejected.

Sentence reduced.

(s. c. 13 P. R. 1911; 86 P. L. R 1911.)

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 404 OF 1910.

December 7, 1910.

Present:—Mr. Justice Shah Din.

KARM DIN AND OTHERS—PLAINTIFFS—APPELLANTS

versus

Musammat JIO—DEFENDANT AND OTHERS—PLAINTIFFS—RESPONDENTS.

Custom—Alienation—Gift of portion of ancestral land to daughter—Ghar-jawai—Arains *of Dholewala*, Tahsil *Zira*, *District Ferozepur*.

Among *Arains* of *Mauza* Dholewala in the Zira *Tahsil* of the Ferozepur District, a sonless proprietor has, by custom, the power to make a gift of a portion of his ancestral land in favour of his daughter whose husband is the donor's *ghar-jawai* or resident son-in-law.

Second appeal from the decree of the Divisional Judge, Ferozepore Division, dated the 2nd June 1909.

Mr. *Miran Bakhsh*, for the Appellants.

Lala *Amar Nath Bhatia*, for the Respondents.

JUDGMENT.—The parties in this case are Arains of *Mauza* Dholewal in the Zira *Tahsil* of the Ferozepore District, and the question for decision is whether by custom applicable to them a sonless proprietor has the power to make a gift of a portion of his ancestral land in favour of his daughter whose husband is the donor's *ghar-jawai* or resident son-in-law. The appellant's Counsel has urged that it is not proved that the husband of *Musammat* Jio, in whose favour the gift in dispute has been made, is a resident son-in-law of Hasham, the donor; but both the Courts below have concurred in holding that he is Hasham's *ghar-jawai*, and as this appeal is one admitted under clause (*b*) of section 70 (1) of the Punjab Courts Act, the finding of the lower Appellate Court on this point, being one of fact, cannot be impugned in this Court. Admittedly, Hasham owned 102 *kanals* of land, and he has only gifted 61 *kanals* and 2 *marlas* out of his estate.

Both the Courts below have held that the gift in dispute is valid by custom, and after hearing arguments on both sides, I entirely concur in that finding. As the learned Divisional Judge has pointed out, the published decisions of this Court show that among the Arains of the Hoshiarpur and Jullundur districts the power of a sonless proprietor to gift ancestral land in favour of his daughter's daughter's son in the presence of near collaterals is very extensively recognised, and it would not be unreasonable to presume that a similar custom prevailed among the Arains of the Ferozepore district.

In *Musammat Rajadan* v. *Umra* (1) it was held by this Court that among the Arains of the Hoshiarpur District custom did not preclude a sonless male proprietor from making a gift of the whole of his property to his daughter's son. Plowden, J., in his judgment in that case says: "in view of the reported decisions in the Punjab Record for the past twelve years I think it can be hardly said that an alienation by a sonless proprietor of a portion of his ancestral land to his daughter's son is opposed to general custom in the Punjab." The learned Judge then proceeds to refer to the instances bearing upon the custom in question, and finds that though the *onus* lay upon the daughter's son to prove that the gift was valid, he had succeeded in discharging it.

In *Nihal* v. *Palla* (2) it was held that a sonless proprietor among the Arains of the Jullandur District was empowered by custom to make a gift of ancestral land to a daughter's son.

In *Sadulla* v. *Husain* (3) it was laid down that among the Arains of the Jullundur District a gift by a sonless proprietor of his entire estate in favour of his daughter is valid in the presence of the donor's nephews.

In *Alla Dia* v. *Nur Bakhsh* (4) it was decided that among Arains of the Jullundur District a gift by a sonless proprietor of the whole of his estate in favour of his daughter's son in the presence of near collaterals was valid by custom.

(1) 57 P. R. 1878.
(2) 62 P. R. 1888.
(3) 2 P. R. 1897.
(4) 83 P. R. 1900.

MIR HAIDAR *v.* MUHAMMAD ALI.

It is urged by the Pleader for the respondents that the above decisions raise a presumption that among the Arains of the Ferozepore District a sonless proprietor has power to make a gift of ancestral property in favour of his daughter, or daughter's son, and that, therefore, the gift in dispute is *prima facie* valid. The entries in the vernacular *Rewaj-i-am* of the Zira *Tahsil* prepared by Mr. Francis (Chapter X, pages 79 and 80) go to show that a sonless proprietor has power to make a gift of a portion of his estate to his daughter by way of dowry or otherwise, and several instances of such gifts by Arains are given under answers to questions Nos. 86 and 87 which have to be read with the answer to question No. 90.

The decision of this Court, reported as *Pir Bakhsh* v. *Isa* (5), strongly supports the respondents' contention. In that case it was held that, according to the custom of the Arains of *Tahsil* Zira in the Ferozepore District, a *khanadamad* may be appointed to succeed to the estate of a sonless proprietor to the exclusion of his brother and nephews. If a *khanadamad* could be so appointed by custom applicable to the Arains, *a fortiori* the daughter whose husband is a *khanadamad* can be appointed an heir, the real intention in all these cases being to benefit the daughter's issue. Furthermore, if the daughter could validly be appointed an heir, her succession can be accelerated by means of a gift in her favour, and that is precisely what has happened in this case.

The respondents' witnesses have given several instances in which an Arain proprietor has made a gift of ancestral property in favour of his daughter. *Musammat* Bhago states that her father, Ilahia, gifted his land to her, her husband being a *khanadamad*. A suit was brought by the collaterals of Ilahia to contest the gift in question, but it was dismissed, both the Courts of first instance and the Appellate Court holding that the gift was valid by custom (see copies of judgments in *Muhammad Baksh* v. *Ilahia*, dated the 3rd December 1907, and the 15th May 1908, respectively). Pir Baksh, witness, mentions five instances in which gifts were made by sonless Arains to their daughters, and none of those gifts was ever contested. Rohela similarly mentions a gift made by one Yusaf, a sonless Arain to his daughter's son. It is said that the reversioners sued to set aside the gift, but the suit was dismissed. This witness also mentions four other gifts to daughters which were made with the consent of the reversioners of the donors concerned.

The appellants' Counsel admits that he is unable to cite one single instance in which a gift by a sonless Arain in favour of his daughter or daughter's son or *khanadamad* was ever set aside on the suit of his reversioners, and he does not dispute that one of the appellants' witnesses is named Rana mentions an instance of a gift having been made by a sonless proprietor belonging to the appellants' family in favour of his daughter, which gift is not shown to have been challenged by any of the donor's reversioners.

For the foregoing reasons, I hold, in agreement with the Courts below, that Hasham was empowerd by custom to make the gift in dispute in favour of his daughter, *Musammat* Jio, and, upholding the decree of the lower Appellate Court, I dismiss this appeal with costs.

Appeal dismissed.

(5) 107 P. R. 1892.

(s. c. 14 P. R. 1911; 44 P. W. R. 1911; 88 P. L. R. 1911.)

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 956 OF 1909.

November 29, 1909.

Present:—Mr. Justice Johnstone.

DR. MIR HAIDAR AND OTHERS—DEFENDANTS—APPELLANTS

versus

MUHAMMAD ALI—PLAINTIFF—RESPONDENT.

Custom—Alienation—Widow inheriting house property from her husband—Right of husband's brother to contest alienation—Sayads of Sialkot City—Muhammadan Law.

The initial presumption in the case of non-agriculturist Sayads dwelling in cities must always be that they follow Muhammadan Law. So where, in defiance of Muhammadan Law, it is found that widows take the whole of their husband's immoveable estate, there is a natural presumption that they do so as life-holders only subject to control by male reversioners.

Muhammad Anwar-ul-Haq v. *Habib-ul-Rahman*, 74 P. R. 1902; *Abdul Hassan* v. *Habibullah*, 18 P. R. 1906, followed.

Among Sayads of Sialkot City, alienations by a widow of house property inherited from her husband are liable to be contested by the husband's brother.

MIR HAIDAR *v.* MUHAMMAD ALI.

Second appeal from the decree of the Divisional Judge, Sialkot Division, dated the 22nd July 1909.

Messrs. *Fazal-i-Husain* and *Muhammad Iqbal*, for the Appellants.

Mr. *Muhammad Taj-ud-din*, for the Respondent.

JUDGMENT.—In this case the sole question left for determination in this second appeal is, whether these Sayads of Sialkot City follow Muhammadan Law or follow any well-defined custom under which alienations by a widow of house property inherited from her husband are liable to be contested by the husband's brother. The issue was first drawn so as to lay on plaintiff the burden of proving that custom governed the case; but on hearing preliminary arguments the first Court changed the *onus* and laid it upon defendants, who were called upon to prove that Muhammadan Law must be looked to for the rule of decision.

In my opinion the *initial* presumption in the case of non-agricultural city-dwelling Sayads must always be that they follow Muhammadan Law.

The question is whether that presumption has been rebutted. I have read the record and heard arguments. It would be idle to pretend that it is proved that in all respects Muhammadan Law has been followed, but it is equally impossible to say that the family has in all respects adopted agricultural custom. As regards Muhammadan Law we have only to consider that both the whole of the landed estate of the late Sher Ali and his house have gone to his widow, defendant No 2, in their entirety, and that in the case of three uncontested alienations by Sayad widows of Sialkot those of 1879, 1885 and 1905, mentioned by Mr. Fazal-i-Husain—the widows similarly seem to have succeeded to the whole of their deceased husbands' effects. These alienations, being uncontested, may be made the basis of an argument that no custom of control of such alienations exists, though, as we shall see, the argument would not be an unassailable one; but they may also be used as showing that succession in these families is not in accordance with the elaborate Muhammadan system of dividing up an estate among all sorts of near relatives in prescribed shares. Again, in some of the precedents set forth in this case we find daughters wholly excluded from inheritance, as indeed happened in the present case.

On the other hand, no clear case has been brought to my notice of control of alienations of immoveable property, and this leaves the question to be decided one of some difficulty. Mr. Taj-ud-din has no difficulty in showing that the four precedents relied upon by Mr. Fazal-i-Husain in argument, namely, judgment of Mr. Lawrence of 11th February 1863, judgment of the Divisional Judge of 7th November 1895, and the two cases of 1900 and 1905, are not of much value. The last was decided on the *dictum* of a sort of arbitrator, who was himself a defendant in the case. The second is hardly in point at all. The third is most like the present case; but neither it nor the first is precisely on all fours with it. In three it was held that the Sayads of Sialkot city followed Muhammadan Law, and in the second we have a similar general *dictum* as to Syads of *Tahsil* Raya. But the first was written at a time when these questions of custom were not understood.

Mr. Taj-ud-din lays special stress on certain observations of Rattigan, J., at page 288 of *Muhammad Anwar-ul-Haq* v. *Habib-ul-Rahman* (1), a ruling I assisted in propounding; but I think the authority most clearly in point here is *Abul Hassan* v. *Habib-ullah* (2), in which Lal Chand, J., and myself pointed out that, where, in defiance of Muhammadan Law, it is found that widows take over the whole of their husbands' immoveable estate, there is a natural presumption that they do so as life holders only subject to control by male reversioners. I fully endorse that *dictum* because it seems to me, that Muhammadan Law being clearly renounced, a custom under which a widow should take all her husband's land and houses as a full owner subject to no control is in this country an unthinkable custom. It is so contrary to general sentiment and practice, that it would have to be strictly proved; that is, it would have to be shown that widows had, in a reasonable number of cases, vindicated this extraordinary position in the face of opposition by near reversioners. Nothing of this kind has been shown here.

Mr. Fazal-i-Husain argued that as no

(1) 74 P. R. 1902
(2) 18 P. R. 1906; 114 P. L. R. 1906.

custom is directly proved of control by reversioners, plaintiff should have sued for possession of his *share* under Muhammadan Law; but the remarks I have just made show that, in my opinion, there is in the present case a presumption in favour of a custom of control, and this amounts to sufficient proof.

For these reasons, I dismiss appeal with costs.

Appeal dismissed.

(s. c. 16 P. R. 1911; 38 P.W R. 1911; 90 P.L.R. 1911.)

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 620 OF 1910.

January 17, 1911.

Present:—Sir Arthur Reid, KT., Chief Judge.

HARNAM SINGH AND OTHERS—PLAINTIFFS—APPELLANTS

versus

LACHMAN SINGH AND OTHERS—DEFENDANTS—RESPONDENTS.

Custom—Alienation—Gift in favour of daughter's son—Kalon Jats *of Shakargarh* Tahsil, *District Gurdaspur.*

Among *Kalon Jats* of Tahsil Shakargarh, District Gurdaspur, an oral gift followed by mutation of ancestral land by a sonless proprietor in favour of his daughter's sons, whose father was his *ghar-jawai* or resident son-in-law, is valid by custom.

Allah Ditta v. *Alla Bakhsh*, 89 P. R. 1900, *Nizam Din* v. *Shahab-ud-Din*, 108 P. R. 1900, *Musammat Lakhan* v. *Rahmat Khan*, 101 P. R. 1895, distinguished.

Second appeal from the decree of the Additional Divisional Judge, Amritsar Division, at Sialkot, dated the 22nd April 1910.

Mr. *Vaughan*, for the Appellants.

JUMGMENT.—I see no reason for interference.

The answering defendants, now respondents, are sons of Surjan Singh and of his wife, the daughter of Rai Singh, a sonless proprietor of the Kalon Jat tribe of Tahsil Shakargarh, District Gurdaspur.

Rai Singh made an oral gift of ancestral land followed by mutation of names to these defendants and the gift has been attacked by his near collaterals. The record contains evidence which has not been shown to be false, that Surjan Singh remained in Rai Singh's house from the date of his marriage. The *Riwaj-i-am* is in favour of the validity of the gift, and I concur with the lower Appellate Court in the conclusion that an oral gift, followed by mutation, fulfils the conditions of the *Riwaj-i-am*.

Answers Nos. 7 and 10, at pages 34 and 35 of Dane's Customary Law of the Gurdaspur District, are also in favour of the validity of the gift, and the *patwari* cited two uncontested instances of similar gifts in the village and *got* of the parties.

Allah Ditta v. *Allah Bakhsh* (1) and *Nizam Din* v. *Shahab-ud-din* (2) do not help the appellants, as they dealt with *Riwaj-i-am* unsupported by instances, and *Musammat Lakhan* v. *Rahmat Khan* (3) dealt with a gift by a Mahomadan Gorewha Rajput of the Jullundur District, opposed to the *Riwaj-i-am* in force.

The oral evidence cited for the appellants to the effect that the custom set up did not exist, and that no such gift had ever been made in the village is, in my opinion, worthless.

The validity of the gift has been established, and I dismiss the appeal under Order XLI, rule 11, of the Code of Civil Procedure.

Appeal dismissed.

(1) 89 P. R. 1900.
(2) 108 P. R. 1900.
(3) 101 P. R. 1895

(s. c. 5 P. R. 1911 Cr.; 91 P. L. R 1911.)

PUNJAB CHIEF COURT.

CRIMINAL APPEAL No. 581 OF 1909.

April 15, 1910.

Present:—Mr. Justice Johnstone and Mr. Justice Shah Din.

ATAYA—CONVICT—APPELLANT

versus

EMPEROR—RESPONDENT.

Confession of one accused, retracted—Admissibility of retracted confession against co-accused—Evidence Act (I of 1872), s. 30.

A retracted confession may be taken into consideration under section 30 of the Evidence Act as against persons tried jointly with the confessing accused for the same offence, but as a general rule such a confession should not be considered as supplying sufficient evidence for the conviction of the co-accused unless it is corroborated by independent testimony in material particulars affecting such co-accused.

Emperor v. *Kehri*, 29 A. 434; A. W. N. (1907) 140; 4 A. L. J. 310; 5 Cr. L. J. 360, followed.

Chet Singh v. *Emperor*, 28 P. W. R. 1907 Cr.; 7 Cr. L. J. 227, referred to.

SAGAR CHANDRA MANDAL *v.* DIGAMBAR MANDAL.

No inflexible rule can be laid down in regard to the weight to be attached to such a confession; the rule must vary in each case with special reference to its particular facts and to the intrinsic value of the confession.

Appeal from the order of the Sessions Judge, Rawalpindi Division, dated the 2nd September 1909.

Mr. *Beni Pershad*, for the Appellant.

Mr. *Mukerji*, for the Respondent.

JUDGMENT.—He (Mr. Mukerji) contends, however, that the missing links in this chain of evidence are supplied by the confession of Ramzan, and he has asked us to take that confession into consideration against Ataya under section 30 of the Evidence Act and to maintain his conviction on that basis. The appellant's Pleader, on the other hand, urges that as Ramzan had retracted his confession, it cannot, and ought not to be taken into consideration against his client under section 30 aforesaid; and he cites the ruling in *Chet Singh* v. *Emperor* (1) in support of his contention. On this point, we agree in the view of the law taken in *Emperor* v. *Kehri* (2), namely, that a retracted confession may be taken into consideration under section 30 of the Evidence Act as against the persons tried jointly with the confessing accused for the same offence, but that, as a general rule, such a confession should not be considered as supplying sufficient evidence for the conviction of the co-accused unless it is corroborated by independent testimony in material particulars affecting such co-accused. The weight to be attached to such a confession, apart from, or taken in conjunction with, corroborative evidence, is, however, a different matter, and no hard and fast rule can be laid down in regard to it; it must vary in each case with special reference to its particular facts and to the intrinsic value of the confession.

In the present case, the confession of Ramzan assigns to Ataya the principal part in the murder of Basula and in almost all the incidents connected with it, and Ramzan himself occupies only a Subordinate position. As we have seen above, the confession is not corroborated by independent testimony in all material particulars so far as Ataya is concerned and it would, therefore, be unsafe, in our opinion, to accept it after its retraction by Ramzan, as sufficient evidence of the guilt of Ataya under section 30 of the Evidence Act.

Appeal accepted.

(1) 28 P. W. R. 1907 Cr.; 7 Cr. L. J. 227.

(2) 29 A. 434; A. W. N. (1907) 140; 4 A. L. J. 310; 5 Cr. L. J. 360.

(s. c. 38 C. 125.)

CALCUTTA HIGH COURT.

CIVIL RULE No. 854 OF 1910.

July 22, 1910.

Present:—Mr. Justice Mookerjee and Mr. Justice Sharfuddin.

SAGAR CHANDRA MANDAL—PLAINTIFF—APPELLANT

versus

DIGAMBAR MANDAL—DEFENDANT—OPPOSITE PARTY.

Decree—Contents of decree—Costs to be stated.

A decree ought to be drawn in due course by the Court deciding a case, and it must show all the costs incurred by both the parties.

Rule against the order of the District Judge of 24-Parganahs, dated January 29th, 1910.

Babu *Prabhachandra Mitra*, for the Petitioner.

Babu *Haricharan Sarkhel*, for the Opposite Party.

JUDGMENT.—This is an application by the appellant in appeal from Original Decree No. 514 of 1907. This appeal was allowed on the 20th August, 1909, by this Court, and we directed that the appellant should recover from the respondent his costs both here and in the Court below. The decree drawn up by this Court showed the costs incurred by the appellant in this Court; and it further declared that the defendant-respondent was to pay to the plaintiff-appellant the costs incurred by him in the lower Court with interest thereon at the rate of six per cent. per annum from the date of the decree of the lower Court until realization. The plaintiff found that no decree had been drawn up by the Court below in which the costs incurred by him were entered. He, thereupon, made an application to the learned District Judge and prayed that a decree might be drawn and the amount of costs incurred by him entered therein. The learned District Judge refused that application and recorded the following order: "I think the High Court decree should show the costs and no decree can be prepared here. The application to amend the decree must be filed in the

High Court." This order is wholly erroneous. The High Court decree cannot show the costs incurred by the parties in the Court of first instance; nor can this Court undertake to calculate the amount of costs incurred by the parties in the subordinate Court. The District Judge in the first instance committed an error in not drawing up a decree. His judgment shows that he dismissed the application for probate with costs and assessed the Pleader's fee at Rs. 48; a decree ought to have been drawn up in due course showing all the costs incurred by both the parties. When this omission was brought to his notice by the successful appellant, he held that the application must be filed in this Court. We are unable to appreciate upon what conceivable principle such a view can be adopted.

The result, therefore, is that this Rule must be made absolute, and the order of the Court below dated the 29th January 1910, discharged. The District Judge must now take up the application presented to him on the 5th January 1910, and draw up a decree showing the costs incurred by the parties in the Court below. There will be no order as to the costs of this Rule, as it has not been opposed and the opposite party does not appear to be responsible in any way for the erroneous order made by the District Judge.

Rule made absolute.

(s. c. 38 C. 127)

CALCUTTA HIGH COURT.

REGULAR APPEAL FROM ORIGINAL CIVIL No. 20 OF 1910.

July 26, 1910.

Present:—Sir Lawrence Jenkins, KT., Chief Justice, and Mr. Justice Woodroffe.

ANGLO-INDIA JUTE MILLS Co.—DEFENDANTS—APPELLANTS

versus

OMADEMULL—PLAINTIFF—RESPONDENT.

Delivery order—Jute trade in Calcutta—Custom—Title—Unpaid vendor—Estoppel—Contract Act (IX of 1872), s. 108—Transfer of Property Act (IV of 1882), s. 137.

In India there is now statutory recognition of a delivery order as a document of title (see section 108 of the Contract Act and section 137 of the Transfer of Property Act) and under it the transferee acquires a title to the goods to which it relates.

These delivery orders pass from hand to hand by endorsement and are sold and dealt with in the market: and according to the invariable course of dealing in the Calcutta Jute Trade, delivery orders are only issued on cash payment and are dealt with in the market as absolutely representing the goods to which they relate.

On March 1st, 1909, the defendant sold certain Hessian cloth to *J.*, on condition that payments were to be made in cash in exchange for delivery orders. On March 2nd, three delivery orders were issued by the defendant to *J.*, by whom they were pledged on March 4th to the plaintiff. The plaintiff subsequently purchased the delivery orders from *J.*, who on March 4th had given a cheque in payment of the goods to the defendant. On March 8th, the cheque was dishonoured. Then the plaintiff demanded the goods from the defendant who refused to give delivery of them to the plaintiff. This action was then brought for delivery of the goods or their value or damages for conversion:

Held, that the defendant intentionally caused the plaintiff to believe that the cash payable in respect of the goods to which the delivery orders related had in fact been paid, that the plaintiff acted on that belief, and that the defendant cannot be allowed to deny that such cash was paid and, therefore, cannot claim to be entitled to a lien as against the plaintiff.

Appeal from Fletcher, J., who gave judgment for the plaintiffs for Rs. 7,220 and costs on scale No. 2.

The defendant Company appealed.

Messrs. *Zorab* and *Buckland*, for the Appellants.

Mr. *B. C. Mitter* (with him Mr. *Sircar* and Mr. *Langford James*), for the Respondent.

JUDGMENT.

JENKINS, C. J.—This appeal arises out of a suit brought by the firm of Chandermull Serahmull and one Luchminarain Kanoria against the Anglo-India Jute Mill Company Ld., for delivery of 1,00,000 yards of Hessian cloth and damages, or the value of the goods with damages, or for Rs. 7,750, as damages for the conversion of the goods.

A decree has been passed in the plaintiff's favour by Fletcher, J., and from this the defendant Company have appealed.

The facts are these: on the 1st March 1909 the defendant Company sold 3,00,000 yards of Hessian cloth and in the sold note sent to them by the brokers Messers. Janki Dass & Co., the sale was expressed to be to the broker's principals. Under the incorporated conditions payments were to be made in cash in exchange for Delivery orders, or on certain other specified terms which have no application in this case (paragraph 3) and delivery of the goods was to be given and taken on the terms "Ready payment against *pucca* Delivery order." Three Delivery orders Nos. M 1/50, M 1/51, M 1/52

bearing the date the 2nd March 1909 were issued by the defendant Company to Messrs. Janki Dass & Co. by whom they were pledged to the firm of Chandramull to secure re-payment with interest of the sum of Rs. 18,000 then advanced by the plaintiff firm to Messrs. Janki Dass & Co. The plaintiff Luchminarain Kanoria was also interested in the advance. Subsequently, an agreement was made between the plaintiffs and Messrs. Janki Dass & Co. under which for valuable consideration the plaintiffs gave up the Delivery orders Nos. M 1/51 and M 1/52 and obtained from Messrs. Janki Dass & Co. an assignment of their equity of redemption in Delivery order No. M 1/50 and the 1,00,000 yards of Hessian cloth represented thereby. It is on this Delivery order No. M 1/50 that the plaintiffs' present claim is based. The defendant Company resist the plaintiffs' claim on the ground that they are unpaid sellers of the goods, and that they have a lien on them so long as they remain in their possession, and the price or any part of it remains unpaid.

So far, I have merely set out the broad outline of the case; the details still have to be filled in.

The plaintiffs' version is that on the 3rd March the plaintiff Luchminarain met Nando Kishore, a partner in Messrs. Janki Dass & Co., near the office of the defendant Company; that he was asked by Nando Kishore to make an advance on three Delivery orders of the defendant Company to which he assented; that he took the three Delivery orders being those with which we are concerned in this suit, to the office of the defendant Company, where he showed them to Mr. Young, who, in reply to his inquiry whether the Delivery orders were correct or in order assured him they were all right. Luchminarain says that he then came out of the office and returned the Delivery orders to Nando Kishore telling him that he would get money the following day from Chandramull Serahmull, and that on that same day he went to that firm and informed them that Rs. 18,000 would have to be paid the following day to Janki Dass & Co. on *pucca* Delivery orders.

The whole of this incident is denied by the defendant Company, but Fletcher, J., accepted it as true, and I think we ought to accept his view as correct, and more especially as it is uncontradicted though it was within the power of the defendant Company to have called evidence to show that no such incident occurred. It may be that Mr. Young's absence from India, prevented his being called, but it obviously was within the defendant Company's power to call evidence from their own office that the Delivery orders were not then issued, if, as their Counsel has argued that, that was the fact, and they could have called Nando Kishore to deny the visit to the defendant Company's office on the 3rd with the Delivery orders, if that story was untrue. Counsel for the defendant Company suggested in explanation of this omission that relations with Nando Kishore were strained; but for this suggestion there is no foundation in the evidence; on the contrary, it appears from the judgment of Fletcher, J., and it is not disputed that members of the firm of Janki Dass & Co. were sitting behind Counsel for the defendant Company and produced certain documents in the course of the trial and it was further admitted that the defendant Company opened a ledger account of Janki Dass & Co. since August 1909, though they had not got one on the previous 4th March. On the 4th the Delivery orders were handed to the plaintiffs and the sum of Rs. 18,000 was advanced and was paid into Janki Dass & Co.'s account with the Bengal National Bank.

On the same date Messrs. Janki Dass & Co. handed the defendant Company a cheque dated the 5th, but this post-dated cheque was in fact not paid into the defendant Company's bank till the 8th of March when it was dishonoured. The defendant Company have given no evidence in explanation of this delay, but the plaintiffs show from Janki Dass & Co.'s Pass-book, which was by consent admitted in evidence before Fletcher, J., that though the Rs. 18,000 received from the plaintiffs did not actually go to pay what was payable on the post-dated cheque, almost the whole of it went to satisfy other claim of the defendant Company.

The delivery order in suit was in these terms:—

"Please Deliver to Messrs. Janki Dass & Co.'s Principals or order 50 Bs.=100,000 yards Hessian Cloth 40 in. 7½ oz. 9 by 9 each 2,000 yards. (One hundred thousand yards only) ready shipment Rs. 113."

This Delivery order was indorsed to the plaintiffs by way of pledge on the 4th of March and this the plaintiffs maintain entitles them in the circumstances to the decree Fletcher, J., has passed in their favour. The defendant Company, on the other hand, urge that the Delivery order was not a document of title, that it was not negotiable, and that no goods passed. But to this the plaintiffs reply, (*a*) that this Delivery order did pass by indorsement, (*b*) that the issue of the Delivery order in the circumstances was a representation on which the plaintiffs acted, that the cash payable in respect of the goods to which it referred had been paid, and (*c*) that it is not open to the defendants to contend that the property in the goods had not passed or to place reliance on their not having passed if that was the fact.

First, then, I will deal with the question whether these Delivery orders pass by indorsement. It is to be noticed that the Delivery order was in favour of Messrs. Janki Dass & Co.'s principals or order, so that the document itself points to its being transferable by indorsement.

But beyond this there is ample evidence that these Delivery orders pass from hand to hand by indorsement, and that as Fletcher, J., holds they are sold and dealt with in the market. On the other hand, there is not a word in the evidence to support Mr. Zorab's argument that for their transfer a document of assignment is necessary. That the Delivery order on which this suit is based was duly indorsed in the plaintiffs' favour on the 4th of March has not been disputed.

I next have to consider whether the issue of the Delivery order amounted to a representation that payment had been made to the defendant Company for the goods to which it related.

On this point we start with the emphatic evidence of the defendant Company's witness, Mr. Tyrel, which is recorded as follows:—

"*Q.* There is not much tick credit in this trade on either side?

"*A.* None whatever.

"*Q.* You don't part with your documents without the cash and he wants his documents representing the goods before he pays?

"*A.* Yes.

"*Q.* These Delivery orders are considered a good tender under a contract?

"*A.* Oh, yes.

"*Q.* It is for the purpose of really making a tender that you make them out?

"*A.* Yes we send them round with a sircar as a rule."

I need not refer to the plaintiffs' evidence in detail; it will suffice to say that it fully supports the position that, according to the invariable course of dealing in the Calcutta Jute Trade, Delivery orders are only issued on cash payment, and that they are dealt with in the market as absolutely representing the goods to which they relate. This is borne out by the contract in this case, which specifically provides that "payments are to be made in cash in exchange for Delivery orders on sellers," and contain the stipulation "Ready payment against *pucca* Delivery order." And in this connection it is worthy of notice that the Delivery order in suit which is a *pucca* Delivery order embodies the term "Ready shipment."

Then we have the interview with Mr. Young, which I have already held to be proved.

An attempt has been made to minimise its effect, but it appears to me to be a matter of plain common sense that, as between business men, Mr. Young's reply would be regarded as an assurance that the Delivery orders could be safely dealt with in the ordinary course of business, and I have been in no way impressed with the analytical argument to which we have been subjected by Counsel for the defendant Company on this point. Mr. Young could not have honestly replied as he did—and I absolutely decline to impute dishonesty to him—if he gave his reply with the mental reservation that if Luchminarain dealt with the Delivery orders for value he might find he took nothing, because Janki Dass & Co. had not paid for the goods. And after all why should these Delivery orders have been issued as they were, unless it was contemplated that Messrs. Janki Dass & Co., would at once deal with them for value either by way of sale or pledge? To this the defendant Company have vouchsafed no answer. Now, here again, I would for a moment re-call the facts. These Delivery orders bearing date the 2nd of March, were issued by the defendant Company to Janki Dass & Co., not later than the 3rd of March, and were on that day placed in Luchminarain's hands and shown by him to Mr. Young. On the 4th

after Luchminarain had promised to make an advance on them the defendant Company take a post-dated cheque from Janki Dass & Co., in respect of the three Delivery orders including that in suit. Though this cheque is dated the 5th of March, it in fact was not paid until the 8th when it was dishonoured. In the meantime, the defendant Company had paid in on the 4th two post-dated cheques of the 3rd which they had received from Janki Dass & Co., in respect of other transactions. These were honoured and it is admitted by the defendant Company, as their Bank Pass-book makes plain, that Rs. 15,000 odd of Rs. 18,000 advanced by the plaintiffs went towards the post-dated cheques so paid in.

Now, there is not a word of explanation from the defendant Company's side as to why the Delivery orders in suit should have been issued on the 3rd, or as to why these post-dated cheques were taken; it is obvious that the defendant Company have had the benefit of the money advanced by the plaintiffs, and, if their contention is to prevail, they will not only have had the benefit of his advance, but also of the goods on which the advance was made in consequence of their conduct. The bare fact that the plaintiffs' money has come to them may not have a direct bearing on the legal position, but it undoubtedly lends colour of probability to the contention that the Delivery orders were handed over to Janki Dass & Co., to enable them to raise money on them, as in fact they did to the advantage of the defendant Company. And this gains the greater force from the fact that no one connected with the defendant Company has ventured into the witness box to explain how the Delivery orders came to be issued on the 3rd, or why post-dated cheques were taken, or to repel the argument that they acted as they did to enable Janki Dass & Co., to raise money on the Delivery orders, or to deny that the issue of Delivery orders has the implication, and conveys to those engaged in this trade the assurance for which the plaintiffs contend. The conclusion, then, to which I come is that the defendant Company intentionally caused or permitted the plaintiffs to believe that the cash payable in respect of the goods to which the Delivery order related had in fact been paid, and that the plaintiffs acted on that belief, and I, therefore, hold that the defendant Company cannot in this suit be allowed to deny that such cash was paid, and, therefore, they cannot claim to be entitled to a lien as against the plaintiffs. But then it is argued for the defendant Company that the plaintiffs cannot succeed, as the property in the goods did not pass since there was no appropriation of them to this Delivery order; and it is contended that no reliance can be placed on the 1st exception to section 108 of the Contract Act, inasmuch as, in the circumstances, the Delivery order was a document of title. It is difficult to see how the defendant Company can successfully rely on this plea in view of my conclusion as to the lien claimed by them; but, however, that may be, I think it must fail.

In India there is now statutory recognition of a Delivery order as a document of title (see section 108 of the Contract Act and section 137 of the Transfer of Property Act) and under it the transferee acquires a title to the goods to which it relates.

It is, however, urged, that, in this case, it cannot be regarded as a document of title, seeing that the goods to which it relates were not ascertained. But in fact the defendant Company have adduced no evidence to prove that the goods had not been ascertained, though this was a fact specially within their knowledge (section 106, Evidence Act). And, apart from this, the defendant Company cannot be heard to advance this plea, and for substantially the same reasons as preclude them from showing cash was not paid.

They do not suggest that there were not goods applicable to the Delivery order; they only say they have not been ascertained. But having regard to the terms of the Delivery order, the known course of dealing in this market, Mr. Young's representation, and their own conduct, the defendant Company must be taken to have appropriated goods of the required quantity and description to this Delivery order, and they cannot now be heard to deny that they held these goods for the plaintiffs. And it must be borne in mind that we have not to consider whether property passed as between the original sellers and buyers, but whether, in the events that have happened the sellers can assert this against the plaintiffs who have acted on the faith of

the seller's representation that no lien existed, and that they held goods to answer the Delivery order. In my opinion the defendant Company's contention on this head must also fail, for, in the circumstances, the defendant Company have represented that the Delivery order would pass and confer a good title, and they put it in the power of Messrs. Janki Dass & Co., to indorse the Delivery order with this representation to the plaintiffs, who, dealing in good faith and for value, were induced to alter their position on the faith of the representation so made. In these circumstances the defendant Company cannot be allowed to defeat the right which the plaintiffs have thus acquired: *Goodwin* v. *Roberts* (1). Nothing has been said against the amount of damages awarded by Fletcher, J., and they must be accepted as correct. His decree, therefore, must be confirmed and this appeal dismissed with costs.

WOODROFFE, J.—I agree.

Appeal dismissed.

Attorneys for the Appellant Company: *Sanderson & Co.*

Attorneys for the Respondent: *Pugh & Co.*

(1) (1876) A. C. 476; 45 L. J. Ex. 748; 55 L. T. 179; 24 W. R. 987.

(s. c. 8 A. L. J. 356.)

ALLAHABAD HIGH COURT.

EXECUTION FIRST CIVIL APPEAL NO. 276 OF 1910.

February 16, 1911.

Present:—Sir John Stanley, KT., Chief Justice, and Mr. Justice Banerji.

MUHAMMAD AHMADULLAH KHAN—AUCTION-PURCHASER—APPELLANT

versus

AHAMAD SAID KHAN AND ANOTHER—DECREE-HOLDERS—RESPONDENTS.

Civil Procedure Code (*Act V of* 1908), *O. XXI, r.* 89—*Sale in execution of simple money decree—Application to set aside the sale by the mortgagee decree-holder—Person holding an interest in property—Competency to make the application.*

A. held two mortgages against *R.* and obtained a decree for sale of certain property. He subsequently obtained a simple money decree against the same judgment-debtor. In execution of his simple money decree he brought the mortgaged property to sale which was purchased by a stranger. *A.* then applied under Order XXI, rule 89, of the Civil Procedure Code, 1908, to have the sale set aside:

Held, that although ordinarily the mortgagee of the property sold was a person who had an interest sufficient to enable him to make an application under Order XXI, rule 89, yet in the case where the holder of the decree for money in execution of which the property was sold, was also the holder of the mortgages, he was not competent to make the application. He would be deemed to have caused the property to be sold either free from the mortgages or subject to the mortgages. If it was sold free from the mortgages, he must be deemed to have abandoned his mortgages, and in that case he had no interest in the property sold. If he caused the property to be sold subject to the mortgages, the sale only related to the interest of the mortgagor in which the mortgagee had no interest.

Execution first appeal from a decree of the Subordinate Judge of Aligarh.

Mr. *Ghulam Mujtaba*, for the Appellant.

Mr. *Muhammad Ishaq*, for the Respondents.

JUDGMENT.—This is an appeal from an order setting aside an auction sale upon an application made under Order XXI, rule 89, of the Code of Civil Procedure. The facts are these,—The respondent, Ahmad Said Khan, obtained a decree against the judgment-debtor, Rafat Khan, on the 8th of October 1909, for sale upon two mortgages. Subsequently, in November 1909, he obtained another decree against the same judgment-debtor but this was a simple decree for money. In execution of this latter decree, he caused *Mauza* Neali, one of the villages comprised in the mortgages upon which he had obtained the earlier decree, to be sold by auction. It was purchased by the appellant, Muhammad Ahmadullah Khan. Thereupon, the decree-holder, Ahmad Said Khan, applied under Order XXI, rule 89, to have the sale set aside and made the deposit required by the section. This application has been granted by the Court below, which was of opinion that the decree-holder in his capacity as mortgagee was a person who held an interest in the property sold within the meaning of rule 89. That rule empowers a person who is the owner of immoveable property which has been sold in execution of a decree, or holds an interest in such property by virtue of title acquired before the sale to make an application to have the sale set aside. It is not alleged on behalf of Ahmad Said Khan that he is the owner of the property sold, but he contends that, as mortgagee of the said property, he holds an interest therein by virtue of which he is competent to make the application. No doubt, ordinarily, a mortgagee of the property sold is a person who has an interest, and, in view of the provisions of rule 89, he would be competent to make an application, but we have to consider the facts of this particular case. Here the holder of the decree for money was

also the holder of two mortgages in respect of the property of which he sought to have a sale. He caused the property to be sold either free from the mortgages, or subject to the mortgages. If it was sold free from the mortgages, he must be deemed to have abandoned his mortgages, and in that case he has no interest in the property sold. If he caused the property to be sold subject to the mortgages, the sale only related to the interest of the mortgagor, that is, his right of redemption. In this right of redemption the mortgagee has no interest. Therefore, from either point of view, the decree-holder in this case has no interest in the property sold such as would entitle him to make an application under rule 89. We think the judgment of the Court below to the contrary is erroneous. We accordingly allow the appeal, set aside the order of the Court below and dismiss the application of the respondent, Ahmad Said Khan, to have the sale set aside with costs in both Courts.

Appeal allowed.

(s. c. 4 Bur. L. T. 117.)

LOWER BURMA CHIEF COURT.

SPECIAL SECOND CIVIL APPEAL No. 127 OF 1908.

February 14, 1911.

Present:—Mr. Justice Twomey.

ARUNACHALLAM CHETTY AND OTHERS —APPELLANTS

versus

VEERAPPA CHETTY AND OTHERS—RESPONDENTS.

Jurisdiction—Civil Court's power to grant a mortgage-decree in respect of land over which no person has a right created by Government grant or a landholder's right—Lower Burma Land and Revenue Act (II of 1876), ss. 55 (b) and 56.

A suit by a mortgagee for a decree for the sale of land, over which no right has been created by a Government grant or a landholder's certificate, is barred by section 56 of the Lower Burma Land and Revenue Act read with section 55, proviso (*b*).

If a mortgagee of land, held under section 19 of the Land and Revenue Act and Chapter IX of the Revenue Rules, wishes to enforce his mortgage, his remedy is to apply to the Revenue Authorities. All that the Civil Court can give is a money decree.

Appeal against the decree of the Divisional Court of Tennaserim in Appeal No. 26 of 1908, reversing the judgment and decree of the District Court of Thaton in Suit No. 23 of 1906.

Mr. *Agabeg*, for the Appellants.

Mr. *Sivaya*, for the Respondents.

JUDGMENT.—The decree as framed by the District Court clearly affected the respondents Nos. 1 to 4, *viz.*, the firm V. R. P. P. L., and they were, therefore, competent to appeal. It may be that the Court did not intend to damnify them in any way and that they might have obtained all that they wanted by petitioning the Court to amend the decree. But, as the decree made them jointly responsible, I think they were at liberty to join with the 5th respondent Pa Ngon in moving the Court of appeal.

The further and the main question raised in this case is, whether a Civil Court can grant a mortgage-decree in respect of land over which no person has a right created by a Government grant or lease or a landholder's right. The Divisional Court has held that such a suit is barred by section 56 of the Lower Burma Land and Revenue Act read with section 55 proviso (*b*). I concur in this opinion, and the ruling in *Edumba Tavan* v. *Sawamy* (1), cited by the Sub-Divisional Judge, is no authority for the contrary opinion. That was a suit to recover money paid as the price of land and the Civil Court was not called upon to decide any such question as is covered by section 55 proviso (*b*). I think it is clear that, in granting a decree for the sale of land, a Court takes upon itself to decide by means of a judicial sale who is to occupy the land, and to do this is to contravene the provisions above mentioned. It seems to me that a mortgagee of land, held under section 10 of the Land and Revenue Act, and Chapter IX of the Revenue Rules, can only apply to the Revenue authorities if he wants to enforce his mortgage. All that the Civil Court can give him is a money decree, and the decree in the present case does order the mortgagor to pay the money due by them.

It may be remarked that the auction-sale by which the 5th respondent obtained the land now in question appears to be invalid for the same reasons as the mortgage-decree against the land. The Township Court, Kyaikto, had no jurisdiction to attach and sell the land in execution of the decree of respondents Nos. 1 to 4. But in this appeal, I am not concerned with the auction-sale. Even if the sale were annulled, the appellants would be in no better position for enforcing their mortgage in the Civil Court.

The appeal is dismissed with costs.

Appeal dismissed.

(1) L. B. P. J. 455.

KRISHNA DAS *v.* HARI CHARAN.

CALCUTTA HIGH COURT.
CIVIL RULE No. 4933 OF 1910.
April 7, 1911.

Present:—Mr. Justice Mookerjee and Mr. Justice Caspersz.

KRISHNA DAS LAHA—DEFENDANT—PETITIONER

versus

HARI CHARAN BANERJEE—PLAINTIFF—OPPOSITE PARTY.

Valuation of suit—Suit for declaration of title and injunction to restrain defendant from collecting rent—Whether plaintiff entitled to value suit arbitrarily—Value of property to be value of relief—Court Fees Act (VII of 1870), s. 7, sub-s. (4), clauses (a) and (d).

The plaintiff sued in the Court of a Munsif for a declaration of title and for an injunction restraining the defendant from collecting rent from the cultivating *raiyats*, and valued the reliefs claimed at Rs. 500. The defendant objected that the value of the property in dispute was Rs. 5,000 and that the suit was not maintainable in the Munsif's Court:

Held, that, in substance the plaintiff will obtain possession of the property, as landlord of the cultivating *raiyats*, and that the value of the relief sought is the value of the property in dispute.

Rule against the decision of the Sub-Judge of Khulna, dated September 13th, 1910, reversing that of the Munsif of Satkhira, dated September 14th, 1909.

Mr. *Sinha*, Counsel, and Babus *Debendra Nath Ghose*, *Narendra Chandra Bose* and *Charu Chandra Biswas*, for the Petitioner.

Babu *Hara Chandra Chakravarti*, for the Opposite Party.

JUDGMENT.—The substantial question of law which calls for decision in this Rule is, whether the suit as framed was cognisable in the Court of the Munsif or in that of the Subordinate Judge. The plaintiff alleges that he is the owner of the property in dispute and that he is entitled to collect rent from the cultivating *raiyats* at specified rates. His grievance is that in proceedings under Chapter X of the Bengal Tenancy Act some of the defendants have got themselves registered as the persons entitled to collect rent from the cultivating *raiyats*. He, therefore, prays for declaration of his title and for an injunction to restrain the defendants from collecting rent from the cultivating *raiyats*. He describes his suit as one for declaration of title with consequential relief and values the reliefs claimed at Rs. 500. The defendants object that the value of the property in dispute is at least Rs. 5,000 and that the suit is not maintainable in the Court of the Munsif. Upon these pleadings, the Munsif took evidence upon the question of the value of the property and came to the conclusion that it was worth from Rs. 4,000 to Rs. 5,000. In this view, he held that he had no jurisdiction to try the suit and returned the plaint for presentation to the proper Court. The plaintiff then appealed to the Subordinate Judge and contended that under section 7, sub-section (4), clauses (*a*) and (*d*) of the Court Fees Act, 1870, he was entitled to value the relief sought at any figure he chose, and that Court-fees had to be paid upon such amount which also determined the jurisdiction of the Court under section 5 of the Suits Valuation Act, 1887. The learned Subordinate Judge gave affect to this contention and held, upon the authority of the decision of this Court in the case of *Hari Bankar Dutt* v. *Kali Kumar Patru* (1), that the Court as well as the defendants were bound to accept the valuation arbitrarily fixed by the plaintiff; in other words, that whatever the real value of the subject-matter in controversy might be the Court had no jurisdiction to adjudicate upon the question of the just and proper valuation of the suit. We are now invited by the defendants to hold that this order is erroneous. In our opinion, there is no room for serious controversy that the order cannot be supported.

In the first place, as was pointed out by this Court in the case of *Umatul Batul* v. *Nanji Kuar* (2), upon a true construction of section 7 of the Court Fees Act and a consideration of the history of the Legislation on the subject, the proposition cannot possibly be maintained that the plaintiff is entitled to fix arbitrarily the value of the relief claimed by him. The learned Vakil for the plaintiff is not prepared to question the reasonableness of this view, but he places reliance upon the decision of this Court in the case of *Hari Sankar Dutt* v. *Kali Kumar Patru* (1) and presses for a reference of the question to a Full Bench for decision. It is not necessary, in our opinion, to adopt the course suggested, because the facts of the litigation in *Hari Sankar Dutt* v. *Kali Kumar Patru* (1) were very peculiar, and till another case arises, of precisely the same description, the consideration of the question, whether the view adopted in that case can be supported on principle, may be deferred. But it is

(1) 32 C. 734; 9 C. W. N. 690.
(2) 6 C. L. J. 427; 11 C. W. N. 507.

worthy of note that the case mentioned seems to stand by itself and cannot be reconciled with the earlier decision of this Court in *Boidya Nath Adya* v. *Makhanlal Adya* (3). It cannot be disputed for a moment that if the view suggested on behalf of the plaintiff is accepted, questions in controversy relating to property of considerable value may be tried in a Court in which the Legislature never intended that matters of that description should be litigated. To adopt to this case the language used by their Lordships of the Judicial Committee in *Run Bahadur Singh* v. *Lucho Koer* (4) if the construction of section 7 of the Court Fees Act suggested by the plaintiff were adopted, the lowest Court in India might determine finally the title to any property in the Empire. The matter, it may be observed, is not one of form but of substance. If the suit is tried in a Court of competent jurisdiction (in this case the Court of the Subordinate Judge) a first appeal might lie to this Court and possibly an appeal to His Majesty in Council. On the other hand, if the suit is tried in the Court of the Munsif, an appeal would lie to the District Judge and only a second appeal to this Court in which questions of fact could not be investigated. We, therefore, adhere to the view taken in the case of *Umatul Batul* v. *Nanji Kuar* (2) as well-founded on first principle and justified by the plain construction of the Act as also the history of the Legislation on the subject.

We may add that in the case before us, the plaintiff, althought he nominally seeks for a declaration of title and for an injunction, essentially asks for recovery of possession. At any rate, if the plaintiff succeeds, the obvious result will follow that the defendant will no longer be in a position, as against the plaintiff, to collect rent from the cultivating *raiyat*. In substance, therefore, the plaintiff will obtain possession of the property as landlord of the cultivating *raiyats* whereas under the decision of the Settlement Officer, such *raiyat* belongs to the defendants. In a case of this description, the value of the relief sought is manifestly the value of the property in dispute. We are supported in this conclusion by the judgment of Muthusami Ayyar and Wilkinson, JJ., in *Ganapati* v. *Chathu* (5), which was accepted by Ayyar and Park, JJ., in *Ibrayan Kunhi* v. *Komamutti Koya* (6). We, therefore, entertain no doubt whatever that the order of the Subordinate Judge is erroneous and that its effect is to confer jurisdiction upon a Court which is not competent to try this suit.

The result is that this rule is made absolute, the order of the Subordinate Judge discharged and that of the Original Court restored. The petitioners will have their costs both here and before the Subordinate Judge. We asses the hearing fee in this Court at three gold *mohurs*.

Rule made absolut.

(3) 17 C. 680.
(4) 11 C. 331; 12 I. A. 23.
(5) 12 M. 223.
(6) 15 M. 501.

(s. c. 7 N. L. R. 67.)

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 793 OF 1910.

March 28, 1911.

Present:—Mr. Drake-Brockman, J. C.

PARASHRAM—APPELLANT

versus

LIKHAN RESPONDENT.

Limitation Act (IX of 1908), ss. 5, 12—Appeal filed without copy of decree—Copy of judgment obtained first—Copy of decree applied for after expiry of ordinary period of limitation Exclusion of time taken in obtaining copy of decree—Time requisite for obtaining copy—Sufficient cause.

In order that a memorandum of appeal may be a good memorandum of appeal in law a copy of the decree appealed against must be filed with it.

Musammat Narbadi v. *Musammat Gajri*, 9 C. P. L. R. 109; *Akbar Ali* v. *Ramchand*, 53 P. R. 1887; *Bhawani Prasad* v. *Kallu*, 17 A. 537 at 553; *Khirode Sundari Debi* v. *Jnanendar Nath*, 6 C. W. N. 283 at 286, followed.

The Appellate Court may dispense with the copy of a judgment but a copy of the decree is indispensable. The time requisite for obtaining a copy of the decree appealed from does not ordinarily begin till an application for the copy is made.

Bechi v. *Ahsanullah Khan*, 12 A. 461, followed.

Where, however, a copy of the judgment alone is applied for and obtained before expiry of the scheduled period of limitation prescribed for an appeal, and an application is made after the expiry of that period for a copy of the decree, the appellant is not entitled to exclude the periods occupied in preparing both these copies, unless some explanation to the satisfaction of the Court is forthcoming why a copy of the decree was not applied for with the judgment.

Mohmud Siyadat-un-nissa v. *Muhammad*, 19 A. 342, relied upon.

Silamban Chetty v. *Ramanadham*, 21 M. L. J. 152; 4 Ind. Cas. 301; 9 M. L. T. 29; 1 M. W. N. 114; 33 M. 256, distinguished.

PARASHRAM *v.* LIKHAN.

A decree was passed on 21st July 1910, and a copy of the judgment only was applied for by post on 14th September and despatched on the 26th *idem*. The memorandum of appeal was presented to the Judicial Commissioner along with the copy of the judgment on 31st October, the appellant's Counsel intimating that he proposed to file later a copy of the decree appealed against. The copy of the decree was applied for on 28th October, was ready on the 12th November but was not actually delivered till 14th December 1910. The copy of the decree was actually filed in the Appellate Court on 15th December. The delay in delivering the copy of the decree was due to the fact that the appellant did not attend the copying office with the receipt It was also explained on behalf of the appellant that a copy of the decree was not applied for with the judgment as it was not known that a copy of the decree was required to make the memorandum of appeal valid:

Held, (1) that the memorandum of appeal should be considered to have actually been filed on the 15th December;

(2) that the time occupied in obtaininga copy of the decree could not be excluded in computing the period of limitation;

(3) that the delay in obtaining and filing a copy of the decree had not been sufficiently explained.

Appeal against the decree of the District Judge, Bhandara, dated the 19th July 1910, confirming the decree of Mr. Laxmi Narayan, Subordinate Judge, Balaghat, dated the 10th February 1910.

Rao Bahadur *V. R. Pandit*, for the Appellant.

Mr. *M. M. Mulna*, for the Respondent.

JUDGMENT.—This is an appeal from a decree of the District Judge, Bhandara, which bears date the 19th July 1910 and was actually signed on the 21st *idem*. Copy of the District Judge's judgment only was applied for by post on the 14th September and despatched on the 26th *idem*, so that the time requisite for obtaining this copy was 13 days. No copy of the District Judge's decree was applied for till the 28th October, but the memorandum of appeal to this Court was presented along with the copy of his judgment on the 31st *idem*, the appellant's Counsel intimating that he proposed to file later a copy of the decree appealed from. Batten, O. J. C., admitted the appeal "subject to the question of its being admissible without a copy of decree".

The copy applied for on the 28th October was ready on the 12th November but was not actually delivered till the 14th December. A detailed explanation of the delay in taking delivery has been put in by the appellant and supported by an affidavit. The copy was actually filed in this Court on the 15th December and I am asked to accept the memorandum of appeal as if it had been filed with this belated copy on the 15th December. Considered altogether apart from section 12 of the Indian Limitation Act, 1908, the period of limitation prescribed for this appeal expired on the 17th October.

The appellant cannot claim for himself a more advantageous position than if he had actually filed his memorandum with both the copies required by law on the 15th December. For till that date there was in fact no legal memorandum in existence: see *Musammat Narbadi* v *Musammat Gajri* (1), *Akbar Ali* v. *Ramchand* (2), *Bhawani Prasad* v. *Kallu* (3) and *Khirode Sundari Debi* v. *Jnanendra Nath* (4). Now, assuming that all the period from the 28th October to the 14th December could be excluded under section 12 (3) of the Indian Limitation Act, 1908, in computing the period of limitation prescribed for this appeal, the memorandum might be regarded as presented on the 88th (149 - 13 48) day. The contention for the appellant is that the right of appeal was subsisting on the 28th October when the application for copy of the decree was made, and that consequently the exclusion sanctioned by section 12 (3) aforesaid is claimable. This contention finds some support in *Mohmud Siyadat-un-nissa* v. *Muhammad* (5), *Tukaram Gopal* v. *Pandurang* (6), *Fandharinath* v. *Shankar* (7) and *Venkata Rao* v. *Venkatachalam Chetty* (8). In none of these, however, was any copy which the law requires to be filed with the memorandum of appeal applied for after the expiry of the period allowed by the limitation schedule and extended by section 5, Indian Limitation Act, 1877. In the two Bombay cases no copy of judgment seems to have been applied for, and in the Allahabad case copies of the decree and judgment were applied for together on the very day the period prescribed by the limitation schedule read with the first paragraph of section 5 of the Limitation Act ended. In *Mohmud Siyadat-un-nissa* v. *Muhammad* (5) it was said,—

"There can be no doubt that, if the time within which an appeal may under the law of limitation be presented is allowed to expire and the decree to become final, the subsequent

(1) 9 C. P. L. R. 109. (2) 53 P. R. 1887.
(3) 17 A. 537 at p. 553.
(4) 6 C. W. N. 283 at p 286. (5) 19 A. 342.
(6) 25 B 584. (7) 25 B. 585.
(8) 28 M. 452; 15 M. L. J. 109.

presentation of an application for copies of the decree and judgment cannot entitle the appellant to prefer an appeal by excluding from computation the time requisite for obtaining copies."

The soundness of this *dictum* is demonstrable arithmetically; for if the period of limitation prescribed for an appeal is 90 days and neither of the necessary copies is applied for till the 91st day, deduction of the time required for obtaining the copies could not possibly reduce the period between the date of the decree and the presentation of a complete memorandum of appeal to as little as 90 days, unless indeed time prior to the application for copies could properly be deducted, a course the possibility of which was recognised in *Saminatha Ayyar* v. *Venkatasubba Ayyar* (9). The question for determination in the present case seems then to be when the time requisite for obtaining a copy of the District Judge's decree began.

Ordinarily, the answer to such a question will doubtless be that the time "requisite for obtaining a copy" does not begin till an application for copy is made: see *Bechi* v. *Ahsanullah Khan* (10). But can it reasonably be held that a person desirous of appealing may, as a matter of course, apply first for a copy of judgment, then—when he has obtained this copy before expiry of the scheduled period ef limitation—apply after expiry of that period for a copy of decree, and finally claim exclusion of the periods taken by the office for preparing both these copies? I think not. For such conduct some explanation should be forthcoming, and none has been offered in the instance now under consideration except the obviously inadequate one that till the 28th October a copy of the judgment alone was thought sufficient. In this connection it has to be remembered that while a copy of the decree is indispensable the Appellate Court may dispense with a copy of the judgment: see rule 1 (1), Order XLI, First Schedule to the Code of Civil Procedure. In the note attached by the appellant's learned Counsel to the memorandum of appeal it is stated that the omission to aply for copy of decree when applying for copy of judgment was due to "error and an oversight". The agent who acted for the appellant in the matter of this appeal has further explained in an affidavit that he did not know copy of decree was required to make the memorandum of appeal valid. This then is not a case in which copy of judgment was applied for merely in order to enable the applicant to decide whether he would appeal or not, and it is noteworthy that the oversight was not even remedied when copy of judgment was received, though the want of the more essential copy should then have attracted attention and there was still ample time (about 3 weeks) before expiry of the 90 days allowed by articles 156 of the limitation schedule in which to apply for that copy. In the Madras High Court and in the Courts subordinate thereto there is a practice to exclude both the time taken for obtaining copy of the decree and the time taken for obtaining a copy of the judgment, even though the application for the one was made after the copy of the other was ready: see *Silamban Chetty* v. *Ramanadham Chetty* (11), in which, however, the learned Judges admitted the fairness of an argument that the time requisite for obtaining a copy is not necessarily the period after the date of the application therefor. No such practice is alleged to exist in the Central Provinces, nor, after 15 years of close touch with civil judicial work, can I re-call a claim to exclude time, as is done in Madras, without regard to the expiry of the time allowed by the appropriate article of the limitation schedule. According to the Madras view, a party might wait till the very last day of the scheduled period allowed for appealing, then deliberately apply for nothing more than a copy of judgment and, finally, on receiving that copy, apply for copy of decree. In my opinion so vague an expression as "the time requisite for obtaining a copy" should not be interpreted in a manner which will encourage procedure of this sort. A person who secures a decree in his favour obtains a valuable advantage which he should not be deprived of by any but an alert opponent, and I am, therefore, unable to think that the Legislature intended by enacting section 12 (3) of the Limitation Act to extend in effect the period in which the copy referred to in section 12 (2) *ibid* might be obtained or *vice versa*. That

(9) 27 M. 211.
(10) 12 A. 461

(11) 21 M. L. J. 152; 4 Ind. Cas. 301; 9 M. L. T. 29; 1 M. W. N. 141; 33 M. 256.

separate applications for these copies will almost inevitably take longer to comply with than a single application for both is clear; for, in the former case, the labour of tracing the record has to be gone through twice.

I hold, then, that the appellant should have applied for copy of decree at any rate on receiving copy of judgment and consequently that he cannot claim to exclude any of the time subsequent to the 28th October, seeing that the preparation of the copy of decree took only 16 days.

Even if the view be incorrect that the time requisite for obtaining a copy may begin before application for copy is made, there was in this case negligence which precludes me from excluding more than 18 or 20 days at most of the period of 48 days which the appellant's agent took to obtain copy of the District Judge's decree. When filing the memorandum of appeal in this Court on the 31st October the agent left with Counsel in Nagpur the receipt for the application filed at Bhandara on the 28th October. When he went to Bhandara on the 11th November, the date fixed by the office there for his first appearance, he omitted to take the receipt with him and consequently was not told when to attend again. Instead of arranging forthwith to obtain the receipt and to transmit the copy when ready to Nagpur he went to his home in a remote part of the Balhar tahsil and there fell ill. The copy was ready on the 12th November, but the District Judge not unreasonably declined to deliver it to a local Pleader who had not the receipt to support his request for it. The obvious course of writing or going to Nagpur for the receipt and of appointing a Pleader or other person with the District Judge's approval to take delivery of the copy was not adopted. Eventually, when the Counsel in Nagpur was asked for the receipt he was unable to produce it, though he ought to have known that without this document delivery of the copy would necessarily be delayed. There was thus carelessness and indifference on the part of the appellant's agent and of his Counsel, and I hold that these are responsible for the greater portion of the delay in obtaining delivery of the copy after it was ready on the 12th November. For this the appellant must suffer: see *Vithia* v. *Sakhya* (12).

The memorandum of appeal should not have been admitted. The appeal is dismissed with costs. In the Courts below costs will be borne as already ordered.

Appeal dismissed.

(12) 5 N. L. R. 25; 1 Ind. Cas. 904.

(s. c. 7 N. L. R. 72.)

NAGPUR JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 87 OF 1908.

July 28, 1908.

Present:—Mr. Stanyon, A. J. C.

NANHUJI—APPELLANT

versus

CHIMNA—RESPONDENT.

Hypothecation—Non-possessory hypothecation of moveables—Mortgage—Pledge—Principles of law governing hypothecation—Rights and remedies of hypothecatee—Foreclosure—Conditional sale—Subsequent transferee—Notice—Registration.

Neither the Transfer of Property Act nor the Indian Contract Act recognize the non-possessory hypothecation of moveables.

Misri Lal v. *Mozhar Hussain*, 13 C. 262, relied upon.

The rights and remedies of the parties to such a transaction must be regulated by the Courts according to the general law of contract, subject to the principles of justice, equity and good conscience, governing Courts in this country under the authority of the highest tribunal.

A non-possessory hypothecation of moveables is a valid contract and should be recognized and enforced by the Courts. The rights of the hypothecatee are entirely regulated by the terms of the contract between the parties. On default in payment of the debt, he can compel delivery of the property or obtain a decree for sale of the property, if so stipulated in the contract. If the property is simply hypothecated without any stipulation as to the manner in which it is to be dealt with, the only remedy open to the creditor is to obtain a money-decree declaring his lien on the property and his right to sell.

As the term is understood in Indian Law, there can be no foreclosure decree in respect of moveables. A contract for the conditional sale of goods ripens into a sale absolute so soon as the condition is fulfilled.

The rights of a hypothecatee cannot be placed above those of a mortgagee without possession under an unregistered mortgage, nor should they be regarded as inferior. The lien of a hypthecatee cannot be enforced against subsequent transferees without notice of the bypothecation, who have taken in good faith and for value the hypothecated property from a transferor in actual possession thereof.

If a subsequent transferee of moveable property has notice at the time of his transfer, that such property is already hypothecated to a particular person for a lawful debt, he must be held bound by such hypothecation to the same extent as his transferor. The notice must, however, be actual notice.

NANHUJI *v.* CHIMNA.

A transferee is not put upon inquiry of any kind if there are circumstances which do not raise a reasonable presumption that the transferor in possession of the property has no right to make the proposed transfer, or that the property is already subject to some liability.

A prior hypothecation of moveable property without possession is not postponed to a subsequent transfer of such property by the person in possession thereof, if the subsequent transferee has actual notice of such hypothecation at the time of the transfer.

Pema v *Ganpat Rao*, 2 C. P. L. R. 108; *Bansidhar* v. *Sant Lal*, 10 A. 133, relied upon.

The registration of a transaction whereby moveables are hypothecated without possession, is no notice, constructive or otherwise, of such transaction to a subsequent purchaser from the person in physical possession of the property.

Appeal against the decree of the District Judge, Chhindwara, dated the 21st November 1907, modifying the decree of the Subordinate Judge, Chhindwara, dated the 22nd August 1907.

Mr. *G. L. Subhedar*, for the Appellant.

Mr. *Krishna Rao Phatak*, for the Respondent.

JUDGMENT.—The suit out of which this appeal has arisen is based on a mortgage-deed, dated 25th March 1902, executed in favour of the plaintiff by the first defendant, Deoba. The principal sum secured by the deed is Rs. 803 and the property comprised in it is thus described,—

(1) Crops of all kinds, *kharif* and *rabi*, with *kadvi* and *bhoosa*, annually produced in fields Nos. 10 and 12;
(2) A tiled house and a *kotha* with *chapri* and compound, north to south 30 cubits, and west to east 35 cubits;
(3) 20 cows, 2 she-buffaloes with calves, and 8 bullocks.

Notwithstanding the deed, the whole of the above property remained in the hands of the mortgagor, Deoba, who subsequently sold the 20 cows to the second defendant, Chimna, one she-buffalo and calf to the third defendant, Ganpati, and two bullocks to the fourth and fifth defendants, Asaram and Phusraj.

The plaintiff filed the present suit against the above defendants, claiming Rs. 409-10-0 as the balance due on the mortgage-deed, together with costs and future interest, or in default, foreclosure of the mortgage as stipulated in the deed. The first and third defendants admitted the claim, the latter confessing in his written statement that he had purchased the buffalo and calf with notice of the mortgage. He retracted this admission subsequently. The other defendants, with whom we are now concerned pleaded,—

(*a*) that the cattle purchased by them were not of those hypothecated;
(*b*) that if they were, these defendants had no notice of the hypothecation when they made their purchases.

The first Court found that all the cattle purchased by the defendants Nos. 2, 3, 4 and 5, were from those referred to in the said deed, and that the purchasers had notice of the hypothecation at the time of buying.

* * * *

The Subordinate Judge passed a foreclosure decree, under section 89 of the Transfer of Property Act, 1882, covering indiscriminately all the property, moveable and immoveable, comprised in the said bond. All the defendants were ordered to pay Rs. 470-6-9 on account of principal and interest (including future interest) due on the bond, and Rs. 132-10-0 for costs on or before the 22nd February 1908, or in default to suffer foreclosure of the mortgaged property. To the description of that property, as already given above, were added these words,—

> "The hypothecated cattle in the hands of the defendants Nos. 2 to 5 shall also be liable for the claim."

* * * *

Against the above decree the defendants, Chimna, Asaram and Phusraj, appealed to the District Court, and that tribunal, finding upon the evidence that these defendants had made their purchases without notice of the mortgage, but without deciding whether or not the animals they purchased were among those hypothecated, allowed the appeal and discharged them from liability under the first Court's decree. The District Judge had no alternative except to leave the remainder of the first Court's decree standing, and the result is that the defendant, Ganpati, by virtue of his purchase of one hypothecated buffalo and calf, may redeem the whole mortgage and claim Deoba's house and premises and his crops for every future year, without apparent limit, in two fields in some unstated village.

The plaintiff has now made the present

appeal against the decree of] the District Judge, and he claims restoration of the first Court's decree against the discharged defendants. The only ground taken is that, since plaintiff's mortgage was a registered transaction, the purchasers-defendants must be presumed to have notice of it, and the *onus* should have been thrown on them to prove want of notice, a fact as to which they had adduced no evidence whatever.

This appeal could be disposed of in a few lines. There are authorities for the proposition that registration of a transaction affecting immoveable property exceeding Rs. 100 in value is notice of such transaction to persons subsequently dealing with the same property, though even on this point there is considerable divergence of opinion in this country. But I am very clearly of opinion that registration of a transaction whereby moveables are hypothecated without possession, is no notice whatsoever, constructive or otherwise, of such transaction to a subsequent purchaser of the same moveables from the person in physical possession thereof. Therefore, the appeal is radically unsound and could be disposed of upon the short ground that since the purchase was made without notice, the plaintiff cannot follow the hypothecated cattle into the hands of the purchasers.

But it is very common, especially among the agricultural classes, to borrow money upon the security of cattle and other moveables, which are not given into the possession of the lender, but remain with the borrower. Such transactions are generally embodied in a deed, and sometimes such deeds are registered. In general, such hypothecation of moveables accompanies a mortgage of immoveables, as in the present case: but I have seen instances where the transaction was confined to chattels only. There is great diversity, and much confusion, in the manner in which the Subordinate Courts handle such transactions, and the absurdity and difficulty to which I have drawn attention in the present case are by no means uncommon. It, therefore, seems expedient to make an endeavour to set out, what appear to me to be, the legal rights arising out of non-possessory hypothecations of moveables, and the form and extent of the relief which can be given by the Civil Courts in respect of them.

The matter is one upon which the Indian Legislature is silent, at least so far as the territorial jurisdiction of this Court is concerned. The term 'mortgage' is an absolute misnomer as applied to such transactions. In the Transfer of Property Act, and every other enactment of general applicability to British India and to Berar, the word is used to denote transactions affecting immoveable property only. The Indian Contract Act, 1872, contains the only statutory provisions which I know regarding transactions in this country wherein money is advanced upon the security of moveables. The enactment deals with one form only of such transactions, called a 'pledge.' It is an indispensable element of every pledge that, pending the discharge of the pecuniary obligation, the property, which constitutes the security for it, should be delivered into the physical possession of the pledgee; and the statutory provisions cannot be applied to a case in which this is not done. For the hypothecation of moveables which remain in the hands of the borrower no legislative provision is forthcoming within the territorial jurisdiction of this Court.

Such transactions are known to English Law (though they are not common in practice) as *mortgages of personal estate*, and bear some analogy to mortgages of land. They are generally effected in England by a deed of assignment securing the payment of money at a future day, with a proviso that the debtor shall remain in possession of the goods so assigned until he make default in payment, upon which the mortgagee shall have power to take possession of the goods. By the rule of English Law the property in the personal estate so mortgaged passes by the deed to the mortgagee, while the mortgagor retains possession of it as a trustee of legal estate, and has an equity of redemption, after the manner of a mortgagor of realty. But the nice distinction between legal and equitable estate, so common in English Law, is not a fiction which has been adopted in India, except, perhaps in the Presidency Towns. Even in England a contract for the non-possessory hypothecation of moveables is only partially recognized. "The common law repudiates the hypothecation of chattels or moveables in its general and extended signification; for, if parties who had bought things in a public

market, or in the ordinary way of trade, of persons who had the possession and visible ownership of them, were liable, after they had paid the purchase-money, to be called upon by third parties who had secret charges or liens upon such goods for further payment, all public confidence would be destroyed, and trade and commerce annihilated. But the law permits goods and chattels to be subjected to what is called, by Continental jurists, imperfect hypothecation, *i. e.*, a debtor may, by deed under seal, grant to his creditor a right to seize and sell a specified chattle, all his goods and chattels generally, in satisfaction and discharge of the debt, in case of the non-payment thereof at an appointed period. Such a power gives the creditor no right to follow the goods into the hands of third parties; but so long as they remain in the possession of the debtor himself and continue his property, the creditor may seize them in the same way that a landlord distrains and sells the goods and chattels of his tenant on the demised premises for rent in arrear." [Addison on Contracts, 10th Edition, pages 765, 766; *Chidell* v. *Galsworthy* (1); *Richards* v. *Symons* (2)]. The English Law also recognizes liens on ships, cargoes, and merchandise: but in these cases the delivery of a bill of lading or dock warrant would give constructive possession to the pawnee, and the transaction would in law amount to a pledge.

We have seen that the Indian Contract Act, 1872, and the Transfer of Property Act, 1882, do not recognize the non-possessory hypothecation of moveables. Section 53 of the latter enactment, which follows 13 Eliz., c. 5, is carefully confined to immoveable property, and does not extend to moveables, as is the case with the English statute. I do not think that this circumstance justifies an inference that the law does not disfavour the transfer of moveables in fraud of creditors. I think it is merely an indication that the Legislature has not deemed it expedient to enter upon any statutory treatment of the subject. For that reason, there is no enactment in this country analogous to the English Bills of Sale Acts. The subject involved is one of contract, and I do not think it would be expedient, even if it were practicable, to apply the Hindu, Muhammadan, or other personal law to it. I think it is one of those cases in which the general law of contract must be followed subject to those principles of justice, equity and good conscience, by which the Courts in this country are governed under the authority of the highest tribunal. In the absence of fraud there is no inherent illegality, immorality, or opposition to public policy in the non-possessory hypothecation of moveables, and, therefore, a contract for such a hypothecation is a valid contract. It is a transaction which is customary throughout the country, and is suited to the circumstances and business intercourse of the people. Therefore, it is one that should be recognized and enforced by the Courts, subject to the principles already enunciated: —

Three questions then arise, namely:—

(*i*) the rights of the 'hypothecatee' (to coin a word) against the hypothecator;

(*ii*) the rights of the hypothecatee against third persons in respect of the hypothec; and

(*iii*) the form in which the hypothecation can be enforced against the security.

As regards the first of these, the rights are entirely regulated by the terms of the contract between the parties, and, in the event of dispute, it becomes merely a question as to how far it is practicable to obtain enforcement of such rights by process of law – a matter which comes under the third of the above heads. If the contract is that, upon default made in payment of the debt the property hypothecated should be delivered to the creditor, the Court will compel delivery of such property if the debtor is capable of making delivery, whether the property so delivered be taken in satisfaction of the debt or as a pledge till payment is made. If the contract is that, on default of payment, the property is to be sold, the Court will give effect to it by ordering a sale of the goods, if they are still in the hands of the debtor. If the property is simply hypothecated without any stipulation as to the manner in which it is to be dealt with, then the creditor's only remedy seems to be to obtain a decree declaring his lien upon it, and his right to sell it: or, if there is nothing in

(1) 6 C. B. (N. S.) 471.

(2) 8 Q. B. 90 S. C. (1846); 15 L. J. Q. B. 35; 10 Jur. 6.

the terms of the contract repugnant to the grant or such a relief, the Court may even order such property to be sold. In the above cases we have analogies to mortgages enforced by foreclosure, by possession, and by sale. But it is quite wrong to suppose that any decree can be made in terms of section 86 or section 88 of the Transfer of Property Act. That enactment has no application whatever, as was held in *Misri Lal* v. *Mozhar Hossein* (3), and that is why the decree of the first Court, so far as it related to moveables, is bad in form in the present case. There can be no foreclosure decree, as the term is understood in Indian law, in respect of moveables. A contract for the conditional sale of goods ripens into a sale absolute as soon as the condition is fulfilled, and if it is a contract otherwise valid in law, then the Courts cannot delay the passing of ownership by such interference as is permitted by the Transfer of Property Act in conditional sales of immoveable property. The answer to the first and third of the above questions may be summed up in this, that the rights and remedies of the parties to a contract of hypothecation depend in every case upon the legal stipulations going to make up that contract. If *A* simply hypothecates moveables to *B* as security for a debt payable on a specified date, *B*'s remedy in case of non-payment is to obtain a decree for money with a lien declared on the hypothecated property in the hands of *A*, and thereafter to attach and sell that property: and he would equitably be bound to exhaust that property before looking elsewhere for his money. If the contract of hypothecation included a stipulation that *B* could sell the property on default, the remedy would be the same. If the contract contained an agreement that, in default of payment on due date, *B* should take possession of the property and hold it until payment was made, then *B*'s remedy would include a right to such possession. Whether *B* could after that treat the property as a pledge is a question upon which I do not express any opinion. Finally, if the contract was that, upon failure to pay by *A*, *B* should become the owner of the hypothecated property which should be deemed to have been sold for the money advanced, then, on the expiry of due date without payment made, *B*'s debt would be disharged by the transfer of ownership in the goods which would at once take place.

It will thus be seen that, with the terms of the contract present as a guide, there need be little difficulty in adjudication between the parties to a contract of hypothecation. It is only when third parties come in that difficulty arises, and a conflict of equities takes place. That is the second of the three questions above-mentioned. It is manifest that the rights of a hypothecatees could not reasonably be placed higher than those of a mortgagee without possession under an unregistered mortgage. But I am unable to find any equitable ground upon which they should be placed lower. I think that if a subsequent transferee of moveable property has notice at the time of his acceptance of the transfer, that such property is already hypothecated to a particular person for a lawful debt, he must be held bound by such hypothecation to the same extent as his transferor. Such notice must be actual notice. The transferee is not put upon inquiry of any kind if there are no circumstances going to raise a reasonable presumption that the transferor in possession of the property has no right to make the proposed transfer, or that the property is already subject to some liability. This is the principle underlying section 108 of the Indian Contract Act, 1872, and I see no reason why it should not be made applicable, as far as possible, between a hypothecatee and a subsequent transferee of the same property. The law very strongly favours *bona fide* purchasers for value of goods from ostensible owners in possession thereof, and there is practically only one case, that of stolen property, in which the rule, that "no seller can give to the buyer of goods a better title to those goods than he has himself", is enforced against a purchaser in good faith. Even as to stolen property, there was considerable diversity of opinion while the Contract Act was on the legislative anvil. The Indian Law Commissioners originally drafted the section as one by which it was proposed to confer upon every possessor of moveable property, irrespective of the origin and nature of his possession, the power of making a good title to a *bona fide* purchaser, provided the circumstances were not such as to raise a reasonable presumption

(3) 13 C. 262.

that the person in possession had no right to sell such property. This proposal was largely based on the English Law, which makes valid the sale of stolen goods where such sale is in market overt, and upon the argument that while the person from whom goods are stolen is often negligent, the purchaser in good faith is always blameless; by reason of which, according to the Law Commissioners, "balance of equitable consideration is on the side of a rule favourable to the purchaser". They also considered "that sound policy with respect to the interest of commerce points in the same direction." The proposal was, however, negatived by the Select Committee of the Legislative Council upon eight grounds which absolutely annihilated the arguments in support of it and carried conviction as to the preferability of the section which eventually became law. But, as I have said, stolen property is the only exception to the rule in favour of a purchaser in good faith from a person in possession thereof as the ostensible owner. Therefore I have no hesitation in holding that no previous hypothecation of such property is binding on a subsequent transferee thereof, whether the transferor in possession be the hypothecator or any other person, if such transferee has no notice of the hypothecation when he accepts the transfer in good faith from the person in possession of the property.

But this principle entirely disappears when it is a case of a transferee with notice of a prior hypothecation of the property taken by him. He cannot be classified as a transferee in good faith if he enters into a transaction which is designed, whether by him or his transferor, or which, without any design, operates to defeat a prior legal existing right. In that case the rule in section 108 of Contract Act applies, and the exceptions appended thereto cannot control it. It is of the very essence of those exceptions that they should be confined to the protection of transferees in good faith only. This was the principle applied by this Court in *Pema* v. *Ganpat Rao* (4) [the head-note to which is incomplete and misleading] and in *Ramanna* v. *Ramji*, Second Appeal No. 209 of 1883. It is farther supported by the *dicta* in *Bansidhar* v. *Sant Lal* (5). Therefore, I hold that a prior hypothecation of moveable property without possession is not postponed to a subsequent transfer of such property by the person in possession thereof, if the subsequent tranferee has actual notice of hypothecation at the time of the transfer being made to him. I am fortified in the views adopted above namely:—

(1) that a hypothecation of moveables without delivery of possession is valid and enforceable except against subsequent purchasers of the hypothec without notice, and
(2) that registration does not operate as notice of such hypothecation

by the judgment of Ismay, J. C., in *Sukhnandan* v. *Kanahiyalal* (6).

In the present case it has been found to be the fact that the respondent to the present appeal had no notice of hypothecation in favour of the plaintiff, and, therefore, such hypothecation cannot be enforced against them because they are purchasers for value, and, by reason of want of notice, purchasers in good faith, of the cattle sold to them by the owner in possession thereof. This appeal, therefore, fails and is dismissed with costs.

Appeal dismissed.

(4) 2 C. P. L. R. 108.
(5) 10 A. 133.
(6) 13 C. P. L. R. 43.

MADRAS HIGH COURT.
FIRST CIVIL APPEAL No. 69 OF 1908.
March 30, 1911.
Present:- Sir Ralph Benson, Judge, and Mr. Justice Sundara Aiyar.
P. A. M. SHEIKH IBRAHIM THARAGAN AND ANOTHER—APPELLANTS
versus
K. R. RAMA AIYAR AND OTHERS—RESPONDENTS.

Joint creditors—Payment to one of joint creditors—Whether operates as a discharge of the debt—Payment to one in fraud of the rest—Whether valid discharge—Hindu Law—Joint family—Debt due to the family—Suit by Manager for its enforcement—Right to sue—Omission to implead the other co-parceners—Maintainability of the suit..

Assuming that paymont to one of several joint creditors operates in law as a payment to all, the rule will not apply where the payment is made fraudulently to one of the creditors and not for the benefit of all.

Baikuntanath Chakrabarti v. *Hara Lal Pal Chowdhry*, 13 C. L. J. 234; 9 Ind. Cas. 116; *Veerasawmy Naicker* v. *Ibrahamsa Rowther*, 19 M. L. J. 221;

SHEIKH IBRAHIM *v.* RAMA AIYAR.

5 M. L. T. 209; 1 Ind. Cas. 200; *Piercy* v. *Fynny*, L. R. 12 Eq. 69; 40 L. J. Ch. 404; 19 W. R. 710, referred to.

Quære:—Whether payment to one of several joint creditors is a valid payment to all?

Barbar Moran v. *Rammanna Gounden*, 20 M. 461, doubted.

Veerasammi Naciker v. *Ibrahamsa Rowther*, 19 M. L. J. 221; 5 M. L. T. 209, 1 Ind. Cas. 200; *Ramasawmi* v. *Muniandi*, 20 M. L. J. 709; 7 M. L. T. 253; 1 M. W. N. 550; 5 Ind. Cas. 343, *Ramasawmi Chetti* v. *Manikka Mudeley*, 9 M. L. J. 155; *Hussainara Begam* v. *Rahmunnissa Begam*, 13 C. L. J. 3; 8 Ind. Cas. 837 and *Adaikalam Chetty* v. *Marimuthu*, 22 M. 326, referred to.

Where a debt is due and owing to a joint Hindu family, the Manager of the family can sue for its enforcement without joining the other members as parties.

Kishen Pershad v. *Har Narain Singh*, 15 C. W. N. 321; 21 M. L. J. 378; 8 A. L. J. 256; 9 M. L. T. 343; 13 C. L. J. 345; 9 Ind. Cas. 739, followed.

Authorities on the subjects reviewed and discussed.

Appeal against the decree of the Subordinate Judge's Court of Tinnevelly in O. S. No. 22 of 1908.

The Hon'ble Mr. *T. V. Seshagiri Aiyar* and Mr. *P. Kundu Panickar*, for the Appellants.

Messrs. *K. N. Aiya* and *S. Srinivasa Aiyar*, for the Respondents.

JUDGMENT.—The suit from which this appeal was preferred was instituted by the plaintiff as the Manager of an undivided Hindu family to enforce payment of the amount due on a mortgage bond executed by defendants Nos. 1 to 15. The 16th defendant, in whose name the bond stood, is the eldest of the three sons of the plaintiff, and was brought in as a party on account of the plea of defendants Nos. 1 to 15 that the debt was due to him alone and not to his family. They also pleaded that they had paid to the 16th defendant, prior to the suit, a sum of Rs. 650 towards the interest due on the bond, and that subsequent to the suit, they deposited the total amount due on the bond with the South Indian Bank, which amount the 16th defendant was at liberty to draw on executing a bond to indemnify them against any claims that might be made by the other members of his family. The 16th defendant also claimed the debt as his own, and set up that the family became divided on the 17th of December 1904. The Subordinate Judge held that no division took place as alleged by the 16th defendant, that the debt was due to the family of the plaintiff and the 16th defendant, that, although the bond was executed in the 16th defendant's name, it was really taken by the plaintiff for the benefit of the family, that the payment of Rs. 650 was not made prior to the suit, and that both the payment and the deposit were not *bona fide* acts, but the result of collusion between the defendants Nos. 1 to 15 and the 16th defendant, with a view to defraud the other members of the 16th defendant's family, and he accordingly decreed the whole of the claim made in the plaint.

This appeal has been preferred by the debtors. It is confined to the Subordinate Judge's disallowance of credit for Rs. 650 alleged to have been paid to the 16th defendant prior to the suit and to the award of interest on the principal amount subsequent to the deposit made by the debtors in the South Indian Bank, and of the plaintiff's costs against the debtors, but the points involved in appeal relate to all the questions decided by the Subordinate Judge.

We have no hesitation in concurring with the Subordinate Judge that the partition set up by the 16th defendant is not proved. There is no formal instrument of partititon, and the only oral evidence adduced to prove it is the testimony of the 16th defendants himself. He relies on Exhibit III a *yaddast* executed in his favour by his father, the plaintiff, authorising him to conduct the trade of the family at Cochin and Kottayam, and containing certain other provisions with respect to that trade, as well as with respect to his right in the rest of the property belonging to the family. But the language of the instrument and the 16th defendant's deposition both show that though some negotiations went on for effecting a division they were never completed and that the family continued undivided. It is not contended by the 16th defendant that the debt belonged to himself if the family did not become divided.

The next question for decision is, whether the payment and the deposit pleaded were made *bona fide* by the debtors and are binding on the family. On this question also we confirm the findings of the Subordinate Judge. The fourth defendant, when examined as a witness, swore that he was not aware of the existence of the plaintiff at all till shortly befor the suit, but this is an absolute falsehood. Defendants Nos. 1 to 15 had dealings with the plaintiff's family for a considerable time before the execution of the bond, Exhibit A. Exhibit B shows that some months before the date of Exhibit A, the plaintiff demanded

payment of the amount due by the defendants but they were unable to pay. The bound itself was taken from the defendants by the plaintiff himself in the absence of the 16th defendant and it was produced in Court by the plaintiff. The correspondence between the debtors and the 16th defendant, which culminated in the payment and deposit in question began with an attempt on the part of the debtors to take advantage of the differences in the creditors' family. They gave the 16th defendant notice on 4th June 1906, (Exhibit XI), that they were ready to pay the amount of the debt, and the 16th defendant had failed to go to them as promised with the mortgage-bond for the purpose of receiving the money and making an endorsement of discharge thereon. The subsequent correspondence, fully set out in the judgment of the lower Court, shows that they were surprised of the fact that the 16th defendant was not in possession of the bond, that, in consequence, they demanded it of him, and that he agreed to give them a bond of indemnity instead, and that the 16th defendant, discovering their device, charged them with making a mere make-believe assertion of readiness to pay without being in possession of the money required for payment. This correspondence ended on the 30th of June 1906. The plaintiff launched his suit on the 2nd of July 1906. Summonses in the suit were taken to the residence of the defendants on the 15th of July 1906, but were not served on them on that date. They then deposited most of the amount due on the 18th of July 1906 in the South Indian Bank. They state that on the 1st July 1906, that is, on the day previous to the institution of the suit, they had paid Rs. 650 to the 16th defendant and produced a receipt bearing that date for the amount. We agree with the Subordinate Judge that the circumstances of the case are in favour of the conclusion that the payment was not really made on that date, and that the receipt was *ante* dated so as to secure evidence of payment before the institution of the suit. We concur with him also in the reasons given for his finding. We may add that the defendants had not produced their day-books, which must presumably have been written up from day to day and would, therefore, be strong evidence of the actual date of payment.

Mr. Seshagiri Aiyar has argued two questions of law arising on these findings. He contends that, whenever the payment may have been made, it was binding on the plaintiff, as payment to one of severel joint-creditors must in law be deemed a valid payment to all, and he relied on the decision *Barbar Maron* v. *Ramanna Gounden* (1). That decision may be taken to support his contention, but the authority of that decision has been considerably shaken by subsequent rulings of this Court. See *Veerasami Naicker* v. *Ibramsa Rowther* (2) and *Ramasawmi* v. *Muniandi* (3). See also *Hussainara Begam* v. *Rahimunnessa Begam* (4). The cases of *Ramasawmi Chetty* v. *Manikkam Mudeley* (5) and *Adaikalam Chetty* v. *Marimuthu* (6) do not really support the appellants' contention, as they proceed on the ground that as the bonds stood in the name of one member only of the family, payment to him would operate as a valid discharge. We do not, however, consider it necessary to decide the point in this case as the evidence shows clearly that the payment to the 16th defendant and the deposit were not made for the benefit of the plaintiff's family, but was tendered to defraud its members other than the 16th defendant and in collusion with him to support his undivided claim to the amount due under the bond. Assuming that the payment to one of several joint creditors will in law operate as payment to them all, there can be no doubt that the rule will not apply where the payment is fraudulently made to one of the creditors and not for the benefit of them all. That question has recently been fully discussed by Mookerjee, J., in *Baikunthanath Chakrabarti* v. *Hara Lal Pal Chowdhury* (7); where the authorities on the point have been fully considered. This Court has held the same view in *Veerasawmi Naicker* v. *Ibramsa Rowther* (2). [See also Halsbury's Laws of England, Volume VII, page 456, paragraph 930 and *Piercy* v. *Fynny*(8)]. In *Barbar Maron* v. *Ramana Gounden* (1) it was observed that the payment in the case was unaffected

(1) 20 M. 461.
(2) 19 M. L. J. 221; 5 M. L. T. 209; 1 Ind. Cas. 200.
(3) 20 M. L. J. 709; 7 M. L. T. 253; 1 M. W. N. 550; 5 Ind. Cas. 343.
(4) 13 C. L. J. 3; 8 Ind. Cas. 837.
(5) 9 M. L. J. 155.
(6) 22 M. 326.
(7) 13 C. L. J. 234; 9 Ind. Cas. 116.
(8) 12 Eq. 69; 40 L. J. Ch. 404; 19 W. R. 710

by fraud. We are, therefore, of opinion that the payment and deposit in this case could not bind the plaintiff or his family.

The other contention of law argued is, that as the debt belongs to all the members of the family and as two of the plaintiff's sons are not parties to this suit either as plaintiffs or as defendants, the suit is not maintainable. It is not denied that the suit was instituted by the plaintiff in his capacity as manager of the family; but this, it is argued, is insufficient. There has been considerable conflict of authority in the Indian Courts on the point raised, but we are of opinion that the decision of the Privy Council in *Kishen Pershad* v. *Har Narain Singh* (9) has practically settled the point. Before referring to their Lordships' judgment and considering its effect, it may be desirable to refer very briefly to the state of the case-law in the High Courts. In *Kanna Pisharoddy* v. *Narayanan Samayajipad* (10) it was held, with reference to a *sabhayagam* or assembly of religious Brahmins in Malabar, that some amongst their members appointed as agents for the management of the property of the assembly could not maintain a suit in their own names for ejectment of a person in unlawful possession of its property. It will be observed that the *sabhayagam* was merely an artificial combination of persons and that its agents possessed no powers under the law of the country, but derived them solely from their appointments as agent by the *sabhayagam*. It is, no doubt, well-established law that a mere agent cannot maintain a suit in his own name with respect to property belonging to his principal, whatever powers of management he may have with regard to it. In *Arunachella* v. *Vythilinga* (11) this Court decided that a suit for possession of family property could be maintained by the managing member alone in his capacity as managing member. The same principle was applied in several subsequent cases where the question was whether a decree against a managing member in his representative capacity would be binding on the family. See *Viraraghavamma* v. *Samudrala* (12); *Ramakrishna* v. *Namasivaya* (13); *Muttiah* v. *Veerammal* (14); *Guruvappa* v. *Thimma* (15). In *Ramaya* v. *Venkatratnam* (16), it was held that when a suit is instituted by the managing member as such, the omission to include the other members of the family as plaintiffs would be regarded only as an error of mis-description and the suit would be considered as properly laid. In *Alagappa Chetty* v. *Vellian Chetty* (17), on the other hand, a suit was held to be bad on the ground that all the members of the family to whom the money sued to be recovered belonged had not been made plaintiffs before the period of limitation to the institution had expired. But the decision seems to be based on the ground that all the members of the family were carrying on a partnership trade and that in such a case all the partners should join as plaintiffs. And reliance was placed on *Ramsebuk* v. *Ramlall* (18) which was also a case of partnership business carried on by the members of a family. See also *Imamudin* v. *Liladhar* (19). In *Adaikalam Chetty* v. *Marimuthu* (6), a suit by the managing members alone was sustained. But this decision may perhaps be regarded as proceeding on the special ground that the bond sued on was in the name of the managing member only. In *Angamuthu Pillay* v. *Kolandavelu Pillay* (20) a suit for the recovery of land was held to be not maintainable by the managing member alone, even if it appeared that he was suing to enforce the right of the whole family. The question arose again in *Sesha Pattar* v. *Veeraragavan Pattar* (1) with respect to the manager's right to sue for money on behalf of the whole family. In that case the rule laid down in *Allagappa Chetty* v. *Villian Chetty* (17) was preferred to the proposition laid down in *Arunachella* v. *Vythilinga* (11) but several of the other Madras cases referred to above were apparently not brought to the notice of the Court. The rule laid down in *Arunachella* v. *Vythilinga* (11) was upheld in *Vadilal* v. *Shah Kushal* (22), although in two

(9) 21 M. L. J. 378; 15 C. W. N. 321; 9 Ind. Cas. 739; 8 A. L. J. 256; 9 M. L. T. 343; 13 C. L J. 345.
(10) 3 M. 234.
(11) 6 M. 27.
(12) 8 M. 208.
(13) 7 M. 295.
(14) 10 M. 283.
(15) 10 M. 316.
(16) 17 M. 122.
(17) 18 M. 33.
(18) 6 C. 815; 8 C. L. R. 457.
(19) 14 A. 524.
(20) 23 M. 190.
(21) 32 M. 284; 5 M. L. T. 351; 4 Ind. Cas. 38.
(22) 27 B. 157.

previous cases—*Kalidas Kavildas* v. *Nathu Bhagwan* (23) and *Balakrishna Moreshwar Kunte* v. *The Municipality of Mahad* (24) a contrary view had been held and the latter case had expressly followed *Kanna Pisharodi* v. *V. M. Narayanan Somayajipad* (10). The ruling in *Rada Proshad Wasti* v. *Esuf* (25) was not in accordance with *Arunchella* v. *Vythilinga* (11). The Allahabad High Court in *Pateshri Partab Narain Singh* v. *Rudra Narain Singh* (26) supported the manager's right to sue on behalf of the family: but in *Shamrethi Singh* v. *Krishen Prasad* (27) that Court held that the managing member of a family carrying on a trade on its behalf could not maintain a suit to recover monies due from third persons in connection with the trade without making all the members as plaintiffs. The decision of the Privy Council referred to above was passed on appeal from the decision of the Allahabad High Court in the last case. The Judicial Committee upheld the manager's right to sue. Their Lordships approved of the decision in *Arunachela* v. *Vythilinga* 11) and observed that the rule laid down in *Kanna Pisharodi* v. *V. M. Narayana Somayajipad* (10) was not applicable "to the members of a business carried on for an undivided Hindu joint family" and distinguished the case from that of mere co-owners as *Kanna Pisharoddy* v. *Narayanan Somayajipad* (10). They also explained *Ramsebuk* v. *Ramlal Koondu* 18) and *Imam-ud-din* v. *Liladhar* (19) as resting on the ground that all who are trading as partners must join in a suit relating to the partnership business and observed that the other members of the family interested in the partnership business need not be joined as plaintiffs. The case of *Alagappa Chetty* v. *Vellian Chetty* (17) was distinguished on the ground "that the single plaintiff in that case was not shown to be the managing member of the family or to be the only partner or proprietor of the business with which the litigation was concerned." Their Lordships concluded as follows:—"In the opinion of their Lordships, the original plaintiffs in this case were entitled, as the sole managers of the family business, to make in their own names the contracts which gave rise to the claim and that they properly sued on such contracts without joining the other members of the family." It is clear to us that their Lordships' decision is now based on the ground that the contract was sued on in the name of the actual plaintiffs only as they expressly approved of the judgment in *Arunachela* v. *Vythilinga* (11) and distinguished it from the case of mere co-owners. In fact, the Privy Council had previously to their decision in the above case, practically upheld the right of the managing member to represent the family in litigation. A long line of cases beginning with *Girdari Lal* v. *Kanto Lal* (28), established the right of a creditor of a Hindu family to proceed against the father or other managing member of the family alone and to effectively bind the whole family property, including the shares of those not actually parties to the litigation. It need hardly be said that a decree against a mere agent, or a guardian of an infant, or a sale in execution of such decree could not bind the principal or the minor, for a suit cannot be instituted against the agent or the guardian as the representative of the principal or the minor. The reason why a decree against the manager of a family in his representative capacity is binding on the whole family is, that amongst the powers which he has according to Hindu Law as manager, must be included the power of representing the family in suits. This view has for a long time been consistently held in the case of the manager of a *tarwad* in Malabar whether governed by the *Marumakkathayam* law or *Makkathayam* law—*Ittachan* v. *Velappan* (29), *Barbar Maran* v. *Ramana Gounden* (1). There is no reason why a difference should be made between a joint family in Malabar and one elsewhere with respect to the right of the manager to sue or be sued on behalf of the family, the only distinction between the two being that a member of a Malabar family has no right to compel partition of the family property. The ordinary rule, no doubt, is that all persons in whom the right to any relief exists should be joined as plaintiffs. But this rule is not of universal application. The language of section 26 of the Civil Procedure Code, 1882, corresponding to Order I,

(23) 7 B. 217.
(24) 10 B. 32.
(25) 7 C. 414.
(26) 26 A. 528.
(27) 29 A. 311; 4 A. L. J. 194; A. W. N. (1907) 58.
(28) 14 B. L. R. 187 (P. C.); 22 W. R. 56.
(29) 8 M. 484.

rule 1 of the present Code, is "that all persons may be joined in one suit as plaintiffs in whom the right to any relief is alleged to exist, whether jointly, severally, or in the alternative". Section 30 of the Code of 1882, corresponding to Order I, rule 8, lays down the general rule of procedure where one or more persons wish to sue on behalf of or for the benefit of themselves and other persons having the same interest in a suit. But it cannot, in our opinion, be laid down that in no case has a person a right to sue on behalf of himself and others, where the procedure laid down in section 30 is either not applicable or has not been taken advantage of. There are several statutory exceptions to the rule and there is no reason why there should not be other exceptions based not on any Legislative provision but on the substantive law applicable to the parties. The case of the Judicial Committee already referred to shows that the case of the manager of a Hindu family is such an exception We must, therefore, refuse to uphold this contention also.

In the result, we dismiss the appeal with costs.

The sixteenth defendant has preferred a memorandum of objections against the direction of the Subordinate Judge making him liable with defendants Nos. 1 to 15 for the plaintiff's costs of the suit. On the finding that he and defendants Nos. 1 to 15 colluded with each other to put forward an exclusive right in himself to the amount of the mortgage-bond, the lower Court's order is right and we must dismiss the memorandum of objections also with the costs of the plaintiff.

Appeal and memorandum of objections dismissed.

MADRAS HIGH COURT

REFERRED CASE No. 5 OF 1909.

April 28, 1911.

Present:—Sir Ralph Benson, Judge, and Mr. Justice Sundara Aiyar.

K. DAMODARA MENON—PETITIONER

versus

PATINHARA MALASERI TIKKALI AMMA'S SON, KITTAPPA MENON AND OTHERS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 141, O. XLVI, r. 1—Reference to High Court—Competency of subordinate Courts to refer a question to High Court in a proceeding, not a suit or appeal.

Section 141 of the Code of Civil Procedure, 1908, does not confer any power on subordinate Courts to make reference to the High Court under Order XLVI, rule 1, in any proceeding, not a suit or appeal. Such power must be expressly conferred by statute.

Minakshi v. *Sabramannya*, 11 M 26; 14 I A. 160, referred to.

Thomas Souza v. *Gulam Moidin Beari*, 26 M. 438; *Parasuramier* v. *Seshier*, 27 M. 504; *Haree Nath Koondoo* v. *Madhoo Soodun Saha*, 19 W. R. 122; *Ningappa* v. *Gangawa*, 10 B. 433, referred to.

Case stated under Order XLVI, rule 1, Civil Procedure Code, by the District Munsif of Palghat, in Miscellaneous Petition No. 474 of 1909 (M. P. No. 666 of 1909).

JUDGMENT.—This is a reference made by the District Munsif of Palghat under Order XLVI, rule 1, of the Code of Civil Procedure. The question referred is, whether when mortgage-money is deposited under section 83 of the Transfer of Property Act, for the benefit of the mortgage and the mortgagee is a Malabar *tarwad* or *tavazhi* governed by the *Marumakkthayam* law consisting of mother and her minor daughters who are all made counter-petitioners to the petition put in under section 83, the minors being represented by their mother as guardian *ad litem* the money may be paid out to the mother alone as manager without taking security from her under Order XXXII, rule 6, of the Code of Civil Procedure, to protect the interests of her minor daughters. The Munsif is of opinion that, although the proceeding before him is not a suit or appeal, he is entitled to make this reference by virtue of the provisions of section 141 of the Code of Civil Procedure which lays down that "the procedure provided in this Code in regard to suits shall be followed as far as it can be made applicable in all proceedings in any Court of Civil Jurisdiction. In our opinion, this reference is incompetent. It has been held in numerous cases that section 141 will not give a party to a proceeding not a suit, a right of appeal. See *Thomas Souza* v. *Gulam Moidin Beari* (1); *Parasurama Ayyar* v. *Seshier* (2). The corresponding provision in section 38 of Act XXIII of 1861 expressed in similar language was interpreted by Jackson and Mitter, JJ., to extend to other proceedings

(1) 26 M. 438.
(2) 27 M. 504

only" the mode of trial and the procedure incidental thereto laid down in the Civil Procedure Code and not a right of appeal. See *Haree Nath Koondoo* v. *Modhoo Soodun Saha* (3) followed in *Ningappa* v. *Gangawa* (4). We are of opinion that the section does not authorise a Court to invoke the jurisdiction of another Court any more than it authorises a party to do so by way of appeal. Such right must be expressly conferred by Statute. See *Minakshi* v. *Subramannya* (5). We, therefore, decline to answer the question. The record will be returned to the Munsif who will dispose of the case according to law.

Record returned.

(3) 19 W. R. 122.
(4) 10 B. 433.
(5) 11 M. 26; 14 I. A. 160.

CALCUTTA HIGH COURT.
CIVIL RULE No. 300 OF 1911.
April 20, 1911.
Present:—Mr. Justice Mookerjee and Mr. Justice Caspersz.

DULHIN MOTHURA KOER—PETITIONER
versus
BANSIDHAR SINGH—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), O. XXI, r. 89—Deposit—Last day—Court leaving earlier—Deposit next day, whether valid—Act of Court not to prejudice party—Conditional deposit—Withdrawal of condition—Deposit by person whose title is not affected by sale, if legal.

An act of the Court cannot prejudice any party.

Therefore, where, on the last day for making a deposit under Order XXI, rule 89, of the Civil Procedure Code, the deposit could not be made as the presiding officer had left the Court earlier than usual and the deposit was made the next day: *Held*, that the deposit was valid and in time.

Mahomed Akbar Jaman Khan v. *Sukhdeo Panday*, 13 C. L. J. 467; 10 Ind. Cas. 51, referred to.

The petition which accompanied the deposit contained a statement that the money was not to be paid out to the decree-holder auction-purchaser till the disposal of a suit which had been commenced by the petitioner in another Court; but as soon as objection was taken by the decree-holder, the petitioner withdrew the objection: *Held*, that the deposit was valid.

Shakoli v. *Jotindra Mohan*, 1 C. W. N. 132 and *Hanooman Singh* v. *Luchman Sahoo*, 8 C. W. N. 355, referred to.

A person whose title cannot be affected by the sale sought to be reversed, is not entitled to make a deposit under Order XXI, rule 89, of the Code.

Therefore, where the petitioner has carried back her title to a date so far anterior to the sale that she could not possibly be affected thereby: *Held*, that she had no *locus standi* to make an application for reversal of the sale which according to her own case does not concern her in the least.

Rule against the order of the Sub-Judge of Patna, dated December 19th, 1910.

Dr. *Rash Behary Ghose*, Babus *Chandra Sekhar Prasad Singh* and *Nobin Chandra Burdelai*, for the Petitioner.

Mr. *B. C. Mitter*, Counsel, Babus *Mohendra Nath Roy*, *Ganesh Dutt Singh* and *Harendra Krishna Mookerjee*, for the Opposite Party.

JUDGMENT.—We are invited in this Rule to set aside an order, by which the Court below has dismissed an application for reversal of an execution sale under rule 89 of Order XXI of the Civil Procedure Code of 1908. The circumstances under which the order in question has been made had not been disputed before this Court. The property in dispute is a house which admittedly belonged to one Naunidh Koer. The case for the petitioner is, that on the 5th November 1907, she purchased the house at a sale in execution of a certificate under the Public Demands Recovery Act issued against Naunidh Koer, for recovery of arrears of road-cess. On the 21st September 1910, in execution of a money-decree held by one Bansidhar Singh against Naunidh Koer, the house was brought to sale and purchased by the decree holder. The Court was closed from the 2nd October till the 3rd November 1910. On the 4th November, when the Court re-opened, one of the officers of the petitioner took to the Court an application for reversal of the sale under rule 89 of Order XXI of the Code of 1908. The presiding officer, it appears, had, for some unexplained reason, left the Court earlier than usual: and when the application was presented to the *Sheristedar* at 5 o'clock in the afternoon, he made a note upon it to the effect that it had been so presented, but refused to accept the money, on the ground that he had no authority to receive it. On the next day, the petition was presented again and registered, and the money was also deposited.

The decree-holder auction-purchaser objected to the reversal of the sale on three gounds, namely, *first*, that the application had been presented beyond the time prescribed by the law, and was consequently of no avail to the petitioner: *secondly*, that the deposit was not unconditional, and was consequently not a valid deposit within the meaning of the rule; and *thirdly*, that the

petitioner had no *locus standi* to make the application, because, upon her own allegation, her interest, if any, had accrued not only before the sale but so long before the execution proceedings commenced that it could not be affected thereby. The Subordinate Judge held that the first two objections taken by the decree-holder auction-purchaser, were well-founded, but that the third ground could not be sustained. In this view he dismissed the application for reversal of the sale. The petitioner has now applied to this Court, and invited us to consider the legality of the order made by the Subordinate Judge. In our opinion the order must be affirmed, but not on the ground stated by the Subordinate Judge.

In so far as the first objection taken by the decree-holder auction-purchaser is concerned, we are of opinion, that there is no substance in it. Upon the facts stated, it is clear that the failure of the petitioner to make the application, accompanied by the deposit, on the day the Court re opened, was due to an act of the Court itself. Consequently, upon the principle explained in the case of *Mahomed Akbar Jaman Khan* v. *Sukdeo Panday* (1) the position of the petitioner could not be prejudiced in any manner. She had done her best to comply with the requirements of the Statute, and the difficulty which has arisen was occasioned, because the presiding officer had left the Court earlier than usual. Under such circumstances, the first presentation of the application and the deposit of the money on the day following would be sufficient compliance with the provisions of the law.

In so far as the second objection urged by the decree-holder auction-purchaser, is concerned, it is, in our opinion, equally unsubstantial. It appears that the petition which accompanied the deposit contained a statement that the money was not to be paid out to the decree-holder auction-purchaser till the disposal of a suit which had been commenced by the petitioner in another Court. Now, it is perfectly true that a deposit under Rule 89 of Order XXI in order that it may be a valid deposit, must be unconditional, because the deposit is to be made for payment to the purchaser and the decree-holder. When, therefore, a deposit is made with a condition that the sum may not be drawn out at once but may be retained in Court until a certain event has happened, it is not a good deposit within the meaning of the rule [see *Shakoti* v. *Jotindra Mohan* (2)] The case of *Hanooman Singh* v. *Luchman Sahoo* (3) is not opposed to this view. There, the deposit, when made, was unconditional, and it was only subsequently that an infructuous attempt was made by the petitioner to fasten a condition thereupon. The Court held that the deposit, if good when made, cannot be invalidated by a subsequent act on the part of the petitioner not authorised by law. On this principle it may well be contended, that the deposit in this case ought not to be treated as valid because a condition was concerned thereto. It appears, however, that the deposit was accepted by the Court without any question, and as soon as objection was taken by the decree-holder, the petitioner withdrew the condition, so that the money became available for payment to the decree-holder before he had made any attempt to withdraw the money from Court. Under such circumstances, we are not prepared to hold that the deposit was invalid and not sufficient for reversal of the sale. The position might have been different if, upon objection taken by the decree-holder, the petitioner had persisted in her effect to annex a condition to the deposit. The decree-holder was not prejudiced in any manner by the insertion of the prayer, in the application of the petitioner, that the money should be retained in Court, and he was substantially in the same position in the end as if such prayer had never been made. We must consequently hold that there was substantially a valid deposit within the time limited by law, sufficient for reversal of the sale.

In so far, however, as the third objection, taken by the decree-holder auction-purchaser is concerned, it was, in our opinion, erroneously overruled by the Subordinate Judge. As already stated, the case for the petitioner is that so far back as the 5th November 1907, she had acquired, by purchase at the certificate sale, a good title to the property in question; in other words,

(1) 10 Ind. Cas. 51; 13 C. L. J. 467.

(2) 1 C. W. N. 132.

(3) 8 C. W. N. 355.

that at the time when the property was sold, on the 21st September 1910, as the property of Naunidh Koer, the latter had no subsisting interest thereon. It is manifest, therefore, that the petitioner has not been, in any manner, affected by the sale. Under these circumstances, the question arises whether she is entitled to make an application for reversal of the sale under rule 89 of Order XXI. That rule, we quote only so much of it as is relevant to our present purpose, provides as follows:—"Where immoveable property has been sold in execution of a decree any person either owning such property or holding an interest therein by virtue of a title acquired before such sale, may apply to have the sale set aside on certain prescribed conditions." It may seem, at first sight, that the language of this rule is comprehensive enough to include a person in the position of the petitioner. It may be contended that here immoveable property has been sold in execution of a decree: the petitioner is the person who owns such property by virtue of a title acquired long before the sale: she is consequently competent to apply to have the sale set aside. In our opinion, this construction, though it may be justified by the language of the Code, is not the right construction of the rule in question. Rule 89 re-produces section 310A, which was inserted in the Code of 1882 by Act V of 1894. That section provided that any person whose immoveable property has been sold under Chapter XIX of the Code of 1882 may, at any time within 30 days from the date of sale, apply to have the sale set aside. Upon the construction of this section, it is well-known, two questions arose upon which there was some divergence of judicial opinion. The first point which arose for consideration was, whether a person who had acquired an interest in the property after the sale sought to be set aside had taken place, was competent to avail himself of the benefit of the section, the question arose, for instance, whether a person to whom the judgment-debtor sold or mortgaged the property after the sale in execution was entitled to apply under the section. Upon this point, as we have already stated, the different High Courts were not agreed [see *Hazari Ram* v. *Badri Ram* (4); *Appaya* v. *Kunhati* (5) and *Manicka* v. *Rajagopala* (6); see also *Ram Chandera* v. *Rakhma Bai* (7); *Mulchand* v. *Govind* (8); *Erode* v. *Puthiedeth* (9) and *Kunja* v. *Bhupendra* (10)]. To settle this divergence of judicial opinion, the Legislature has introduced the words "by virtue of a title acquired before such sale." The second question which arose for consideration was, whether the person who sought to avail himself of the provisions of section 310A must have been full owner of the property sold, or whether it was sufficient that he should have an interest in the property affected by sale. [*Nityanand Patra* v. *Hiralal Karmakar* (11) overruled by a Full Bench in *Paresh Nath* v. *Nabo Gopal* (12), *Mallikrjunadu* v. *Linga Murti* (13)]. In order to settle this divergence of judicial opinion, the Legislature has introduced the words "either owning such property or holding an interest therein." In order to give effect, however, to the policy of the Legislature upon the two points just mentioned, the rule appears to have been re-drafted with the result that the phraseology has been so altered as to lend some colour of support to the interpretation, that any person who owns the property or has an interest therein, is entitled to apply for reversal of the sale, even though his title is such as cannot be effected by the sale: in other words, the attempt to remove the two difficulties which had arisen under the old Code, has resulted in a new obscurity. It is plain, however, that a reasonable interpretation must be given to the provisions of the Statute, and it is useful in this connection to bear in mind the well-known cannon of construction laid down in *Stradling* v. *Morgan* (14) and quoted with approval by Lord Halsbury, L. C., in *Bell Cox* v. *Hakes* (15) and by this Court in the case of *Narendra Nath* v. *Nagendra Nath* 16). "The sages of the law heretofore have construed Statutes quite contrary to the letter in some appearance, and those Statutes which

(4) 1 C. W. N. 279.
(5) 30 M. 214; 17 M. L. J. 127.
(6) 30 M. 507; 2 M. L. T. 347; 17 M. L. J. 291.
(7) 23 B. 450.
(8) 30 B. 575; 8 Bom. L. R. 578.
(9) 26 M. 365.
(10) 12 C. W. N. 151.
(11) 5 C. W. N. 63.
(12) 29 C. 1.
(13) 26 M. 332.
(14) (1560) Plowd. 197 at p. 205.
(15) 15 A. C. 506 at p. 518; 60 L. J. Q. B. 89; 63 L. T. 392; 39 W. R. 145; 17 Cox C. C. 158; 54 J. P. 820.
(16) 13 C. L. J. 471 at p. 475; 15 C. W. N. 586; 10 Ind. Cas. 43.

comprehend all things in the letter, they have expounded to extend but to some things, and those which generally prohibit all people from doing such an act they have interpreted to permit some people to do it, and those which include every person in the letter they have adjudged to reach to some persons only, which expositions have always been founded on the intent of the Legislature, which they have collected sometimes by considering the cause and necessity of making the Act, sometimes by comparing one part of the Act with another, and sometimes by foreign circumstances. So that they have ever been guided by the intent of the Legislature, which they have always taken according to the necessity of the matter and according to that which is consonant to reason and good discretion."

It would, in our opinion, be an obviously unreasonable interpretation of rule 89 to hold that any person might avail himself of the benefit thereof even though admittedly he was, in no way, effected by the sale sought to be reversed. In a case of this description a reference to the history of the Legislation on the subject is perfectly legitimate as was done by the Judicial Committee in *Ishuree Persad* v. *Chatterput* (17) and *Brown* v. *McLachlan* (18). The history of the Legislation here shows conclusively that the extended construction put upon the rule by the learned Subordinate Judge, cannot be supported: we must, after all, take a rational view of the scope and object of the section, and cannot attribute to the Legislature any intention such as would be obviously unreasonable; but we need not, for our present purposes, determine the precise limits of the scope of the rule or define the circumstances under which it may be applicable. The view we take as to the true interpretation of section 89 is in accord with that taken by Stanley, C. J., and Banerji, J., in *Muhammad Ahmadullah Khan* v. *Ahmad Said Khan* (19) [see also *Asmutunnissa* v. *Ashruff Ali* (20) which overruled the contrary view maintained by Mr. Justice Field in *Panye Chunder* v. *Hur Chunder* (21). As the petitioner has carried back her title to a date so far anterior to the sale and the execution proceedings that she could not possibly be affected thereby. We must hold that she had no *locus standi* to make an application for reversal of the sale, which, according to his own case, does not concern her in the least.

The result, therefore, is that, although we disagree with the Subordinate Judge upon all the three points taken by the decree-holder auction-purchaser, we must affirm his order and discharge the Rule: under these circumstances, there will be no order as to costs under this Court.

Rule discharged.

(17) 3 M. I. A. 100 at p. 130.

(18) L. R. 4 P. C. 543 at p. 550; 9 M. P. C. (N. S.) 384; 42 L. J. P. C. 18; 21 W. R. 277.

(19) 8 A. L. J. 356; 10 Ind Cas. 863.

(20) 15 C. 488.

(21) 10 C. 496 at p. 500.

CALCUTTA HIGH COURT.

CIVIL RULE No. 5398 OF 1910.

March 23, 1911.

Present:—Mr. Justice Mookerjee and Mr. Justice Caspersz.

KAILAS CHANDRA MANDAL—DEFENDANT PETITIONER

versus

K RANENDA GHOSH—PLAINTIFF—OPPOSITE PARTY.

Provincial Small Cause Courts Act (IX of 1887), Sch. II, art. 31 Suit for account, what is Account between silk merchant and dyer and dresser of silk.

If in order to grant relief to the plaintiff, it is necessary to take accounts, the suit is one for account within the meaning of Article 31 of the Provincial Small Cause Courts Act, although the plaintiff may have chosen to put a definite money value upon his claim.

The plaintiff, a silk merchant, advanced money to the defendant from time to time. Out of the money so advanced the defendant purchased materials for dyeing and dressing and retained the balance as remuneration for work done. The plaintiff kept an account book. The accounts were not adjusted. The plaintiff brought this suit for recovery of Rs. 307, on the allegation that upon settlement of accounts that sum would be found due from the defendant:

Held, that the suit was one for account within the meaning of Article 31 and that the Small Cause Court had no jurisdiction.

Rule against the decree of the Small Cause Court Judge of Murshidabad, dated November 4, 1910.

Babu *Jadu Nath Mandal*, for the Petitioner.

Babu *Girish Chandra Pal*, for the Opposite Party.

JUDGMENT.—We are invited in this Rule to set aside a decree of the Court below, on the ground that it has been made without jurisdiction. The plaintiff, opposite party, is

a silk merchant. The defendant-petitioner is an artisan engaged in the business of dyeing and dressing silk. He has been employed by the plaintiff, during many years past, in his professional work. The plaintiff from time to time advanced money to him out of which he spent a portion on materials for dyeing and dressing, and paid himself as remuneration for work done. The plaintiff kept an account book in which he made entries as to the sums paid out to the defendant as occasion required, and as the defendant supplied articles, the plaintiff also made entries as to the amount which the defendant was entitled to charge on account of labour and materials. The accounts between the parties, however, have not been adjusted. The plaintiff brings this suit for recovery of Rs. 307 on the allegation that upon settlement of accounts that sum would be found due from the defendant. The learned Small Cause Court Judge has treated the suit as one for accounts. He made a preliminary decree on the 23rd September 1910 and under Order XXVI, rule 11, of the Code of 1908 appointed a Commissioner to adjust the account from the books produced and other evidence that might be adduced by the parties. The Commissioner submitted his report and a decree was made in favour of the plaintiff.

It is now contended on behalf of the defendant that the suit is excluded from the cognizance of the Court of Small Causes by Article 31 of the Second Schedule of the Provincial Small Cause Courts Act. That Article provides that any suit for account (other than a suit for an account of partnership transactions or a suit for an account of property which are excluded by Articles 29 and 30) cannot be entertained by a Court of Small Causes. The question, therefore, arises whether this is a suit for account within the meaning of Article 31. We feel no doubt whatever that it is a suit of that description. The true relation between the parties is that as the defendant has from time to time accepted advances from the plaintiff, it is his duty to account for the sums received and spent by him. He is bound to show what sums have been spent in the purchase of materials from time to time. He is also entitled to deduct from the funds in his hand the charges for labour. Clearly, the determination of the question in controversy between the parties does involve the taking of accounts in the strict sense of the term. It need not be disputed that every suit in which strict accounts, have to be taken is not a suit for accounts within the meaning of Article 31. In support of this proposition, reference may be made to the case of *Konduru Runga* v. *Subbiah Setty* (1). It may also be conceded that, as pointed out by Mr. Justice Trevelyan in *Kunjo Behary Singh* v. *Madhub Chandra Ghose* (2), a suit for account is a suit which seeks for a decree, not for a definite sum of money, but ordering the defendant to account to the plaintiff for monies received by him. At the same time, it must be remembered that the true nature of a suit cannot be altered by the form in which the claim is laid in the plaint; the matter is essentially one of substance. If, in order to grant relief to the plaintiff, it is necessary to take accounts, the suit is one for account within the meaning of Article 31 although the plaintiff may have chosen to put a definite money value upon his claim. In fact, with a view to determine the jurisdiction of the Court, such money value is invariably put upon the claim by the plaintiff in a suit for account. But whether the suit is one for account within the meaning of Article 31, must depend upon the relation in which the parties stand to each other, and the nature of the investigation required to afford relief to the plaintiff. In the case before us, upon the facts stated, there is no room for controversy that the suit is one for account strictly so called and that it has been tried as such by the Subordinate Judge without any objection by the plaintiff in the Court below. But the Subordinate Judge has overlooked that, treated as a suit for account, it was beyond his jurisdiction.

The result, therefore, is that this Rule must be made absolute and the decree of the Court below set aside. The plaint will be returned to the plaintiff for presentation to the proper Court, the petitioner will have his costs in this Rule. We assess the hearing fee at two gold *mohurs*. The costs in the Court below will be costs in the suit.

Rule made absolute.

(1) 28 M. 394.
(2) 23 C. 884 at p. 890.

MRS. GROSE JONES *v.* MR. A. CUMPER.

PUNJAB CHIEF COURT.
CIVIL REVISION No. 1446 OF 1909.
May 16, 1911.
Present:—Mr. Justice Chevis.
MRS. GROSE JONES—PLAINTIFF—PETITIONER
versus
MR. A. CUMPER AND OTHERS—DEFENDANTS RESPONDENTS.

Landlord and tenant—Tenant's goods attached in execution of a creditor's decree and locked up in the house occupied by him—A second creditor putting forward a prior claim and obtaining sale-proceeds of the attached goods What person liable to pay rent for the period during which goods remained stored in the house.

In execution of a decree against a person, who was occupying a house as a tenant, his property was attached and locked up in the house by the *Nazir* of the executing Court. A creditor, other than the decree-holder, put forward a preferential claim to the attached property on the basis of a mortgage of the property and obtained all the money realized by auction of the attached property. The landlord sued the tenant and the decree-holder for rent for the period during which the property remained locked up in the house:

Held, (1) that as the house remained under lock and the tenant could not enter it, he was not liable for the rent;

(2) that also the decree-holder, in execution of whose decree the property was attached and locked up in the house, was not liable for the rent;

(3) that granting that the *Nazir*, when he attaches property, does so as the decree-holder's agent, still when a creditor with a prior claim steps in and ousts the attaching creditor, he must be regarded as taking over the liabilities, including rent due for the storing of the property from time of attachment to sale.

Petition, under section 25 of Act IX of 1887, for revision of the order of the Judge Cantonment Small Cause Court, Rawalpindi, dated the 17th day of May 1909, dismissing plaintiff'a claim.

Bhagat *Govind Das*, for Mr. *Bodh Raj Sawhny*, for the Petitioner.

JUDGMENT.—The house was rented by Mr. Cumper, against whom Messrs. Jamasjee and Sons got a decree in execution of which they attached Mr. Cumper's goods. The goods were locked up in the house. Then the Punjab Banking Company put in a claim on a mortgage-deed, and this claim, having preference over Messrs. Jamasjee's unsecured debt, the Punjab Banking Company obtained all the money realized by auction of the goods less sale expenses. Plaintiff now sues Mr. Cumper and Messrs. Jamasjee for rent. Granting that the *Nazir*, when he attaches property, does so as the decree-holder's agent, still when a creditor with a prior claim steps in and ousts the attaching creditor, I think he must be regarded as taking over the liabilities, including rent due for the storing of the goods from time of attachment to sale. It seems to me that it is the Punjab Banking Company and not Messrs. Jamasjee who should pay. Whether plaintiff can now sue the Punjab Banking Company it is not for me to decide. All that I have to decide is, whether the present defendants are liable, and I agree with the Small Cause Court Judge that they are not. I utterly fail to see how Mr. Cumper can be liable when he was not in possession of the premises. The house was locked and he could not enter it.

This application fails and is dismissed.

Appeal dismissed.

BASANTI *v.* PARTAPA.

PUNJAB CHIEF COURT.
SECOND CIVIL APPEAL No. 936 OF 1909.
May 13, 1911.
Present:—Mr. Justice Shah Din.
Musammat BASANTI—DEFENDANT—APPELLANT
versus
PARTAPA AND OTHERS—PLAINTIFFS—RESPONDENTS.

Custom—Sikh Jats *of* Mouza *Butaheri*, Tahsil *and District Ludhiana—Widow remarrying her deceased husband's brother, effect of, on her life-estate—Widow, whether forfeits her life-interest in her deceased husband's property by such re-marriage.*

Among *Sikh Jats* of *Mauza* Butaheri, *Tahsil* and District Ludhiana, a widow does not forfeit her life-estate in her deceased husband's property by reason of her re-marriage in *karewa* form with the latter's brother, whether he is the sole surviving brother or there are other brothers as well of the deceased. But if she re-marries a collateral, however near, other than the brother of her deceased husband, she must surrender her life-estate to the latter's own brother, as in that case she steps out of the proper family circle and different considerations come into play.

Musammat Indi v. Bhanga Singh, 115 P. R. 1900; 29 P. L. R. 190, relied upon.

Punjab Singh v. *Musammat Chandi*, 88 P. R. 1900, referred to.

Second appeal from the order of the Divisional Judge Ambala Division, dated the 20th March 1909, reversing that of the Munsif of the 1st Class, Ludhiana, dated the 31st December 1908, dismissing plaintiff's suit.

Mr. *Abdulla*, for the Appellant.

Mr. *G. R. Harris*, for the Respondents.

JUDGMENT. The parties in this case are *Sikh Jats* of *Mauza* Butaheri, *Tahsil* and

District Ludhiana; and the question for decision is, whether among them a widow on her re-marriage with her deceased husband's brother does not forfeit her life-estate in her first husband's property.

The facts are very fully stated in the judgments of the Courts below. The Court of first instance has held that by custom applicable to the parties the widow does not forfeit her life-estate by reason of her re-marriage with her deceased husband's brother, while the lower Appellate Court has held that such re-marriage works a forfeiture. In a case of this kind the question of the allocation of the burden of proof is a matter of some difficulty, but assuming that the *onus* lay upon the widow in this case of proving that her re-marriage in the *karewa* form with the brother of her deceased husband did not by custom cause a forfeiture of her life-interest in her first husband's property, she has, in my opinion, discharged that *onus*.

The leading authority on the question under consideration is *Musammat Indi* v. *Bhanga Singh* (3) in which after a very full discussion of the matter, it was held by Mr. Justice Chatterjee that among the *Sikh Jats* in the Ferozepore District the widow by marrying her deceased husband's brother does not forfeit, by custom, her life-estate in her former husband's property. The following observations made by the learned Judge in the course of his judgment contain a lucid exposition of the principles on which the custom in question is based:—

"The decision of the question is not free from difficulty, but on the whole I am disposed to think that the plaintiff's claim ought not to succeed. Having regard to the customs and notions of the *Jats*, I am inclined to hold that there is a substantial distinction recognized by them between the marriage of a widow with her husband's brother and her marriage with a stranger. The *Jat* notion undoubtedly is that by marrying a member of a family a woman not only becomes a member of it but comes to be looked upon as if she were the property of the family. If her husband dies, his male relations in the order of propinquity to him have a preferential claim to take her to wife. In practice in most instances she follows this rule if she contracts a second marriage at all. Where she takes the liberty of choosing a husband elsewhere, it is usual for the next relative of the deceased to institute a criminal prosecution under section 498, Indian Penal Code, or sue for her custody on the allegation that a *karewa* has actually taken place with him. Such proceedings fail because our Courts refuse to recognize the mere sentimental claims of the male relation as binding on the woman without proof of an actual marriage whether by ceremonies or a distinct declaration or continued cohabitation in the avowed character of husband and wife.

"Among *Jats* also no ceremonies are essential to a widow's re-marriage, but this is more specially the case where the second husband is the brother of the first. By mere cohabitation the widow assumes the position of his wife and he of her husband. [See remarks in *Hira Singh* v. *Musammat Rami* (2) at page 318] This must be due to the universal opinion held by *Jats* that in marrying her husband's brother the widow is doing the right and proper thing and what she is expected to do. It is allowable, then, to infer that as regards forfeiture there would be some differentiation between the consequences of an act of this nature and those of a *karewa* out of the family. The estate of the widow is only for life, and is primarily given to her by way of maintenance. She gets this as a member of the family and loses it if she leaves the family for another. Would she be subjected to the same penalty if she continues a member of the family as before in spite of her re-marriage? Probably custom which is founded on the good sense of the people and the notions of natural justice and equity prevalent among them, would prevent the second husband, if he is the sole brother of the deceased, from saying to his brother's widow 'you have done what is regarded as the proper thing amongst us by marrying me. I now call upon you to surrender your first husband's property as the penal consequence of that act.' If there are more brothers than one the case of those who do not marry the widow is but little stronger than that of him who does marry her. I should be prepared from these considerations to prefer the evidence in support of the contention that such a marriage does not involve loss of the first husband's estate."

(1) 115 P. R. 1900; 29 P. L. R. 1901.

(2) 74 P. R. 1893.

The learned Judge then proceeds to discuss the published decisions of this Court bearing upon the point. He says,—

"The custom, however, does not rest on mere speculation. There is plenty of authority in support of the position that among *Sikh Jats* the widow of a man marrying his brother by *karewa* does not ordinarily forfeit his estate. *Parema* v. *Mussammat Pardhan* (3) has already been mentioned in *Punjab Singh* v. *Musammat Chandi* (4). These cases fairly establish the existence of the custom among the *Sikh Jats* of Sirsa. A similar custom was found to prevail in Rohtak,—Civil Appeal No. 1211 of 1876. In *Musammat Lachmi* v. *Harjus* (5) and *Sita* v. *Khuha* (6) a contrary custom was found, but the former case related to *Nors* of Karnal, while in the latter the second husband was not a brother but a cousin. In *Hira Singh* v. *Musammat Rami* (2), which was a case has among *Hinjra Jats* of Amritsar, the Divisional Judge held that the widow did not forfeit her right by cohabiting with her first husband's brother which did not amount to marraige, and the case was remanded for a further inquiry into custom by Sir Meredyth Plowden after reviewing the existing authorities. The substance of his remark is, on the whole, favourable to the existence of such a custom, though perhaps the headnote goes further in this respect than his words justify. One of the plaintiff's own witnesses in that case deposed that the widow loses her first husband's estate if she leaves his home, and said that in that instance the widow had not done so. The case was ultimately compromised by the other brothers of the deceased husband, who were plaintiffs, paying the widow Rs. 400 in consideration of her relinquishing the estate. This case, therefore, is on the whole favourable to the widow's retention of her first husband's estate in spit of *karewa* with his brother, and shows that this custom is wide-spread among *Jats*, and is not confined to the Sirsa District. The remarks of Mr. Justice Barkley in *Prema* v. *Musammat Pardhan* (3) are also indicative of the custom being known to officers of large judicial experience and possessing intimate knowledge of the people. The most accurate statement regarding forfeiture on re-marriage is given by Sir Charles Roe, in his Tribal Law, page 60. Marriage with a brother or next agnate is treated by him as a thing apart from marriage with a stranger. The custom on the latter point is of no real help in deciding the custom as regards the former"

I entirely agree with Mr. Justice Chatterjee that the *Sikh Jats* in this Province regard with full approval the re-marriage of a widow with her deceased husband's brother, and that as, in spite of such re-marriage the widow remains a member of the family of her first husband, public opinion among *Jats*, as expressed in the rules of custom, does not insist upon the widow surrendering her life-estate in her first husband's property either in favour of her second husband or, if the deceased has left more than one brother, in favour of the other brother or brothers of her second husband.

The instances cited by the parties in the present case also support this view. The plaintiff's witnesses gave altogether three instances, in which, according to them, the widow on her re-marriage with her deceased husband's brother forfeited her life estate. Of these, however, two instances, as pointed out by the first Court, have not been proved; and there is, therefore, only one instance in plaintiff's favour, namely that of *Musammat* Paremon, widow of Daya Singh, who re-married Daya Singh's younger brother, Chatra, and in consequence of that re-marriage forfeited her life-estate in Daya Singh's land, which was thereafter partitioned among the three surviving brothers of Daya Singh. On the other hand, four instances have been cited on behalf of the defendant to show that among *Sikh Jats* the re-marriage of a widow with her deceased husband's brother does not work a forfeiture of her life-estate. The Divisional Judge has discarded three of these instances on the ground that they "relate to cases in which the deceased husband of the widow left only one brother who espoused his widow and allowed his land to remain in her name" The learned Judge says "It is self evident that such instances prove nothing," I do not see my way to agree in this view. As pointed out by Chatterjee, J, in the above mentioned decision "If there are more brothers than one, the case of those who do not marry the widow is but little

(3) 137 P. R. 1883.
(4) 88 P. R. 1900.
(5) 123 P. R. 1884.
(6) 53 P. R. 1886.

stronger than that of him who does marry her;" inasmuch as the widow on her re-marriage with the sole surviving brother, or with one of the brothers, of her deceased husband does not cease to be a member of the latter's family, her second husband taking the place of the first; and she does not, therefore, incur the penalty of forfeiting her life-estate as a widow which she would necessarily incur if she were to re-marry outside the family. In this respect *Jat*—custom appears to be very strict, so much so that, according to it, there is, as pointed out in *Punjab Singh* v. *Musammat Chandi* (4), a considerable difference between re-marriage with the deceased husband's brother and re-marriage with a near relative of the deceased husband As soon as the widow steps out of the family circle, represented by the joint family, of her deceased husband, other considerations come into play; and then, although her re-marriage may be with a near collateral of her deceased husband, she must surrender her life-estate to the latter's own brothers In my opinion, therefore, the Divisional Judge was in error in leaving out of account the three instances referred to above; they are nearly as good evidence of the prevalence of the custom contended for the widow as if the deceased husband of the widow in each of those cases had left more than one brother. The fourth instance cited for the defendant is admittedly in point. Uttam Singh, Bhana, Mahla and Kehra were four brothers. Uttam Singh died leaving a widow, *Musammat* Harnami, who contracted a *karewa* marriage with Mahla and in spite of her re-marriage retained possession of Uttam Singh's land during her life-time. It was not until after her death that it was partitioned among the three surviving brothers of Uttam Singh.

I think that these four instances, taken in conjunction with the decisions of this Court in *Punjab Singh* v. *Musammat Chandi* (4); *Musammat Indi* v. *Bhanga Singh* (1 , are sufficient to prove that among the parties tribe a widow do s not forfeit her life-interest in her deceased husband's property by reason of her re-marriage with the latter's brother. In support of his view the Divisional Judge relies also on the answer to question No 42 in the Customary Law of the Ludhiana District (885) page 59. There the rule of custom is stated in the following terms,—

"All tribes agree that unchastity and re-marriage (whether in the family or to a stranger *apparently*) equally destroy the right of the widow over her husband's estate; some say that mere unchastity has not this effect, if the woman does not actually leave her husband's home.....Re-marriage to a *stranger* would in all cases, I think, deprive the widow of her right; and *so would a union with a member of her deceased husband's family.*"

The above is only a faint expression of opinion by the learned compiler of the volume of the Customary Law in question; and it cannot, therefore, have the same weight as would attach to an unequivocal statement of a rule of custom made by those concerned and supported by some definite instances of the actual operation of the rule. It would appear from the language used by the compiler (see the words italicised by me) that the question of the forfeiture of the widow's life estate, in the event of her marrying her deceased husband's own brother by *karewa*, was not definitely put before the tribes concerned, and they had, therefore, no opportunity of stating what their custom was on that point.

For the foregoing reasons, I hold that the defendant has not forfeited her life-estate in the property of Kehru by reason of her re-marriage in *karewa* form with Sheru, brother of the deceased. I, therefore, accept this appeal and reversing the decree of the Divisional Judge, restore that of the first Court with costs throughout.

Appeal accepted.

(s. c. 13 Bom. L. R. 264.)

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 374 OF 1909.

February 23, 1911.

Present: Sir Basil Scott, KT., Chief Justice, and Mr. Justice Batchelor.

EBRAHIM HAJI YAKUB APPELLANT

versus

CHUNILAL LALCHAND KABREE— RESPONDENT.

Limitation Act (XV of 1877), s. 19—Gumasta—Acknowledgment after master's death—Death not known to the creditor—Contract Act (IX of 1872), ss. 208, 209—Estate of master bound by act of gumasta.

Plaintiffs had dealings with the firm of one *H.* A *gumasta* carried on the business of the firm for his master, and generally managed its affairs, and his

master always allowed him to write letters on behalf of the firm and never repudiated any of them. After *H's* death, a fact not known to the plaintiffs, the *gumasta* in answer to a letter from the plaintiffs, relating to their account, wrote, 'you mention that there are moneys due; as to that I admit whatever may be found on proper accounts to be owing by me, you need not entertain any anxiety':

Held, (1) that the statement amounted to an acknowledgment within the meaning of section 19 of the Limitation Act, 1877;

(2) that the case fell within the provisions of sections 208 and 209 of the Contract Act and hence the *gumasta* did bind the estate of *H*.

Second appeal from the decision of the District Judge of Ahmednagar, in Appeal No. 40 of 1908, confirming the decree passed by the First Class Subordinate Judge of Ahmednagar, in Civil Suit No. 323 of 1906.

Mr. *P. D. Bhide*, for the Appellant.

Mr. *D. R. Patwardhan*, for the Respondents.

JUDGMENT.—It is admitted that the defendant No. 1, by an order of the Court made in an administration suit, is the manager of the property of Haji Usman Haji Oomar who died in or about March 1903.

The plaintiffs' firm had dealings with Haji Usman's firm at Malegaon. The business of that firm, according to the finding of the lower Court, was, during the life-time of Haji Usman, carrid on by a *gumasta* named Khanderao.

The suit was instituted by the plaintiffs on 30th of May 1906 by presenting the plaint to the officer of the Court at Ahmednagar In order that he plaintiffs may not be me by a bar of limitation they have to show that there was some acknowledgment binding upon the estate given under section 19 of the Limitation Act within the three years anterior to the 30th of May 1906. The acknowledgment relied upon for this purpose is dated 2nd of June 1903. It is in the shape of a post-card addressed to the plaintiffs by the *gumasta* Khanderao from Malegaon in the name of Haji Usman Haji Oomar in which no reference is made to the death of the latter. It purports to be an answer to a letter from the plaintiffs relating to their account and concludes by saying. "You mention that there are moneys due; as to that I admit whatever may be found on proper accounts to be owing by me, you need not entertain any anxiety."

The learned Judge of the lower Apellate Court has held that there was no reason to suppose that the plaintiffs at this time knew that Khanderao's authority had terminated by the death of Haji Usman, and it is not alleged that they had notice of his death at that time assuming the authority of the writer of the letter to give acknowledgment had terminated.

It appears from the decision of the Privy Council in *Mani Ram Seth* v. *Seth Kup Chand* (1) that an acknowledgment in terms such as we have referred to would be an acknowledgment within the meaning of section 19.

The question then is, whether the *gumasta* Khanderao, who was in charge of the business on the 2nd of June 1903, could bind the estate of Haji Usman who died two months previously.

The learned Judge has held that there is a strong presumption in favour of the arrangement which existed in Haji Usman's time as deposed to by the witness Khanderao having continued with, at any rate, the implied authority of Haji Usman's legal representatives, so far as to cover the acknowledgment of the 2nd of June.

According to the evidence of Khanderao and a number of letters which were proved in the case, he carried on business for his master and generally managed the affairs of the firm, and his master always allowed him to write letters on behalf of the firm and never repudiated any of them.

Under these circumstances, we think that the case falls within the provisions of sections 208 and 209 of the Contract Act. The termination of Khanderao's authority, if it did terminate, did not take effect as regards the plaintiffs before the 2nd of June as they did not know of Haji Usman's death; and Khanderao was bound under section 209 to take on behalf of the representatives of his late principal all reasonable steps for the protection and preservation of the interest entrusted to him. The post card written on the 2nd of June was, we think, a reasonable letter for the manager to write to a creditor who was inquiring about the moneys due to him, and was written for the protection and preservation of the assets of the shop. We, therefore, hold that the suit was not barred by limitation.

(1) 33 C. 1047; 8 Bom. L. R. 501; 4 C. L. J. 94; 10 C. W. N. 874; 1 M. L. T. 199; 3 A. L. J. 525; 16 M. L. J. 300; 2 N. L. R. 130.

We affirm the decree of the lower Appellate Court and dismiss the appeal with costs.

Decree confirmed.

(s. c. 13 Bom. L. R. 268.)

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 864 OF 1908.

February 21, 1911.

Present:—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Batchelor.

ABDUL ALI ABDULHUSEIN—

APPELLANTS

versus

MIAKHAN ABDULHUSEIN—

RESPONDENT.

Civil Procedure Code (Act XIV of 1882), ss. 13, 44 (b) Res judicata—*Prior donee not estopped by judgment in an action after gift—Priority of estate—Joining causes of action in respect of two different estates—Misjoinder.*

The donee of a house cannot be estopped as being privy in estate by a judgment obtained in an action against the donor commenced after the gift.

Mercantile Investment and General Trust Company v. *River Plate Trust, Loan and Agency Company*, (1894) 1 Ch. 578; 8 R. 791; 70 L. T. 13'; 42 W. R. 365; 63 L. J. Ch 366; *The Natal Land and Colonization Co.* v. *Good*, (1868) 5 Moore P. C. (N. S.) 132; L. R. 2 P. C. 121; 16 W. R. 1086; *Niazullah Khan* v. *Nazir Begum*, 15 A. 108, referred to.

A person claiming property as the heir of his father on the ground that his mother had no title to the property, which she purported to dispose of by way of gift to his daughter, cannot join in the same suit another cause of action based on the ground that the daughter had obtained a good title to the property from her grandmother and he was entitled to it as her father.

Second appeal from the decision of the District Judge of Surat, in Appeal No. 6 of 1907, confirming the decree passed by the First Class Subordinate Judge, A. P., at Surat, in Civil Suit No. 179 of 1908.

Mr. *Modi*, with Mr. *N. K. Mehta*, for the Appellants.

Mr. *Ratanlal Ranchhoddas*, for the Respondent.

JUDGMENT.—This suit relates to a portion of a house alleged to have been given away by one Mariam, the widow of Abdool Husen Kamrudin, to her grand-daughter Rukhiaboo, the daughter of Abdul Ali, the first plaintiff, and the wife of the first defendant Miakhan.

The deed of gift in favour of Rukhiaboo was dated the 3rd of June 1899.

In the year 1900, Mariam found herself involved in three suits in all of which an issue was raised and decided against her as to whether she had any title to the house in question, which had originally belonged to her husband Abdool Husen Kamrudin. The decision against Mariam in those suits is now relied upon as evidence against Miakhan the husband of Rukhiaboo, although not only were the causes of action in those suits concerned with a different portion of the house to that which was the subject of the gift in favour of Rukhiaboo, but the suits themselves were instituted a year subsequent to that deed of gift.

Without considering the question how far a judgment in a suit relating to one portion of a house can be *res judicata* against the owners of another portion of the house, we hold that the judgments in the suits of 1900 are not admissible in evidence against Rukhiaboo on the ground stated by Mr. Justice Romer in *Mercantile Investment and General Trust Company* v. *River Plate Trust, Loan and Agency Company* (1), "that a prior purchaser of land cannot be estopped as being privy in estate by a judgment obtained in an action against the vendor commenced after the purchase." To the same effect are the judgment of the Privy Council in *The Natal and Colonization Land Company* v. *Good* (2), and the judgment of the Allahabad High Court in *Niazullah Khan* v. *Nazir Begum* (3).

Then, it is contended by the appellants that at all events the lower Court in deciding the suit should have considered Abdul Ali's claim as one of the heirs of Rukhiaboo.

Now, the claim that was first put forward in this suit was put forward jointly by Abdul Ali with the children of his brother Esoofali claiming as the heirs of Abdul Husein Kamrudin on the ground that their mother Moriamboo had no title to the property which she purported to dispose of by way of gift to Rukhiaboo. They, therefore, claimed under a title derived from Abdul Husen Kamrudin as his heirs and claimed in respect of his estate. That was a clear and definite cause of action.

(1) (1894) 1 Ch. 578; 63 L. J. Ch. 366; 8 R. 791; 70 L. T. 31; 42, W. R. 365.

(2) (1868) L. R. 2 P. C. 121; 5 Moore P. C. (N S.) 132; 16 W. R. 1086.

(3) 15 A. 108.

BHOLA NATH *v.* BELCHAMBERS.

Abdul Ali, the appellant, now complains that he was not allowed to put forward in the same suit a case based upon an entirely different cause of action, namely, that he was the father of Rukhiaboo, deceased, who obtained a good title to the property in dispute from Mariamboo. That cause of action relates to the estate of Rukhiaboo and is put forward by Abdul Ali claiming by derivative title as one of her heirs, and, we think, it is clear that the joinder of two such causes of action in respect of two different estates is prohibited by section 44 (*b*) of the Civil Procedure Code of 1882, which was in force at the date of the institution of this suit.

The appellants' Counsel suggests that it might possibly be held, if a subsequent suit were instituted by Abdul Ali claiming as the heir of Rukhiaboo, that the matter is *res judicata* as it might and ought to have been put forward as a ground of attack in this suit. It is difficult to see how it can be put forward as *res judicata* since *ex hypothesi* the subsequent suit would be between the same parties between whom the Court has decided in this judgment that the claim ought not to be and might not be put forward.

The only remaining question is the question of costs. The learned Subordinate Judge states correctly that the defendants filed written statements which are identical in their contentions. They are all members of the same family, the only difference of interest being that some claim as heirs of Rukhiaboo and others claim as tenants. The Subordinate Judge, however, allowed the tenants one set of costs and the heirs another. When the matter went to the lower Appellate Court the learned District Judge, although his judgment states that he confirmed the decree of the lower Court and dismissed the appeal with costs, appears to have allowed the decree to be drawn up awarding three separate sets of costs to the defendants.

As all the questions in the case are before us in this appeal we are competent to deal with question of costs; and we are of opinion that the defendants are not entitled to more than one set of costs. We, therefore, vary the decrees of the lower Courts in the matter of costs by allowing only one set to the defendants in each Court. In other respects the decree is affirmed.

The costs of this appeal must be borne by the appellants.

Decree confirmed.

CALCUTTA HIGH COURT.

REGULAR CIVIL APPEAL No. 479 OF 1907.

May 24, 911.

Present :—Mr. Justice Holmwood and Mr. Justice Tennon.

BHOLA NATH BOSE AND OTHERS—DEFENDANTS—APPELLANTS

versus

R. BELCHAMBERS AND OTHERS—PLAINTIFFS, AND OTHER DEFENDANTS—RESPONDENTS.

Landlord and tenant—Right of suit—Plaintiffs co-sharers Arrangement to collect rent separately—Subsequent joint suit for rent, whether maintainable.

Plaintiffs, co-sharer landlords, who by an arrangement with the tenants used to collect their shares of the rent separately and had in previous years brought separate suits, are competent to sue jointly for the total amount of demands due to them although they may relate to different periods

Pramada Nath Roy v. *Ramani Kanta Roy*, 35 C. 331; 12 C. W. N. 244; 10 Bom. L. R. 66; 7 C. L. J. 139; 3 M. L. T. 151; 18 M. L J. 43, referred to.

Appeal from the decree of the Second Sub-Judge of Hooghly, dated August 20, 1907.

Babus *Mohendra Nath Roy* and *Khetra Mohan Sen*, for the Appellant.

Babus *Ram Chandra Majumdar*, *Shoroshi Charan Mitra*, *Nagendra Nath Ghose*, *Provas Chandra Mittra* and *Sailendra Nath Palit* for *Narendra Chandra Bose*, for the Respondents.

JUDGMENT.—The only question which arises in this appeal is, whether the three plaintiffs co-sharers who by an arrangement with the tenants used to collect their shares separately and had in previous years brought separate suits are competent now to sue jointly for the total amount of demands due to them which happened to relate to different periods. The real foundation, of course, for this form of suit and for the appeal is that if the suit is treated as a suit by the entire body of the landlords, the decree will carry with it all the incidents attaching to such a suit, and that is really what the appellants desire to avoid. They seek to contend that the terms of the original lease cannot be enforced by all the co-sharers together without the consent of the

tenants, and to support this contention they cite the case of *Guni Mahomed* v. *Moran* and *Doorga Prashad Mytee* v. *Joy Narain Hazra* (1). It was the decision of a Full Bench which laid down converse proposition that, where it has been arranged between the co-sharers of an estate and their tenant that he shall pay each co-sharer his proportionate share of the entire rent, each co-sharer may bring a separate suit against the tenant for such proportionate share. But in the absence of such an arrangement no such suits can be maintained. It is true that Garth, C. J., in delivering judgment says "such arrangements are by no means unusual, and they may be evidenced either by direct proof or by usage from which their existence may be presumed. But in either case they are perfectly consistent with the continuance of the original lease of the entire tenure; and the same consent of all the parties by which the arrangement was originally created may at any time put an end to it". Upon this dictum we are asked to hold that the same consent of all parties is necessary to put an end to it. That this is not so is shown by the very next sentence in the judgment and it is emphasized at the end of the judgment in the following terms: – "No Court of Justice ought to presume the cancellation or determination of the lease from the mere fact of a separate payment of rent to one or more of the co-sharers."

This case has been considered by the Privy Council in the case of *Pramoda Nath Roy* v. *Ramani Kanta Roy* (2) and it appears to us to conclude the question which is now raised before us. Their Lordships say, "It has long been held in Bengal that agreement either expressly proved or implied by the conduct of parties may establish the right to sue separately for the share of rent receivable by the separate share-holder, and their Lordships have no inclination to question the course of rulings." This is the point which we have just noticed was laid down by the Full Bench in *Doorga Prashad Mytee* v. *Joy Narain Hazra* (1). But their Lordships go on to say,—"It has been equally clearly laid down in Bengal that such an arrangement express or implied merely affects the right to sue separately for rent, and in no other respect modifies the terms of the holding; and their Lordships think that this is clearly a sound view of the law. And it appears to their Lordships to be sufficient ground upon which to decide this appeal, for it follows, from the propositions referred to, that the right to bring to tenure to sale for arrears of rent remains in tact, and also the right of one sharer to sue making his co-sharers defendants when they will not join as plaintiffs". This concludes the matter, as the case of the three co-sharers joining, as in the case before us, to bring a suit is *a fortiori* governed by the principle laid down by the Privy Council.

We, therefore, direct that this appeal be dismissed with costs. We assess the hearing fee at three gold *mohurs*.

Appeal dismissed.

(1) 4 C. 96; 2 C. L. R 371.
(2) 35 C. 331; 12 C. W. N. 249; 10 Bom. L. R. 66; 7 C. L. J. 139; 3 M. L. T. 151; 18 M. L. J. 43.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1002 OF 1908.

May 24 1911.

Present:—Mr. Justice Coxe and Mr. Justice Teunon.

KANAI MANDAL AND OTHERS—DEFENDANTS—APPELLANTS

versus

SHYAMA CHARAN KHAURA—PLAINTIFF—RESPONDENT.

Lease—Term exceeding one year—Evidence—Not admissible without registration—Whether admissible to prove present demise—Relation of landlord and tenant.

An unregistered lease for a period exceeding one year cannot be received in evidence to prove a present demise of the property constituting the relation of landlord and tenant between the parties. It cannot be received in evidence of any transaction affecting the property.

Appeal from the decree of the District Judge of 24-Pergannahs, dated January 29th, 1908, modifying that of the Sub-Judge of that District, dated July 19th, 1906.

Moulvi *Syed Shamsul Huda* and Babu *Atul Krishna Roy*, for the Appellants.

Babus *Mohendra Nath Roy* and *Beraj Mohan Mojumdar*, for the Respondent.

JUDGMENT.—The land to which this appeal relates is a *chak* owned by five persons. The defendants admittedly have a lease

of one-half of the property from two of the properties. The plaintiffs has obtained a lease of the other half from the other three proprietors and has brought this suit for recovery of possession and partition, alleging that he has been kept out of his share by the defendants.

The suit was dismissed by the Subordinate Judge, who held that the defendants had a tenancy of the one-half share claimed by the plaintiff prior to the plaintiff's lease.

On appeal, the District Judge held that the prior tenancy alleged by the defendants had not been made out, and accordingly he remanded the case to the Subordinate Judge for decision of the remaining issues.

The suit then proceeded and partition was finally decreed.

This appeal is lodged by the defendants against the final decree; but their real complaint is against the judgment of the 11th March 1905, remanding the case to the Subordinate Judge for decision of the remaining issues. The defendants pleaded a tenancy under the three proprietors, Surya Kant Roy Chowdhry, Yusuff Mollah and Jogendra Nath Bose, who were entitled to the disputed one-half of the property. As regards Yusuff Mollah, they relied on an *amalnama* and on certain rent receipts. The learned District Judge held that this *amalnama*, not having been registered, could not be received as evidence of any transaction affecting the property; and did not regard the evidence of payment of rent as sufficient to prove the defendant's tenancy under Yusuff Mollah. The learned Vakil for the appellant attacks this decision of the learned District Judge in respect of the *amalnama*. He contends that even although the *amalnama* might be a lease for a period exceeding one year, as the District Judge finds, and could not, therefore, be received in evidence without registration, yet it might be taken as evidence of a present demise of the property to the defendants constituting the relation of landlord and tenant between them; and he relies on the case of *Champakalatika* v. *Nafar Chandar Lal Chowdhury* (1). But, before dealing with that case, it is as well to refer to the terms of section 49 of the Indian Registration Act. This section provides that when a document, such as this, required by section 17 to be registered, is not registered, it shall not be received as evidence of any transaction affecting any immoveable property comprised therein. It appears to us, under this section, that if this document is a lease and, in our opinion, there can be no doubt that it is a lease it cannot be received as evidence of any transaction affecting the property, whether that transaction be a lease for more than a year, or simply a demise of the property.

Turning to the case cited, it appears that in that case both parties invited the Court to construe the *amalnama* and to ascertain what were their rights ond obligations under it. It does not appear that the plaintiff in that suit contended that the document could not be received in evidence. No doubt, he might have raised this contention and argued that the *amalnama* was not a valid lease and that the defendant was a mere trespasser. Without knowing what the facts of the case were, it is impossible to say why he did not take this course. He may have thought that the decree obtained by the defendant, under section 9 of the Specific Relief Act, would stand in his way, or there may have been other evidence of the defendants' tenancy. But the fact remains that he did not take this course: and the parties, as I have said, invited this Court to construe the *amalnama*. Beyond an incidental remark that the document was neither stamped, nor registered, there is nothing in the decision to justify the view that the learned Judges held on consideration, that the document was admissible in evidence of transactions affecting the property.

We think, therefore, that the learned District Judge was right in holding that the *amalnama* was not admissible in evidence; and his finding that the rest of the evidence did not establish the defendant's tenancy is a finding of fact which we cannot disturb in second appeal.

Next, it has been argued that the *amalnama* may be regarded as an agreement to lease and in that case would justify the retention of the property by the defendants; and reliance is placed on the decision in the case of *Singheeram Poddar* v. *Bhagat Chander Nundi* (2). The document, however, has been laid before us; and it is

(1) 8 Ind. Cas.44; 15 C. W. N. 536; 13 C. L. J. 300.

(2) 11 C. L. J. 543; 6 Ind. Cas. 632.

clear, in our opinion, that it is not an agreement to lease. The ruling, therefore, has no application.

As regards the tenancies under the other two landlords, the findings of the learned District Judge that the evidence does not establish the existence of these tenancies is binding upon us in second appeal.

So far as regards the tenancy under Jogendra Nath Bose, the learned Pleader for the defendants has very properly refrained from pressing his appeal.

These are all the points taken; and it appears to us that they fail and that the appeal should be dismissed with costs.

Appeal dismisse l.

CALCUTTA HIGH COURT.

CIVIL RULE NO. 4551 OF 1910.

April 12, 1911.

Present: Mr. Justice Mookerjee and Mr. Justice Caspersz.

HAKIM GIR AND OTHERS—DECREE-HOLDERS PETITIONERS

versus

BASDEO SAHI AND ANOTHER JUDGMENT-DEBTORS—OPPOSITE PARTY.

Decree on alleged compromise—Allegation by one party that he did not consent—Application for review—Court's power to review and recall order—Civil Procedure Code (Act V of 1908), O. XLVII, r. 1.

In the course of certain execution proceedings, an order was obtained from the Court on the allegation that both parties had assented thereto. Subsequently, it was asserted by one of the parties that he never consented to the order in question:

Held, that it was open to the Court to review the order and re-call it upon an application by the aggrieved party under rule 1 of Order XLVII of the Civil Procedure Code, and that it was not obligatory upon the party to bring a suit to set aside the consent order.

Golab Koer v. *Badshah Bahadur*, 2 Ind. Cas. 129; 10 C. L. J. 420; 13 C. W. N. 1197, referred to.

Rule against the order of the Munsif of Sewan dated August 23, 1910, rejecting the application of the petitioners, decree-holders, to set aside on review, his order, dated May 12th, 1910, which set aside a sale to the petitioners of the mortgaged property of the opposite party, judgment-debtors, held on May 7th, 1910.

Moulvi *Muhammad Mustafa Khan*, for the Petitioner.

Babu *Kumar Sankar Roy*, for the Opposite Party.

JUDGMENT.—We are invited in this Rule to set aside an order by which the Court below has dismissed an application for an inquiry into the validity of an order alleged to have been made by consent of parties on the 12th May 1910. The petitioner before us held a decree against the opposite party judgment-debtors. In execution of that decree the properties of the judgment-debtors were sold on the 7th May 1910 and purchased by the decree-holder himself. Before the sale, the judgment-debtors had taken exception to the execution on the ground that the decree had been satisfied. That objection had been overruled and the sale directed to be held. The judgment-debtors had preferred an appeal against that order and attemped to obtain a stay of proceedings during the pendency of the appeal. Their attempt was infructuous and the sale took place as stated. The appeal then came to be heard in due course, and, it transpired that the execution sale had been set aside on the 12th May 1910 upon the strength of a petition of compromise to which the decree-holder was alleged to be a consenting party. The appeal was dismissed, but the learned District Judge directed an inquiry into the circumstances under which the sale had been set aside. Thereupon, the decree holder, on the 22nd August 1910, applied to the original Court for an order inquiring into the validity of the order which purported to have been made by consent and on the strength thereof the sale had been set aside. The Court summarily dismissed the application on the ground that it had been made more than 70 days after the order of the 12th May 1910. This order we are now invited to revise.

The learned Vakil for the judgment debtors has not discussed the merits of the case or dealt with the allegation made on behalf of the decree-holder. But he has contended that the decree holder has erroneously made an application for review, whereas he should either have made an application under rule 13 of Order IX of the Code of 1908, or brought a suit to set aside the consent order.

In support of the first branch of this contention, reliance has been placed upon

the case of *Bholai Naskar* v. *Alach Naskar* (1) and *Kunja Behari Ghose* v. *Durgamoni Dassi* (2). These cases, no doubt, lay down the proposition that although a decree purports, on the face of it, to have been made by consent, if it is subsequently alleged by one of the parties that he was not present at the time when the consent order was made and that, as a matter of fact, what appears to be a consent decree was in essence an *ex parte* decree, it is open to him to pursue the remedy provided by section 10?, Civil Procedure Code of 1882. But these cases do not affirm the proposition that this is the sole remedy open to a person placed in that position. In our opinion, it is open to a person so affected to make an application under rule 1 of Order XLVII of the Code and to invite the Court to consider its previous decision in the light of the facts subsequently discovered.

As regards the second branch of the argument of the learned Vakil for the judgment-debtors, namely, that a suit should be brought to set aside the consent order, we need only state that it is not obligatory upon the decree-holder to adopt that course. No doubt it was pointed out by this Court in the case of *Musammat Gulab Koer* v. *Badshah Bahadur* (3), that when a consent decree has been obtained by fraud, the appropriate mathod to set it aside is to institute a suit in that behalf. That principle, in our opinion, does not govern the circumstances of the present case. Here, in the course of execution proceedings, it is asserted, an order has been obtained from the Court on the allegation that both parties had assented thereto. It is now asserted by one of the parties that he never consented to the order in question and that what purports to be a petition on his behalf, was, as a matter of fact, never approved by him. If these allegations are established, it is, in our opinion, open to the Court to review the order and recall it.

The result is that this Rule is made absolute and the order of the 23rd August 1910 discharged. The case will be remanded in order that the Munsif may take up the application of the decree-holder, and upon evidence to be produced by both parties determine whether the order of the 12th May 1910 was or was not made by consent. If it was not made by consent of the decree-holder, it must be discharged and such other proceedings taken as may be found necessary in the circumstances of the case. The petitioner is entitled to the costs of this Rule. We assess the hearing fee at two gold *mohurs*.

Rule made absolute.

(1) 3 C. L J. 158.
(2) 3 C. L. J. 169.
(3) 2 Ind. Cas. 129; 10 C. L. J. 420; 13 C. W. N. 1197.

CALCUTTA HIGH COURT.

ORDINARY ORIGINAL CIVIL SUIT NO. 1171 OF 1910.

March 21, 1911.

Present:—Mr. Justice Harington.

E. D. SASSOON AND CO.—PLAINTIFFS—

versus

M. S. P. ANGULLIA AND CO.

DEFENDANTS.

Civil Procedure Code (Act V of 1908), O. XXX, r. 10—Suit against person carrying on business in firm's name - High Court Charter, cl. 12—Jurisdiction—Person living outside but carrying on business within jurisdiction of High Court—Contract signed by manager—Authority of manager - Power-of-attorney, construction of—Power of re-sale—Non-appropriation of goods to fulfilment of contract—Measure of damages Contract Act (IX of 1872), s. 107.

A plaintiff is entitled in respect of a firm transaction to sue the defendant under the name in which he traded, by virtue of Order XXX, Rule 10, of the Civil Procedure Code, 1908. There is nothing in that rule which says anything about residence either in or without the jurisdiction of the High Court, and it has not the effect of curtailing the powers which the High Court derives from clause 12 of the Charter, under which it has jurisdiction over persons who carry on business within its local limits.

A contract was signed by the manager of the defendant's business in Calcutta, the defendant himself being a resident of Singapore. The defendant was sued in his firm's name for damages for breach of the contract in the Original Side of the High Court:

Held, that the suit was maintainable in the form in which it had been brought, and the High Court had jurisdiction to try it.

The defendant by a power-of-attorney empowered his manager to contract, superintend and carry on the business of general merchant, as now carried on by the defendant in Singapore. The manager entered into forward contracts with the plaintiff in respect of sugar, and there was evidence that the defendant's firm was accustomed in Calcutta to enter into forward contracts in the sugar trade:

Held, that the manager had authority to enter into the contract sued upon and that the defendant was liable.

E. D. SASSOON AND CO. *v.* M. S. P. ANGULLIA & CO.

By the contract the defendant purchased 750 tons of sugar, the delivery of which was to be made in five equal shipments in August, September, October, November and December 1910. Notice was given of the arrival of the August shipment amounting to 150 tons. The defendant took delivery of 25 tons but failed to take delivery of the balance which was re-sold by the plaintiff at a loss, and he now sued to recover the loss:

Held, that as no goods had been appropriated to the fulfilment of the contract, the plaintiff had no right to re-sell and charge the defendant for the difference between the contract price and the price at which he sold the balance of the sugar, but that the measure of damages was the difference between the market price on the date of the breach and the contract price.

Messrs. *Sinha*, *Dass*, *H. C. Bose*, *J. N. Mitter* and *Sircar* instructed by Mr. *N. C. Bose*, Solicitor, for the Plaintiffs.

Messrs. *Pugh* and *Langford James*, instructed by Messrs. *Pugh & Co.*, for the Defendants.

JUDGMENT.—This is an action by sellers against buyers for breach of contract to take delivery of certain bags of Java sugar. The contract was made on the 8th of February 1910. By it the defendant purchased 750 tons of Java sugar, the delivery to be made in five equal shipments in August, September, October, November and December 1910. Notice was given in September of the arrival of the August shipment amounting to 150 tons. After some pressure, the defendant took delivery of 25 tons, but, in spite of repeated notices, he failed to take delivary of the balance of 125 tons. After due notice that they would re-sell the 12 tons, the plaintiffs advertised and held a sale. The 125 tons were sold at a loss of Rs. 2,341-14-9 and, to recover that sum together with the expenses of the sale and the charges made by the Port Commissioners and other items making it up to a total of Rs. 2,745-12-6, the present action has been brought.

The contract in question was signed by a man named Misree *per pro*. Misree was the Manager of the defendant's business in Calcutta, the defendant himself being a resident of Singapore.

The defence that has been set up is, *first*, that the Court has no jurisdiction over the defendant who is a resident out of its jurisdiction; *secondly*, that Misree had no authority to enter into the contract sued upon and, *thirdly*, that no goods had been appropriated to the fulfilment of this contract and that, therefore, the plaintiffs have no right to re sell and charge the defendant for the difference between the contract price and the price at which they sold certain bags of sugar.

On the first point a number of cases decided in English Courts have been cited for the purpose of showing that the Court would not seek to exercise jurisdiction over a single trader residing out of its jurisdiction, notwithstanding the fact that he had an office within the local limits of the jurisdiction of the Court. In my view, those are cases which are not applicable in this country. The jurisdiction of this Court with regard to persons who are liable to be sued in it is derived from clause 12 of the Charter. That clause gives the Court express jurisdiction over persons who carry on business within the local limits of its jurisdiction. In the present case, in two documents which have been put in, namely, in the power-of-attorney and in the printed notice circulated by the defendant repudiating certain contracts, the defendant described himself as carrying on business in Calcutta. He brings himself thus within the express provision of clause 12 of the Charter. It is true that he is sued in the firm's name instead of in his own name but the plaintiffs are entitled in respect of a firm transaction to sue the defendant under the name in which he traded by virtue of Order XXX, rule 10. There is nothing in that rule which says anything about residence either in or without the jurisdiction and it certainly has not the effect of curtailing the powers which this Court derives from the Charter under which it has jurisdiction over persons who carry on business within its local limits. In my view, therefore, the first point raised by the defendant fails.

The second point is as to the authority exercised by Misree. Now it is contended by the defendant that, inasmuch as the contract was signed *per pro*, the plaintiffs had notice that Misree was acting under the authority of a power-of-attorney. They were, therefore, put upon an inquiry as to what the limits of Misree's authority were. Then it is said that the power-of-attorney only entitles Misree to carry on business in the same way in which the defendant carries on his business in Singapore and that, therefore, to show that the contract was one which Misree had authority to make it is necessary to show that a forward contract of this nature could be made in the ordinary course of business by the defendant at Singapore. Now, the

power-of-attorney empowers two persons namely, Faz Ali Fazul Husen Kassim Ali of Singapore and Kassim Misr e of Bangkok, jointly or severally "to contract, superintend, manage and control and carry on in Calcutta aforesaid in the name of M. S. P. Angullia & Co. the business of general merchants as now carried on by me (the defendant) in Singapore and elsewhere under the style and firm aforesaid" and *inter alia* it authorizes them to contract, buy or sell goods and merchandise; and then, after reciting many powers which he places in the hands of attorneys, there is a proviso limiting their powers in these terms; "nothing herein contained shall be deemed to authorise my said attorneys or attorney to speculate in gunnies, opium shares or exchange or to become sureties or surety for or in any way guarantee the debt or liabilities of any person or firm." Now, in the present case, there is evidence to the effect that the entering into forward contracts in the sugar trade is part of the business of the general merchants. There is evidence that, in fact, the defendant's firm was accustomed, in Calcutta at any rate, to enter into such contracts. There is the evidence of the present Manager that, with respect to forward contracts made by Misree which resulted in a gain, he has been endeavouring to realise, for the benefit of the defendant, the gain. It is only apparently with respect to those which resulted in the loss that the defendant's firm has repudiated the authority of Misree. It is true that there is no evidence as to whether the defendant usually makes forward contracts in his trade at Singapur but it is a very significant fact that Kashim Ali the Manager sent to Calcutta, it is stated, to succeed Misree, is unable to say what the course of business at Singapore is and, if the power-of-attorney is construed in the way in which the defendant says it ought to be construed, it results in this absurdity that although Kassim Ali is sent to Calcutta with authority to carry on business as it is carried on at Singapore, he is not given any intimation as to the way in which the business at Singapore is carried on. That, in my view, reduces the matter to an absurdity and I have no doubt that the Managers appointed under the power-of attorney were authorised to carry on business of general merchants in the way in which it was actually carried on in Calcutta and in course of that business, they were authorised to make contracts such as that in the present suit. The second contention, therefore, that the contract was made without the defendant's authority, fails.

Now, the third question is one which, to my mind, is rather more difficult. The evidence is that the plaintiffs called upon the defendant to take delivery of 150 tons of sugar from the Port Commissioner's warehouse, at that warehouse the plaintiffs had a large quantity of sugar in bags, a great deal more than sufficient to satisfy the contract which they had with the defendants. It is admitted that no particular bags were selected for delivery to the defendant but that the course of business was for the defendant to pay for the sugar he was prepared to take, and on payment, to obtain a delivery order. On presentation of the delivery order at the warehouse sufficient bags to meet the delivery order would be taken out of the bulk lying in the warehouse and then and there delivered to the defendant. It is conceded that in this case no particular bags were selected from the bulk because the defendant failed to pay for and obtain a delivery order for the balance of 125 tons as he was bound to do. The plaintiffs sold off 125 tons out of the bulk and now claims to charge as against the de endant the difference in the price at which they sold this quantity and the price the defendant contracted to give. On one side, it is contended that the circumstance that no goods had been appropriated to the contract makes no difference, the sale being held under the condition in the contract On the other side, it is contended that as no bags had ever been tendered or set apart for the purpose of satisfying this particular contract there is nothing to show that the bags sold by the plaintiffs were the actual bags that the defendant ought to have taken and, that being so, the defendant says that the plaintiffs are not entitled to recover the difference between the two sales but they say the measure of damages is the difference between the market price on the date of the breach and the contract price.

The cases which have been cited during the argument do not bear on the question because in each case the goods of which the buyer had refused to take delivery had been ascertained. In this particular case they had not been ascertained, If they had been ascer-

tained or if there had been a tender of a particular parcel of goods to satisfy the contract no difficulty would have arisen.

On the whole, I have come to the conclusion that the defendant's contention on this point is the correct one. The clause in the contract giving a power of re-sale refers to the goods covered by the contract and until the particular goods to be delivered in accordance with the contract have been ascertained, there is nothing to which the power of re-sale under the contract can attach.

But inasmuch as my view on this point in no wise affects the merits of the case or the plaintiffs' right to recover, assuming that the market has gone against the defendant, I do not think it right to dismiss the case.

The measure of damages is the difference between the market price and the contract price of the sugar at the date of the breach. The latest date, as disclosed in the correspondence on which the defendants could have delivered, was October 20th.

There must, therefore, be a reference to ascertain the market price of the undelivered portion of the 150 tons on October 20th and the plaintiff will be entitled to judgment for the difference between that sum and the contract price if the latter sum is the larger of the two.

The plaintiffs will get their costs of action on scale No. II.

CALCUTTA HIGH COURT.
CIVIL RULE No. 5454 OF 1910.
March 28, 1911.
Present:—Mr. Justice Mookerjee and
Mr. Justice Caspersz.
CHANDRA SEKHAR PROSAD SINGH
—PETITIONER
versus
HARI HARENDRA SAHI—OPPOSITE PARTY.

Receiver—Mortgage suit—Mortgagor taking money from Receiver as accommodation loan—Refusal to pay—Power of Court to compel payment.

A Receiver was appointed in a mortgage suit from whose officer the judgment-debtor took a sum of money as accommodation loan out of the funds of the Receiver in his hands. The officer was dead and the judgment-debtor refused to re-pay the amount:

Held, that the Court had power to direct the judgment-debtor to deposit the money in Court within a fixed time, and that in default of such deposit the Receiver was entitled to execute the order of the Court as a decree.

Rule to show cause why the opposite party should not refund to the petitioner (Receiver) the sum of Rs. 1,390 (pending the mortgage suit in the Court of the Sub-Judge of Sarun) as having been paid on his account to his agent by Sidh Nath Panday, officer of the Receiver.

Babus *Mohendra Nath Roy*, *Nabin Chandra Bardulo* and *Rajeswari Prosad*, for the Petitioner.

Maulvi *Muhammad Mustafa Khan*, for the Opposite Party.

JUDGMENT.—The question raised in this rule is one of some nicety and apparently of first impression in so far as the Courts of this country are concerned. Babu Chandra Sekhar Prosad Singh, a Vakil of this Court, was appointed Receiver by the Court in a mortgage suit. He submitted his accounts under rule 3 of Order XL of the Code; and, at the same time, intimated that he was unable to pay into Court a sum of Rs. 1,390 which had been realised by him but had been taken from his officer by the judgment-debtor who refused to re-pay the amount. He, therefore, sought the assistance of the Court with a view to recover this sum from the judgment-debtor. The rule now under consideration was thereupon issued upon the judgment-debtor calling upon him to show cause why he should not refund this sum of Rs. 1,390.

The judgment-debtor does not dispute that he has taken this sum. But he alleges that he received from the officer of the Receiver, a sum of Rs. 1,600 and returned to him Rs. 949-3-3 so that he is liable to refund only the difference, namely, Rs. 650-12-9. But an examination of the account book of the judgment-debtor, produced by himself, shows that on 25th September 1909, he took from the Receiver through his officer, Sidh Nath Panday, the sum of Rs. 1,600 as a temporary loan. It is thus manifest that he is bound to refund the whole of Rs. 1,600 to the Receiver, The Receiver, however, admits that not the whole of this sum but only Rs. 1,390 is still due. But the judgment-debtor has invited our attention to an entry in his own account books to the effect that on the 6th March 1910, Rs. 949-3-3 was paid to Sidh Nath Panday. The Receiver denies the truth of this entry, and on his behalf an affidavit has been filed to the effect that from before the 6th March 1910, Sidh Nath Panday was in

Calcutta and could not possibly have received the sum alleged to have been made over to him. Sidh Nath Panday is now dead, and we are not in a position to decide whether this sum was paid to him or not. But as, on the face of the account book of the judgment-debtor, it appears that the temporary loan was taken for purposes of accommodation from the funds of the Receiver, it was his duty to pay back that money into the hands of the Receiver himself: and the Court cannot recognise a payment alleged to have been made to any other person. Under these circumstances, we must direct the judgment-debtor to pay the Receiver Rs. 1,390.

No question can possibly arise as to the power of the Court to make an order of this description. The Receiver is an officer of Court. Under orders of the Court it is his duty to collect the income of the property in litigation and to bring the money into Court to the credit of the suit, to be applied as the Court may direct. It is the plain duty of the judgment-debtor not to intercept any portion of this sum. If, therefore, as a matter of fact, any part of the income has found its way into the hands of the judgment-debtor and is improperly retained by him, the Court has ample jurisdiction to compel him to refund the same to the Receiver. As instances of cases in which a Court has interfered, by summary process, to require restoration of the property (or recovery of value thereof) abstracted from the possession of the Receiver and wrongfully retained, reference may be made to *Erie Rail Road Co.* v. *Heath* (1); *In re Day* (2); *Schuldz* v. *Lupt* (3) and *Parkar* v. *Peacock* (4). If the contrary view were adopted, the discharge of the duties of the Receiver under the direction of the Court would be impracticable. We direct accordingly that the judgment-debtor do, within one month from this date, deposit in this Court to the credit of the Receiver the sum of Rs. 1,390. If he fails to do so, the Receiver will be at liberty to execute the order of this Court as a decree held by him against the judgment-debtor, Hari Harendra Sahi, and in that contingency, he will be entitled to recover the sum with interest at 12 per cent. per annum from the 25th September 1909, up to the date of realisation. No interest, however, will be charged if the money is deposited within one month from this date.

We may add that if the judgment-debtor has any claim against the estate of Sidh Nath Panday for money proved to have been paid to him, he has his remedy by a suit in a Court of competent jurisdiction against his representatives.

The rule is made absolute to this extent. There will be no order for costs.

Rule made absolute.

(1) 8 Fed. Cas. 762.
(2) 34 Wis. 638.
(3) 77 N. Y. Sup. 493.
(4) 30 L. T. N. S. 458.

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 271 OF 1909.

April 12, 1911.

Present:—Mr. Justice Coxe.

KRIPA SINDHU ROY—PLAINTIFF—APPELLANT

versus

BANCHA NIDHI MAHANTI AND OTHERS—DEFENDANTS—RESPONDENTS.

Act VIII (B. C.) of 1865, s. 6—"All costs of process"—Whether include costs of execution—Sale in execution of rent-decree—Some of costs entered in sale proclamation, not really due, effect of—Unregistered purchaser—Title Superiority—Purchaser at rent sale.

The words "all costs of process" in section 6 of Act VIII B. C. of 1865 are quite wide enough to include costs of execution such, for instance, as the fees necessary for the issue of an attachment or a sale-proclamation.

If the plaintiff judgment-debtor, in a suit to set aside a sale for arrears of rent, succeed in proving that some of the costs of process entered in the sale proclamation were not really due from him, the sale which followed in perfect good faith on that sale-proclamation cannot be regarded as null and void.

An unregistered purchaser of a tenure cannot set up his title against a person purchasing at a sale of the tenure for arrears of rent, and cannot succeed in a suit for possession or for a declaration that the sale was collusive.

Sham Chand Koondoo v. *Brojo Nath Pal*, 21 W. R. 94; *Kristo Chunder Ghose* v. *Raj Kristo Bandyopadhya*, 12 C. 24; *Palit Shahu* v. *Hari Mahanti*, 27 C. 789; *Niladri Mahanti* v. *Bichitranand Roy*, 6 Ind. Cas. 605; 37 C. 823: 14 C. W. N. 905; 12 C. L. J. 158, followed.

Sheik Afzul Ali v. *Lalla Gurnarain*, 6 W. R. Act X Rulings p. 59, doubted.

Appeal from the decree of the Sub-Judge of Cuttack, dated December 14th, 1908, modifying that of the Munsif of Puri, dated August 17th, 1907.

Babus *Provash Chandra Mitter* and *Susil Madhab Mallik*, for the Appellant.

KRIPA SINDHU ROY *v.* BANCHA NIDHI MAHANTI.

Babus *Upendra Narain Mukherji*, *Janaki Nath Pal* and *Birbhushan Dutt*, for the Respondent.

JUDGMENT.—The plaintiffs in this case were the unregistered purchasers of a certain tenure. This tenure was sold by the whole body of the landlord, for the arears of rent due upon it and purchased by defendant No. 1. The plaintiffs brought this suit to set aside the sale on several grounds including that of fraud.

The suit has been dismissed by the Courts below and the plaintiffs appeal.

It appears that the plaintiffs deposited Rs. 61 odd on the 27th of the June 1905. An application for execution had been filed on the 9th June 1905 before the Collector which was transferred to the Deputy Collector for disposal on the 29th of June. The rent-suit and the decree in execution of which the sale was made had taken place in the Court of the Deputy Collector. It is stated that this sum of Rs. 61 odd was all that was due under the decree exclusive of the execution costs. This, if I understand him aright, appears to be the view of the Munsif.

The first point raised on behalf of the appellants is that the execution costs were not payable under section 6 of Act VIII of 1865 and that consequently they were not bound to pay anything more than this sum of Rs. 61 odd. I do not think that this contention can be sustained. The words in section 6 are as follows: "If the sum due under the decree, together with interest to date of payment and all costs of process, be paid into Court at any time before the sale commences such sale shall not take place." The words "all costs of process" are quite wide enough to include execution, such, for instance, as the fees necessary for the issue of attachment or sale-proclamation.

The second point taken is that on the date when this sum of Rs. 61 odd was paid that was all that was due under the decree, inasmuch as the application for execution did not come to the Court of the Deputy Collector until the 29th of June 1905, that is to say, two days after this deposit was made. It is urged that as the suit was disposed of by the Deputy Collector the landlord should not have filed the application for execution in the Collector's Court and that the plaintiffs cannot be regarded as having been liable on the 27th June to pay any costs which might have been incurred in another Court. I am rather doubtful whether I am entitled in second appeal to deal with this point at all. The finding at which the learned Subordinate Judge arrives is that the plaintiffs have not proved that the deposit was sufficient to cover the decretal debt with interest and costs of process as laid down in section 6 of Act VIII of 1865. The learned Subordinate Judge has not apparently come to any finding as to whether the sum deposited on the 27th June covered all that was due from the plaintiffs exclusive of the execution costs. But, even assuming this in favour of the plaintiffs, I cannot hold that the plaintiffs are entitled to succeed on this merely technical ground. It appears to be the practice for all suits and applications for execution to be filed in the Collector's Court and to be made over by the Collector to the Deputy Collector for disposal. This is what was done apparently in the present case. Even supposing for the sake of argument, and only for the sake of argument, that the plaintiffs for this technical reason, were not liable to pay more than Rs. 61 odd on the 27th June, it does not seem to me that section 6 affords them any protection. I have already quoted the terms of section 6. They are to the effect that all costs of process must be paid in Court to prevent the sale taking place. In the present case the execution continued. The sale proclamation presumably was issued stating what costs were due including the costs of execution. I think it impossible to hold that because the plaintiffs might succeed in proving that some of the costs of process so entered was not really due from them the sale which followed in perfect good faith on that sale proclamation must be regarded as null and void. There is no doubt that at the time when the sale was held these costs had been incurred. Even assuming that there may be some doubt as to the plaintiffs' liability for them, that would not, in my opinion, justify as against an innocent purchaser for value the setting aside of the sale.

The third point taken is that the judgments of the Courts below are insufficient on the question of fraud. Both the Courts are clearly of opinion that there is no vestige of dishonesty or fraud in the present case. My attention has been invited to the allegation of fraud made in the plaint. But with respect to this the Munsif observes,—"In this case,

however, the execution proceedings were not fraudulent; the only thing attempted to be shown is that the decretal money had been deposited before the execution was taken out; and as regards the fact which would be of the first importance in establishing an allegation of fraud of this nature, namely, the service of the sale proclamation, he says "he (the plaintiff) has not endeavoured seriously to get it proved that no sale proclamation was published." It is clear, therefore, that the plaintiffs made no real attempt in the Courts below to show any dishonesty on the part of the defendant and the Munsif appears to be completely satisfied with the *bona fides* of the defendant's action.

These findings are sufficient for the disposal of the appeal but it is necessary to discuss the fourth point, that is, that the Courts below have erred in holding that the plaintiffs have no *locus standi* in this case. If this matter rested si ply on the terms of Act X of 1859 I should feel very strongly impressed by the arguments of the learned Pleader for the appellants. But the point has been settled by a number of cases all I think ultimately based on the proviso to section 106 of Act X. At least, it is difficult to see on what other provision of law they can be based. If the matter rested on the terms of the section I shall have considerable hesitation in holding that the proviso was intended to operate beyond the limits of the section to which it is attached. But the decisions on this point go considerably beyond section 106 and no longer leave it open to me to hold that the plaintiffs can maintain the suit. The first case to which I may refer is that of *Sham Chand Koondoo* v. *Brojo Nath Pal* (1), in which it was held that an unregistered purchaser of a tenure could not set up his title against a person purchasing at a sale of the tenure for arrears of rent. Then comes the case of *Kristo Chunder Ghose* v. *Raj Kristo Bandyopadhya* (2). A distinction has been drawn between the case of a plaintiff who attacks a sale in execution of a decree for the whole rent and one who attacks a sale in execution of a decree for a share of the rent. In the case cited the decree was for a share of rent and the learned Judges held that, that being so, the plaintiffs were not precluded by the fact that their names were not registered from suing to recover the tenure. But, at the same time, they followed the case of *Sham Chand Kundu* v. *Brojo Nath Pal* (1), by which they held it was established that if a sale takes place in a rent-suit brought by and against proper persons, and the sale be of the tenure, the unregistered transferee has no title as against the purchaser. Then comes the case of *Palit Shahu* v. *Hari Mahanti* (3). That was a case of a sale of decree for a share of the rent. But even there the learned Judges held that an unregistered purchaser had no *locus standi* against a subsequent auction purchaser. Finally, we come to the case of *Niladri Mahanti* v. *Bichitranand Roy* (4). There the learned Judges held that an unregistered purchaser cannot attack the title of an auction purchaser under section 105 though he can attack the title of a purchaser under section 108; and in dealing with the case of *Palit Shahu* v. *Hari Mahanti* (3), the learned Judges apparently hold that that case would have been rightly decided if, as a matter of fact, the auction-purchaser attacked in that case had been one under section 105.

It has been strenuously argued on behalf of the appellants that this is not a case for recovery of possession of the holding against the auction-purchaser but one to declare the sale invalid. Much reliance has been placed on the remarks of the learned Chief Justice in the case, which I have already quoted, on page 830. But these remarks, if I understand them aright, deal with auction-purchasers under section 108. This seems to be clear from the reference in them to the case of *Kristo Chunder Ghose* v. *Raj Kristo Bandyopadhya* (2). Later on the learned Chief Justice says in the clearest terms that when a case comes within the scope of the proviso to section 106, Act X of 1859, the plaintiff has no *locus standi*. The remarks of the learned Judges in the case of *Kristo Chunder* v. *Raj Kristo* (2) to the effect that an unregistered transferee obtains a title must also be read together with the remark that he cannot attack an auction-purchaser. And in the case of *Palit Shahu* v. *Hari Mahanti* (3) to which I have already referred, the suit was not to recover

(1) 21 W. R. 94.
(2) 12 C. 24.
(3) 27 C. 789.
(4) 6 Ind. Cas. 605; 37 C. 823; 14 C. W. N. 905; 12 C. L. J. 158.

possession from the auction-purchaser but for a declaration that the sale was collusive and, therefore, null and void, precisely as is the case in the present suit.

No doubt, the old case of *Sheikh Afzul Ali* v. *Lalla Gurnarain* (5) is very strongly in the plaintiffs' favour. It has been suggested that, having regard to that decision, I should send back this case to be tried by the Division Bench. But if there is really a conflict between the decisions of two Full Benches, a Bench would be in no better position than I am myself in dealing with the matter. It appears to me that, having regard to this long stream of cases including a decision of a Full Bench I am bound to hold that the authority of the decision in *Sheikh Afzul Ali* v. *Lalla Gurnarain* (5), must now be regarded as shaken.

It appears to me, therefore, that the points taken on behalf of the appellants fail, and the appeal must be dismissed with costs.

Appeal dismissed.

(5) 6 W. R. Act X, Rulings p. 59.

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 683 OF 1910.

June 6, 1911.

Present:—Mr. Justice Johnstone.

AUTAR SINGH—DEFENDANT—APPELLANT

versus

SURAIN AND ANOTHER—PLAINTIFFS—RESPONDENTS.

Jurisdiction of Civil or Revenue Court—Partition suit regarding land—Question of title involved—Proper procedure—Punjab Land Revenue Act (XVII of 1887) Chap. IX, ss. 117, 158 (xvii).

A suit for the partition of land is cognizable only by a Revenue Court, notwithstanding that, upon the defendant's plea, a question of title arises. In so far as the claim for partition is concerned, the jurisdiction of a Civil Court is clearly excluded by law.

A suit for partition must in the first instance be instituted in the Revenue Court and if that Court, in taking the pleas of the defendant, finds a question of title involved in the case, it may refer a party to the Civil Court for a decision on the question of title or it may resolve itself into a Civil Court and hear and decide that question. The function of a Civil Court in partition cases is simply to decide the question of title, pure and simple.

Second appeal from the order of the Divisional Judge, Amritsar Division, dated the 31st March 1910, reversing that of the Extra Assistant Commissioner and Munsif 1st Class, Amritsar, dated the 30th November 1909, returning the plaint.

Mr. *Duni Chand*, for the Appellants.

Mr. *Mul Raj*, for the Respondents.

JUDGMENT.—In this case the plaintiffs sued the defendant for possession by partition of 54 *kanals*, 9 *marlas* of land out of a total of 81 *kanals*, 14 *marlas*. The defendant pleaded that the plaintiffs were only entitled to ½ and not 2/3rds of the land, but also objected that the suit was one for a Revenue Court. The first Court agreed with the defendant on this latter point and returned the plaint for presentation in a Revenue Court. The plaintiffs appealed to the learned Divisional Judge who took the opposite view. He held that, inasmuch as the whole dispute is whether the plaintiffs are entitled to a *pagwand* or to a *chundawand* share, therefore, the suit was cognizable by a Civil Court, being concerned with a question of title. The defendant has now come up to this Court with a revision petition under clause (*b*) and this has been admitted as a further appeal.

There can be no doubt whatever that the order of the first Court was the correct one.

The relevant portion of section 158 (*xvii*) of the Punjab Land Revenue Act runs as follows:—

"A Civil Court shall not exercise jurisdiction over any of the following matters, namely:—

"Any claim for partition of an estate holding or tenancy, not being a question as to title in any of the property of which partition is sought".

Now here the plaintiffs are claiming a partition of a holding and though, upon the defendant's plea, a question of title arises, the exclusion of the jurisdiction of the Civil Court in so far as the claim for partition is concerned, is clear.

If the learned Divisional Judge had studied Chapter IX of the Punjab Land Revenue Act and especially section 117 and the following sections he would have understood that, in a case of land falling within the purview of the Act, a suit for partition must always be instituted in the first instance in the Revenue Court. The Revenue Court takes the pleas of the defendant, and if it finds a question of title involved in the case, its course is clearly laid down in section 117 of the Act, *i. e.*, it may refer a party to the Civil Court for a decision on the question of title, or it may resolve itself into a Civil

Court and hear and decide that question. In my opinion it can never have been the intention of the Legislature that a Civil Court should take cognizance of a suit for partition whenever any question of title was raised in such suit. The function of the Civil Court in partition cases is simply to decide the question of title pure and simp'e.

The Counsel for the respondents tries to contend that his clients did not ask for actual partition but only for joint possession in accordance with certain shares; but this is quite out of keeping with the wording of the plaint. The rulings in *Fazaldad Khan* v *Ata Muhammad* (1) and *Sundar* v. *Wazir* (2) referred to by him in argument seem to me to be quite irrelevant in the present connection.

For these reasons I accept the appeal, set aside the order of the learned Divisional Judge and direct that the plaint be returned to the plaintiffs for presentation in the Revenue Court.

The plaintiffs should pay the costs of the defendant up to the present date.

(1) 99 P. R. 1905; 46 P. L. R. 1906.

(2) 144 P. R. 1907.

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL FROM ORDER No. 17 OF 1911.

May 22, 1911.

Present:—Sir George Knox, KT., Judge, and Mr. Justice Piggott.

RAM NARAYAN DUBE AND ANOTHER—DEFENDANTS—APPELLANTS

versus

JAGDEO MISIR AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), O. XVI, r. 10 and O. XVII, rr. 2 and 3—Witnesses cited by a party not appearing—Court's power to issue warrant of arrest—Default in appearance—Power of Court to proceed to decide the case.

Where the witnesses cited by a party fail to appear without lawful excuse and the party concerned does not apply to the Court to act under Order XVI, rule 10, clauses (2) and 3), but the Court has reason to believe that the evidence of the witnesses is material, the Court would exercise a sound discretion by itself putting in force the powers entrusted to it by the said provisions.

Where the witnesses cited by a party do not appear in Court on the fixed date, the Court ought not to proceed under Order XVII, rule 3, nor should the party be considered to have committed a default in appearance within the meaning of rule 2, Order XVII. *Dulhin Sonraj Kuari* v. *Audhan Singh*, A. W. N. (1891) 112; *J. G. Bachman* v. *Lal Beharee Pandey*, 13 W. R. 324; *Luchmun Singh* v. *Chokowree Singh*, 25 W. R. 154, distinguished.

First appeal from an order of District Judge of Jaunpur, dated the 15th December 1910.

Mr. *Ghulam Majtaba*, for the Appellants.

Mr. *Muhammad Ishaq Khan*, for the Respondents.

JUDGMENT.—We find ourselves unable to support the order passed by the learned District Judge in this case on the grounds taken by him. The ruling which the learned Judge professes to follow, namely, *Dulhin Sonraj Kuari* v. *Audhan Singh* (1) differs in circumstances materially from the case before us. The parties were present in Court on the 24th of April 1910, the day fixed for the first hearing. The witnesses, too, were in attendance on that day so far as we gather from the order sheet. On that day, the parties expressed a desire to compromise the matter in dispute between them and the Court very properly granted time for this purpose. It, however, directed the parties, if they found themselves unable to come to terms, to present themselves again in Court with evidence on the 27th May 1910. They were unable to agree. On the 27th of May 1910 the parties were present in Court, but the witnesses for the plaintiffs, although summoned to appear on that date, had not appeared in Court; although the time fixed for the opening of the Court and for their attendance had passed by a considerable interval. The plaintiffs' Pleader appears to have stated to the Court that the witnesses were coming but neither then nor afterwards was any application for adjournment put in on the part of the plaintiffs, nor did the plaintiffs apply to enforce the attendance of the witnesses. The Court went on to deal with the case under Order XVII, rule 3, and proceeded to decide the suit forthwith against the plaintiffs. The plaintiffs appealed to the District Judge. The District Judge dealt with the case as though the plaintiffs had made a default in appearing and, setting aside the order of the Court of first instance, directed that Court to restore the suit to its file to be disposed of anew according to law. His procedure was in error. There had been no default

(1) A. W. N. (1891) 112.

on the part of the plaintiffs. At the same time, the Court could by reference to its file and, no doubt, did so refer and find that the plaintiffs used due diligence in causing their witnesses to be summoned. It might fairly have presumed from the fact that the witnesses had twice been summoned by the plaintiffs that the evidence of such witnesses was material, that the plaintiffs deemed it material and fully intended to have put it before the Court but were prevented by the non-appearance of the witnesses. It is contended by the defendants-appellants that when this stage had been reached the plaintiffs, if in earnest, ought to have applied to the Court to enforce the power given to the Court by Order XVI, rule 10 clauses (2) and (3). But it is a matter of experience that the parties, who have cited witnesses and who when such witnesses do not appear, proceed to put them to the indignity of arrest or proclamation, afterwards find such witnesses very unwilling to give evidence on behalf of the persons who have thus acted. We think that, under the circumstances, the Court, which certainly had reason to believe that the evidence was material and that the witnesses were failing to attend so far as it could then judge without lawful excuse, would have exercised a sound discretion in putting in force the powers entrusted to it by Order XVI, rule 10, clauses (2) and (3) of the Code of Civil Procedure. Our attention was called to certain rulings of the Calcutta High Court passed under the previous Code of Civil Procedure, namely, Mr. *J. G. Bachman* v. *Lall Beharee* (2) and *Luchman Singh* v *Chokowree Singh* (3). It was urged that there is considerable difference between the present Code and the previous Code so far as the duty cast on the Court in this matter is concerned. As we read the present Code, we think that the present Code leaves the Court a discretion to proceed at once when witnesses have failed to attend if, from any circumstance before it, it has reason to believe that the evidence of such defaulting witnesses is material and that the witnesses are defaulting. It would be for the witnesses to show that their absence rested on lawful excuse. It is urged before us that where a number of witnesses have been cited, it would be casting too great a burden on a Court to proceed against all who might have defaulted. The probability is that in such a case the Court would of itself see that the evidence of all such witnesses is not material. The Court can generally make a shrewd guess where witnesses have been unnecessarily summoned. In any case, a discretion is allowed by law. We think that the Court should have proceeded under Order XLI, rule 27, to direct the admission of fresh evidence and under Order XLI, rule 25, to refer the issues, which in this case had never been really tried, for trial to the Court of first instance directing that Court to return findings. We so far allow the appeal as to make order just pointed out. Costs will abide the event.

Appeal allowed.

(2) 13 W. R. 324.
(3) 25 W. R. 154

CALCUTTA HIGH COURT.

MISCELLANEOUS CIVIL APPEAL No. 31 OF 1911.

May 22, 1911.

Present:—Mr. Justice Holmwood and Mr. Justice Teunon.

JANNATUNNESSA BIBI—OBJECTOR—APPELLANT

versus

HAFIZ-UD-DIN—PETITIONER—RESPONDENT.

Muhammadan Law—Guardianship—Mother's right to be guardian of minor children—How defeated.

The rule of Muhammadan Law is strict and the mother's right to the guardianship of her children can only be defeated on proof of gross and open immorality.

Where it is found that a mother was divorced by her husband because she was in the habit of going out in the evening and neglecting her children, and refusing to cook for him but that since her divorce she has lived in a hut in a respectable quarter, belonging to her husband, and has supported herself and her family by keeping cows and selling milk, and that she is now an elderly woman: *Held*, that she should have the custody of her children, the boy until he arrives at the age of seven and the girl until she reaches the age of puberty.

Appeal from the order of the District Judge of 24-Parganahs, dated January 18th, 1911.

Mr. *Ashgar*, Counsel, and Babu *Sarat Chandra Mukerjee*, for the Appellant.

Mr. *A. Rasool*, Counsel, and Maulvi *Nur-ud-din-Ahmed*, for the Respondent.

JUDGMENT.—This is an appeal from the order of the learned District Judge of 24-Parganahs removing two children under

the age of 7 from the custody of their mother and appointing their father as guardian. We are of opinion that this order is not to be supported on the ground that the rule of Muhammadan Law is strict and that the mother's right can only be defeated by proof of what is termed by Wilson "gross and open immorality". It is true that Mr. Ameer Ali in his book says, one of the qualifications necessary for the purpose of the rights of *hizanat* is that she should be of good moral conduct. But the case which he cites in support of that which is also cited by Baillie, *Abasi* v. *Dunne* (1), clearly lays down that the wickedness which disqualifies a mother for the custody of her child is such as may be injurious to it as *zina*, or theft, or the being a professional singer, or mourner, and a person is not worthy to be trusted who is continually going out and leaving her child hungry. Now the evidence is that of the husband and that of the *mollah*. The husband says,—some years ago this lady was in the habit of going out in the evening and neglecting her children and she then refused to cook for him. So he divorced her. But since her divorce—she has been living in a hut, in a respectable quarter, belonging to her husband and has been supporting herself and her family by keeping cows and selling milk. The *Mollah* is vague in his statements and has never been inside her house. She is an elderly woman she has appeared before us in Court and we certainly think her not in the least likely to lead an immoral life. There appears to us, therefore, to be no reason whatever why she should not have the custody of her minor children, the boy until he arrives at the age of 7 and the girl until she reaches the age of puberty.

We set aside the order of the learned District Judge and direct that the mother be appointed guardian of the persons of the children. The boy will be delivered to the mother in pursuance of this order.

As the appeal has succeeded, no order need be passed on the rule. The appellant is entitled to her costs. We fix the hearing fee at 2 gold *mohurs*.

(1) 1 A. 598.

CALCUTTA HIGH COURT.

APPLICATION FOR REVIEW OF JUDGMENT IN S. A. No. 153 OF 1911.

May 8, 1911.

Present:—Mr. Justice Coxe and Mr. Justice Teunon.

MAROCHIN AND OTHERS—PLAINTIFFS—APPELLANTS—PETITIONERS

versus

PARSURAM MAHARAJ—DEFENDANT—RESPONDENT—OPPOSITE PARTY.

Decree—Suit to set aside decree on ground of fraud—What plaintiff should prove Fraud practised upon Court—Dishonesty of claim

In a suit to set aside a decree on the ground of fraud, the plaintiff must prove that the decree was obtained by some fraud practised upon the Court. The dishonesty of a claim on which a plaintiff obtains a decree, after following strictly and honestly the procedure laid down for the trial of suits, cannot justify the setting aside of the decree in a subsequent suit.

Therefore, if the plaintiff cannot prove that a decree was fraudulently obtained, he cannot succeed whether the original claim against him was true or false.

Application for review of judgment passed by Mr. Justice Coxe and Mr. Justice Carnduff on March 3rd, 1911, summarily dismissing the Second Appeal No. 153 of 1911 under Order XLI, rule 11 of the Civil Procedure Code.

Babu *Harendra Narain Mitra* for Babu *Indu Bhushan Bramhachari*, for the Petitioners.

JUDGMENT.—This is an application for review of an order dismissing an appeal summarily under Order XLI, rule 11. The appeal arose out of a suit to set aside a decree on the ground of fraud. The lower Appellate Court dismissed the suit on the ground that the plaintiff had failed to show that the decree had been fraudulently obtained. It is argued that whether the decree was properly or improperly obtained the lower Appellate Court should have gone into the question whether the bond on which the former suit as based was forged or genuine. In our opinion the application must fail. If the appellant cannot prove that the decree was fraudulently obtained, he cannot succeed, whether the original claim against him was true or false. The case of *Venkatappa Naick* v. *Subba Naik* (1), on which the appellant relies, is distinguishable, as in that case evidence was fraudulently suppressed. And

(1) 29 M. 179; 16 M. L. J. 59.

the two English cases, on which the learned Judge relied, namely, *Abouloff* v. *Oppenheimer* (2) and *Vadala* v. *Lawes* (3), related to foreign judgments, which do not stand on the same footing as the judgments of the English Courts. We agree with the remarks of Petheram, C. J., quoted in *Mahomed Golab* v. *Mahomed Sulliman* (4) and hold that to succeed in a suit of this nature the plaintiff must prove that the decree of which he complains was obtained by some fraud practised upon the Court in the trial of the suit. The dishonesty of a claim on which a plaintiff obtains a decree, after following strictly and honestly the procedure laid down for the trial of suits, cannot, we think, justify the setting aside of the decree in a subsequent suit. The application is refused.

Application refused.

(2) 10 Q. B. D. 295; 52 L. J. Q. B. 31; 47 L. T. 325; 31 W. R. 57.
(3) 25 Q. B. D. 310; 63 L. T. 128; 38 W. R. 594.
(4) 21 C. 612.

ALLAHABAD HIGH COURT.

EXECUTION FIRST APPEAL No. 92 OF 1910.

May 10, 1911.

Present:—Sir George Knox, KT., Judge, and Mr. Justice Piggott.

Kunwar MUHAMMAD OBAID ULLAH KHAN—DECREE-HOLDER—APPELLANT

versus

Kunwar MOHAMMAD IBRAHIM ALI KHAN—RESPONDENT.

Contract Act (IX of 1872), s. 11—Sale by father in favour of his minor son, validity of—Transfer of Property Act (IV of 1882), s. 53—Sale by father to his minor son—No consideration—Fraudulent transfer.

The sale of property by a father to his own minor son is invalid if no one but the father himself acted for the minor or settled the terms of the contract on his behalf.

Navakotti Narayana Chetty v. *Logalinga Chetty*, 33 M. 32: 4 Ind. Cas 383; 19 M L. J. 752; 7 M. L. T. 233, followed.

Mohori Bibee v. *Dhamodas Ghosh*, 30 C. 539, referred to.

But if the father be presumed to have represented his minor son as his natural guardian and the sale is without consideration, the transaction is voidable under section 53 of the Transfer of Property Act.

Execution first appeal from the decision of the Subordinate Judge of Aligarh, dated the 4th December 1909.

Mr. *Ghulam Mujtaba*, for the Appellant.

Mr. *Abdul Raof* (with him Messrs. *B. E. O'Conor* and *Sital Prashad Ghose*), for the Respondent.

JUDGMENT.—This is an appeal in an execution case. The one and only point for determination is whether a certain sale-deed, dated November 26th, 1898, by which Kunwar Umrao Khan purported to transfer his proprietary rights in village Karthala to his own minor son Mohammad Ibrahim Ali Khan, operated as a valid sale in favour of the latter. This very question has already beeen before a Bench of this Court in First Appeal No. 130 of 1904 decided on March 29th, 1906. It was then held that there was no real sale and that no valid title passed to Mohammad Ibrahim Ali Khan under the deed in question. One of the pleas taken before us is that this decision operates as *res judicata* in the present case. It seems scarcely necessary to enter into the somewhat complicated facts of the previous litigation for the sake of determining whether or not it can truly be said that in the proceedings now before us the same parties are litigating under the same title as in the suit decided on March 29th, 1906. The issue of *res judicata* was evidently not pressed in the Court below, and the case seems so clear to us on the merits that we prefer to deal with it on the assumption that the parties were entitled to have the question determined once more in the present proceeding. The deed in question is on the face of it and in view of the attendant circumstances an entirely suspicious document. Though dated November 28th, 1898, it was registered on January 7th, 1899, four days after a suit had been filed by one Abdul Ghafur Khan under which a decree for sale was sought to be obtained against the same property. It was not registered at the office at which it naturally have been presented for the purpose, but at a smaller office sixteen miles distant. It is much over stamped. It is by a father in favour of his own minor son, and the consideration purports to be the latter's share in the unpaid dower debt of his deceased mother. On a view of these facts and a consideration of the inferences thereby suggested, the Bench of this Court which tried the former suit felt no hesitation about concurring with the learned Subordinate Judge, who had held the sale-deed to be a mere sham transaction, and that no title passed thereunder to the nominal ven-

dee. In the case now before us the lower Court has once more found the deed in suit was executed by Kunwar Umrao Khan fraudulently, and with intent to save the property concerned from sale in execution of decree; nor has any serious attempt been made to contest the correctness of this finding in the course of the arguments before us. The learned Subordinate Judge, however, has gone on to hold that there was in fact a debt due from the father to the son, the amount of which he arrives at upon a computation of the shares according to which the estate left by Mohammad Ibrahim Ali Khan's mother would pass to her various heirs on her death; he has, therefore, passed a somewhat anomalous order intended to give effect to the transaction embodied in the sale-deed of 28th November 1898 to the extent of what he holds to be the genuine consideration. The order as passed has been appealed against by both parties, and certainly cannot be maintained. If the document in question operates as a valid sale, then Mohammad Ibrahim Ali Khan became proprietor of the share in village Karthala from the date of the deed itself, and the proceeding now before the Court must be disposed of accordingly. We hold, however, that there was no valid sale. It is at least doubtful whether there is any basis for the lower Court's finding that any consideration passed; the very witnesses who were called to prove the amount of the dower debt speak of the death of the lady to whom it was due as having occurred more than three years previously to the month of November 1898, and the recital in the sale-deed itself regarding the reasons which led to its execution by Umrao Khan has a fictitious air and seems merely a part of the fraud which that gentleman was engaged in perpetrating. The learned Subordinate Judge, though he does not refer to it seems to have had in mind the proviso contained in the concluding clause of section 53 of the Transfer of Property Act (Act IV of 1882). We do not think that the position of Mohammad Ibrahim Ali Khan in this transaction can be described as that of a transferee in good faith and for consideration. Apart from this, it seems to us impossible to hold that there was in this case any sale at all. The vendee was a minor, and there is not the slightest reason to suppose that any one but Umrao Khan acted for him in this matter, or settled the terms of the contract on his behalf. The Madras High Court in *Navakotti Narayana Chetty* v. *Logalinga Chetty* (1) has laid down the broad proposition that a sale in favour of a minor is void. This seems to follow from the principles laid down by their Lordships of the Privy Council in *Mohori Bibee* v. *Dharmodas Ghosh* (2), which have already been acted upon by this Court in *Jagaranath Singh* v. *Lalta Prasad* 3).

In the present case, however, the question in its broadest form can scarcely be said to arise. The case against this sale-deed of November 28th, 1898, is a peculiarly strong one, and might be put in the from of a dilemma. Either there was no valid contract because no one acted for the minor vendee or settled the terms of the contract on his behalf; or else it must be held that Mohammad Ibrahim Ali Khan was represented by his own father and natural guardian Umrao Khan. In the latter case the whole transaction is tainted by the fraudulent purpose of Umrao Khan, and the sale must be set aside under the provisions of section 53 of Act IV of 1882.

These considerations are sufficient to dispose of the position taken up by the learned Subordinate Judge. As a matter of fact, the correct view of the case is probably the simplest, namely that this alleged sale-deed is altogether fictitious, the consideration as much as any other part of it, and was never intended to effect more than a colourable transfer of ownership which could be pleaded against creditors of Umrao Khan.

We accept this appeal and setting aside the order of the lower Court dismiss Mohammad Ibrahim Ali Khan's objection altogether. The appellants decree-holders will get their costs throughout. The fees in this Court will include fees on the higher scale.

Appeal accepted.

(1) 33 M. 312; 4 Ind. Case. 383; 19 M. L. J. 752; 7 M. L. T. 233.

(2) 30 C. 539.

(3) 31 A. 21; 5 A. L. J. 674; A. W. N. (1908) 267, 1 Ind. Cas. 562.

GHISU MAL *v.* W. K. PORTER.

ALLAHABAD HIGH COURT.
FIRST CIVIL APPEAL No. 28 OF 1911.
May 10, 12, 1911.
Present:—Sir George Knox, KT., Judge and Mr. Justice Piggott.
GHISU MAL AND OTHERS—APPELLANTS
versus
W. K. PORTER AND OTHERS—
RESPONDENTS.

Companies Act (VI of 1882), s. 169—Appeal—Notice within three weeks not given, effect of.

An appeal against an order in the matter of the winding-up of a company, is incomptent where the notice, required by section 169 of Companies Act, is not given.

Ramanappa v. The Official Liquidator Bellary Brucepetta Stock and Loan Transacting Company, 22 M. 291; *Lakshmi Narasayya Setti* v. *Venkanna Setti*, 25 M. 576; *R. Wall* v. *J. E. Howard*, 18 A. 215; *Lallah* v. *Official Liquidator*, 4 C. 704, referred to.

First appeal from the order of the District Judge of Aligarh, dated the 7th February 1911.

Dr. *Tej Bahadur Sapru* (with him Mr. *Gulzari Lal*), for the Appellants.

JUDGMENT.—The appeal before us is on the face of it an appeal against the order of the District Judge, dated the 7th of February 1911. The order in question is an order refusing to revoke an order passed by him on the 3rd of December 1910, which order was for winding-up of the company known as Shri Baldeo Mills Company Ld., Hathras. A preliminary objection is taken by the Official Liquidator to the hearing of this appeal on the ground that the appeal is time-barred The objection sets out two grounds on which the plea of limitation is pressed. The *first* is, that the order winding-up the company was passed on the 3rd of December 1910 and has become final. Section 169 of the Indian Companies Act while allowing appeals from any order or decision in the matter of winding-up of a company provides further that no appeal will be heard unless notice of the same is given within three weeks after the order complained of has been made in the manner in which notices of appeal are ordinarily given under the Code of Civil Procedure unless such time is extended by the Court of appeal; and *secondly*, even if the appeal be taken to be against the order, dated the 7th of February 1911, it is still out of time. The memorandum of appeal was presented within three weeks from the 7th February 1911, but notice was not given until

TULSHI RAM *v.* BABU LAL.

long after three weeks had passed. In our opinion the preliminary objection is a good one and prevails. We were referred to several cases by the learned Advocate for the appellants, namely, *Ramanappa* v. *The Official Liquidator Bellary Brucepetta Stock and Loan Transacting Company* (1), *Lakshmi Narasayya Setti* v. *Venkana Setti* (2), *R. Wall* v. *J. E. Howard* (3) *Lallah* v. *Official Liquidator* (4). We have considered all these cases and, in our opinion, the position taken up in all these cases are against the appellants. The appeal is beyond time and is dismisesd with costs, separate sets of costs will be allowed in case of the Official Liquidator, respondents Nos. 4 and 5 and respondent No. 33.

In the present case we make an order allowing two gold *mohurs* as costs to each of the parties represented, namely, Nos. 1-6 Official Liqudator; 2. respondents Nos. 4 and 5, and 3. respondent No. 33. But we added to this that we do not pass the order as a precedent to be ordinarily followed in all cases of this kind. In cases in which there are so many parties they might well agree together and leave the conduct of the case in the hands of one party. If each person were represented by a separate Pleader and that Pleader's costs allowed, it would in many cases nullify the privilege of appeal.

Appeal dismissed.

(1) 22 M. 291.
(2) 25 M 576.
(3) 18 A. 215
(4) 4 C. 704.

ALLAHABAD HIGH COURT.
LETTERS PATENT APPEAL No. 90 OF 1910.
May 19, 1911.
Present:—Mr. Richards, K. C., Chief Justice, and Mr. Justice Banerji.
TULSHI RAM PLAINTIFF—APPELLANT
versus
BABU LAL AND OTHERS—DEFENDANTS—
RESPONDENTS.

Hindu Law—Alienation by father without consent of son, validity of—Alienation questioned by a son's son subsequently born.

A joint Hindu family consisted of one *R* and his two sons *B* and *S*. *R* made a mortgage of the joint property to which *S* gave no consent:

Held, that the mortgage was invalid and ineffectual: and that it could be questioned even by the sons of *B* who were born subsequent to the mortgage.

BHIWA JOTIBA *v* DEVCHAND BECHAR.

Kali Shankar v. *Nawab Singh*, 31 A. 507; 6 A L. J. 762; 3 Ind. Cas. 309, referred to.

Chattan Lal v. *Jai Ram*, 8 A. L. J. 15; 8 Ind. Cas. 721, distinguished.

Letters Patent Appeal against the decision of Sir George Knox, Kt., Judge, dated 19th July, 1910, in S. A. No. 96 of 1910.

Mr. *Girdhari Lal Agaruala*, for the Appellants.

Dr. *Satish Chundra Banerji*, for the Respondent.

JUDGMENT.—This appeal arises out of a suit to enforce a mortgage. The mortgage was made in the year 189 by one Ram Sahai. Ram Sahai had two sons Boli and Sundar Lal. Boli left surviving him two sons Babu Lal and Munshi Lal. The suit was instituted in the year 1903 against Sundar Lal, Babu Lal and Munshi Lal. The defence was that there was no legal necessity and that, therefore, Ram Sahai had no power to mortgage the ancestral property. The Court of first instance found that there was no legal necessity for the loan. It, however, gave a decree for the sale of $\frac{2}{3}$rds of the property exempting $\frac{1}{3}$rd as being the share of Sundar Lal who had not consented to the mortgage. This was not very accurate because on partition the share of Sundar Lal in the property after the death of his father would have been one-half and not $\frac{1}{3}$rd. On appeal by Babu Lal and Munshi Lal the lower Appellate Court affirmed the finding on the question of legal necessity and dismissed the plaintiff's suit to the extent of a further $\frac{1}{3}$rd, why it gave a decree for sale of $\frac{1}{3}$rd we do not know. However the question does not arise inasmuch as neither Babu Lal nor Munshi Lal appealed. The plaintiff then preferred an appeal to the High Court. The case coming before our learned brother he dismissed the appeal. Whereupon the present appeal was preferred under the Letters Patent, a Bench of this Court remitted issues to the Court below as to whether Babu Lal and Munshi Lal were born in the year 1891 when the mortgage was made. The finding on this issue is that neither was born until sometime subsequently. It is now contended on behalf of the appellant that inasmuch as neither Babu Lal nor Munshi Lal was alive at the date of the mortgage they cannot question the validity of the mortgage.

A passage to be found at page 449 of the 7th Edition, Maynes Hindu Law, was referred to. It is as follows: "a son cannot object to alienations validly made by his father before he was born or begotten because he could only by birth obtain an interest in property which then existing in his ancestor." It seems to us that in order that the alienation should bind sons who are afterwards begotten it must be a valid and effectual alienation. On the very same page Mr. Mayne says "On the other hand, if the alienation was made by a father without necessity and without the consent of sons then living it would not only be invalid against them but also against any son born before they had ratified the transaction and no consent given by them after his birth would render it binding upon him." In the present case the family at the time of the alienation consisted of Ram Sahai and his two sons, Boli and Sundar Lal. It is clear on the finding of the Court that Sundar Lal gave no consent. The attempted alienation was, therefore, invalid and ineffectual.

There is abundant authority, if it was wanted, that where there is no legal necessity one of the co-parcenary body connot alienate the ancestral property without the consent of all the other members. See *Kali Shankar* v. *Nawab Singh* (1). The case of *Chattan Lal* v. *Jai Ram* (2) was also relied upon on behalf of the appellant. In that case it would appear that there had been a valid alienation before the birth of the member who afterwards might impugn its validity.

In our opinion the decision of our learned brother was correct and we, therefore, dismiss the appeal with costs.

Appeal dismissed.

(1) 31 A. 507; 6 A. L. J. 762; 3 Ind. Cas. 309.
(2) 8 A. L. J. 15; 8 Ind. Cas. 719.

(s. c. 13 Bom. L. R. 280.)

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 834 OF 1908.

March 9, 1911.

Present:—Sir N. G. Chandavarkar, KT., Judge, and Mr. Justice Heaton.

BHIWA JOTIBA—APPELLANT

versus

DEVCHAND BECHAR—RESPONDENT.

Civil Procedure Code (Act XIV of 1882), s. 462—Compromise—Minor interested—Leave of Court not obtained—Compromise voidable.

DAYARAM *v.* LAXMAN.

A compromise entered into by the parties to a suit in which a minor is interested, shall not bind the minor unless the leave of the Court is obtained under section 462 of the old Code of Civil Procedure, (Order XXXII, rule 7, of the new Code), and where the minor comes forward to set aside the compromise the Court has no power to uphold it on the ground that it is for the benefit of the minor or that the minor has derived benefit from it.

Second appeal from the decision of the Joint First Class Subordinate Judge, A. P., at Poona, in Appeals Nos. 200 and 207 of 1907, reversing the decree passed by the Subordinate Judge at Haveli, in Civil Suit No. 176 of 1906.

Mr. *P. V. Nitsure*, for the Appellant.

Mr. *Gadgil* with Mr. *N. M. Patvardhan*, for the Respondent.

JUDGMENT.—The lower Appellate Court has held that leave of the Court was not obtained under section 462 of the old Civil Procedure Code (Act XIV of 1882). That being the case, according to the provisions of that section, the compromise could not bind the minor and was voidable. The Court under circumstances such as those in the present suit, where the minor comes forward to set aside the compromise, has no power to uphold it on the ground that it was for the benefit of the minor or that the minor had derived benefit from it. The Legislature has said in so many words that a compromise entered into by the parties to a suit, in which minors are interested, shall not bind the minor unless leave was obtained. See the observations of the Privy Council in *Monohar Lal* v. *Jadu Nath Singh* (1) and *Virupakshappa* v. *Shidappa and Basappa* (2). The compromise must be set aside as not binding the plaintiff. The lower Appellate Court having disposed of the case on a preliminary point, we must reverse the decree and remand the appeal for a fresh hearing on the merits. Costs of this appeal on the respondent. Other costs to be costs in the appeal in the lower Court.

Decree reversed: Case remanded.

(1) 33 I. A. 128; 4 C. L. J. 8; 8 Bom. L. R. 489; 10 C. W. N. 898; 9 O. C. 219; 1 M. L. T. 210; 16 M. L. J. 291; 3 A. L. J. 710.

(2) 26 B. 108.

(s. c. 13 Bom. L. R. 284.)

BOMBAY HIGH COURT.

CIVIL REFERENCE NO. 9 OF 1910.

February 23, 1911.

Present.—Sir Basil Scott, KT., Chief Justice, and Mr. Justice Batchelor.

DAYARAM PARASHRAM MARWADI

PLAINTIFF

versus

LAXMAN RUNJA TELI—DEFENDANT.

Limitation Act (IX of 1908), s. 31, Art. 132—Extension of time—Dekkhan Agriculturists' Relief Act (XVII of 1879), s. 48—Prescribed period.

The period of limitation prescribed for a suit or application of the kind referred to in section 48 of the Dekkhan Agriculturists' Relief Act is twelve years under Article 132 of the Limitation Act.

Section 31 of the Limitation Act (IX of 1908) gives a period of grace of two years from the date of the passing of the Act, and this period of two years cannot be extended by excluding any period of time within it.

Civil Reference made by the Subordinate Judge of Kopergaon.

Mr. *Ratanlal Ranchhoddas* (*amicus curiæ*), for the Plaintiff.

Mr. *J. R. Gharpure* (*amicus curiæ*, for the Defendant.

JUDGMENT.- We answer the question referred to us in the negative.

Section 48 of the Dekkhan Agriculturists' Relief Act provides for the exclusion of the period intervening between the application for Conciliator's certificate and the grant of the certificate under section 46 for the purpose of computing the period of limitation prescribed for any such suit or application.

Now the period prescribed for any such suit or application, as is referred to in section 48 is, according to the judgment of the Privy Council, twelve years. That period is prescribed by Article 132 of the Limitation Act (XV of 1877) and of the Limitation Act (IX of 1908).

"The period prescribed" is an expression which is used in the same sense in various provisions of the Legislature in *pari materia*: for example, in section 72, Dekkhan Agriculturists' Relief Act, in sections 4 and 5 of the Limitation Act of 1877, and section 3 of the Limitation Act of 1908; and we, therefore, conclude that in section 48 of the Dekkhan Agriculturists' Relief Act it was intended to refer to the period prescribed in the Schedule.

Section 31 of the Limitation Act, however, is relied upon, and it is contended that in

effect that adds a period of two years to the period prescribed by the Article; that is to say. the period of two years from the date of the passing of the Act can be extended by excluding the time elapsing between the date of an application for a Conciliator's certificate and the grant of the certificate.

This, we think, is an erroneous view. Section 31 was enacted in order that hardship might be obviated in particular cases. It gave a period of grace of two years from a definite date, that is to say, from the date of the passing of the Limitation Act.

No argument has been advanced to us which would induce us to suppose that that period was extendable by excluding any period of time within it.

The Court is indebted to the Pleaders who have undertaken the duty *amici curiæ* in arguing this reference.

Answer accordingly.

(s. c. 13 Bom. L. R. 287.)

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 699 OF 1909.

February 21, 1911.

Present:—Sir N. G. Chandavarkar, KT., Judge, and Mr. Justice Heaton.

ANANDIBAI RAM PAI—APPELLANT

versus

HARI SUBA PAI—RESPONDENT.

Hindu Law—Partition—Onus probandi—*Breach in the state of union—Presumption—Rebuttal—Re-union—Proof.*

According to Hindu Law, the person who alleges partition must prove it, because 'once is a partition made.' If it is proved that there has been a breach in the state of union, the law presumes that there has been a complete partition both as to parties and property. The presumption in question continues until it is rebutted by proof of an agreement, which means proof of intention on the part of some to remain united as before and to confine the partition to the rest, or if the partition was intended to extend to the interest of all individually, there must be proof that some of them re-united.

Second appeal from the decision of the District Judge of Kanara, in Appeal No. 85 of 1906, confirming the decree passed by the Subordinate Judge of Kumta, in Civil Suit No. 196 of 1904.

Mr. *S. S. Patkar*, for the Appellant.

Mr. *S. V. Palekar*, for the Respondent.

JUDGMENT.—The facts found by the ower Appellate Court are shortly these; Upendra, Waman, Rampai (defendants Nos. 3, 4 and 5 respectively), Hari, Keshav and Shrinivas were members of a joint Hindu family. The first three of them separated from the rest under a deed of partition in 1888 (Exhibit 44), the last three continuing joint as before.

On these facts the lower Court has found that the last three persons either continued as before to be co-parceners or that they "(if the legal fiction is to be employed) must be held as having immediately re-united with each other after executing Exhibit 44.

The legal correctness of the latter view as to re-union is challenged by the learned Pleader for the appellant on the authority of the Privy Council judgment in *Balabux* v. *Rukhmabai* (1). There it was held "that there is no presumption, when one co-parcener separates from the others that the latter remained united," but that the agreement to remain united or to re-unite "must be proved like any other fact." It is contended that in the present case there is no finding by the Appellate Court as to an agreement to re-unite and that there is no evidence of such agreement. The answer to that contention is simple The evidence is that the co-parceners agreed to effect not a complete but partial disruption of the co-parcenary, that, in other words, three of them separated from the rest and also *intre se* and that the latter agreed to continue joint. The Courts below have found accordingly. The finding satisfies the law enunciated by the Judicial Committee of the Privy Council in the case cited.

According to Hindu Law, he who alleges partition must prove it, because "once is a partition made." If it is proved that there has been a breach in the state of union, the law presumes that there has been a complete partition both as to parties and property. The presumption in question continues until it is rebutted by proof of an agreement, which means, proof of intention on the part of some to remain united as before and to confine the partition to the rest, or if the partition was intended to extend to the interest of all individually, there must be proof that some of them re-united. In the present case the former was alleged and has been found established by the evidence.

(1) 30 I. A. 130; 5 Bom. L. R. 460; 30 C. 729; 7 C. W. N. 642.

The decree must, therefore, be confirmed with costs.

Decree canfirmed.

(s. c. 13 Bom. L. R. 292.)

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 591 OF 1910.

March 21, 1911.

Present:—Sir N. G. Chandavarkar, KT., Judge and Mr. Justice Heaton.

GANPATSING HIMATSING—APPELLANT

versus

BAJIBHAI MAHMAD ASMAL—RESPONDENT.

Gujarat Talukdars Act (Bom. Act VI of 1888), s. 29 E.—Talukdari *Settlement Officer—Notice—Decree-holder submitting his claim—Exclusion of time—Limitation—Application for execution.*

A. obtained a decree for money against *B.*, a *Talukdar*, on the 22nd of February 1903 and presented his first *darkhast* for execution on the 8th of December 1903. From the 21st of September 1905, the *Talukdari* estate of *B.* came by notice to be in the management of the Settlement Officer under section 29 *B.* of the Gujarat Talukdars Act, and as required by that section, *A.* submitted his claim under the decree for the consideration of the officer on the 7th of March 1906. The officer rejected the claim on the 12th of August 1908. *A* then applied to the Civil Court to execute the decree and claimed in computation of the period of limitation to exclude the whole of the time taken up by the Settlement Officer in considering his rights under the decree:

Held, that *A.* was not entitled to exclude the whole of the period taken up by the officer and, therefore, his application for execution was barred by time.

Section 29 *E.* of the Gujarat Talukdars Act places no absolute bar upon the right of a decree-holder to apply to the Court for execution by reason of the submission of his claim to the Settlement Officer.

Under that section a decree-holder has to do one of two things before he can ask the Court to execute his decree. He has either to produce a certificate from the officer that the claim has been duly submitted or to apply in writing to the officer for such certificate accompanied by a certified copy of the decree and wait for the expiry of one month from the date of receipt by the officer of the application. If the officer gives no certificate within that month, the decree-holder's right to apply to the Court for execution revives.

Second appeal from the decision of the District Judge of Broach, in Appeal No. 121 of 1909, reversing the order passed by the Subordinate Judge of Jambusar, in *Darkhast* No. 160 of 1909.

Mr. *G. S. Rao*, (Government Pleader), for the Appellant.

Mr. *G. K. Parekh*, for the Respondent.

JUDGMENT.—The learned District Judge has gone beyond the plain language of section 29E of the Gujarat Talukdars Act in differing from the Subordinate Judge and holding that the present *darkhast* of the respondent for execution of his decree is not barred by limitation. The facts are as follows: The respondent obtained his decree for money against the appellant, a *Talukdar*, on the 22nd of February 1903 and presented his first *darkhast* for execution on the 8th of December 1903. It is admitted that from the 21st of September 1905 the *Talukdari* estate of the appellant came by notice to be in the management of the Settlement Officer under section 29B of the Act; and as required by the provisions of that section, as respondent submitted his claim under the decree in dispute for the consideration of the officer on the 7th of March 1906. The respondent could not after that proceed with the execution of his decree through the Court without complying with the provisions of section 29E. Under that section he had to do one of two things before he could ask the Court to execute his decree. He had either to produce a certificate from the officer that the claim had been duly submitted or to apply in writing to the officer for such certificate accompanied by a certified copy of the decree and wait for the expiry of one month from the date of receipt by the officer of the application. If the officer gave no certificate within that month, the respondent's right to apply to the Court for execution revived.

There was, therefore, no absolute bar placed upon the right of the respondent to apply to the Court for execution by reason of the submission of his claim to the Settlement Officer.

The District Judge thinks that the repondent is entitled to deduct the whole of the time from the date of the submission to the officer to the date on which the claim was considered and rejected by the latter, because submission, in the learned Judge's opinion, means "an attempt to explain and press the claim or an effort to settle it," which in the present case was made, says the learned Judge, when the officer rejected the respondent's claim on the 12th of August 1908, and he relies in support of that view on a dictum in the judgment of the learned Chief Justice of this Court in *Purushottam Hargovandas* v. *Rajbai Rajaji*(1). That dictum bears

(1) 11 Bom. L. R. 1358; 4 Ind. Cas, 839.

no such meaning as the District Judge attributes to it.

The decree must, therefore, be reversed and the *darkhast* disallowed with costs throughout on the respondent.

Decree reversed.

(s. c. 13 Bom. L. R. 507.)

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL No. 958 OF 1909.

March 13, 1911.

Present:—Sir N. G. Chandavarkar, KT., Judge, and Mr. Justice Heaton.

NARAYAN SADOBA HALVAI—APPELLANTS

versus

UMBAR ADAM MEMON—RESPONDENT.

Civil Procedure Code (Act XIV of 1882), *s.* 282—*Auction-purchaser no party to order is not bound by it—Objection limited to ownership—Order deciding lien—Not order under s* 282.

An auction-purchaser in an execution sale cannot be regarded as a party to the miscellaneous order passed under section 282 of the Code of Civil Procedure, 1882, not being a representative of either the judgment-debtor or of the judgment-creditor, and is, therefore, not bound by the order.

Where an intervenor seeks to raise an attachment upon the ground that the property belongs to him and there is no question raised by him directly that he is entitled to a lien, the order of the Court that the property may be sold subject to his lien, cannot be treated as an order under section 282 of the Civil Procedure Code, 1882, but may be regarded as one made under section 287.

Second appeal from the decision of the District Judge of Thana in Appeal No. 417 of 1903, reversing the decree passed by the Subordinate Judge of Bassein, in Civil Suit No. 50 of 1908.

Messrs. *D. A. Khare* and *B. V. Desai*, for the Appellant.

Mr. *G. S. Rao*, for the Respondent.

JUDGMENT.

CHANDAVARKAR, J.—The facts which arise in this second appeal, for the determination of the question of limitation argued before us, are shortly these. One Govind Sodaba obtaind a money-decree against one Haroo Hussan. In execution of that money-decree the property in dispute was attached by the judgment-creditor. The present respondent-plaintiff intervened and applied to have the attachment raised on the ground that he was owner of the property.

Upon investigation of the claim under sections 280 and 281 of the Civil Procedure Code the Court held that the property belonged to the judgment-debtor, not to the present plaintiff. But it also held that the intervenor was entitled to a lien on the property. Accordingly, the Court passed an order that the property should be attached and sold, subject to the lien of the intervenor. The property was sold subject to the present plaintiff's lien, namely, Rs. 687-11-3, and the defendant purchased it at the Court sale.

The plaintiff has now brought this suit to recover the amount of lien which, he contends, has been established conclusively by the order passed in the miscellaneous proceeding. The lower Court has allowed the claim. But it is contended before us by the defendant, the auction-purchaser, that he is entitled to question the existence of the lien; that the miscellaneous order does not bind him; and that he was not bound to bring a suit to set aside that order after the sale within a year from its date. It has been held by this Court, in a series of cases, that under the circumstances mentioned above the auction-purchaser cannot be regarded as a party to the miscellaneous order, being not a representative either of the judgment-debtor, or of the judgment-creditor: see *Vasanji Haribhai* v. *Lallu Akha* (1) and *Vishvanath Chardu Naik* v. *Subraya Shivapa Shetti* (2). Unless, therefore, the plaintiff brings this case within the principle of the decision in *Yashvant Shenvi* v. *Vithoba Sheti* (3) and *Nemagauda* v. *Paresha* (4) his suit must fail. But these two decisions cannot apply here because there the auction-purchaser was also the attaching creditor, and, therefore, the order was one which bound the parties to it and the suit was brought by the party who was unsuccessful in the miscellaneous proceeding.

The second ground is, that in the miscellaneous proceeding the plaintiff came in and sought to raise the attachment upon the ground that the property belonged to him. There was no question directly raised by him that he was entitled to a lien. The question of lien came in only incidentally and, therefore, the order passed by the Subordinate Judge, that the property should

(1) 9 B 285. (2) 15 B. 290.
(3) 12 B. 231. (4) 22 B. 640.

be sold subject to the plaintiff's lien, cannot be treated as an order under section 282. It must, under the circumstances, be regarded as one made under section 287.

The lower Appellate Court's decision on the preliminary point having erroneously disposed of the prelimin ry point arising in this case, we must reverse the decree and remand the appeal to that Court for a hearing on the merits.

Costs to be costs in the appeal.

HEATON, J.—I agree to this order. I notice that the District Judge has distinguished clearly between two different aspects of the case. The first was the question whether the auction-purchaser is bound by the order in the miscellaneous proceeding; and he held, I think quite rightly, that the auction-purchaser was not bound; the second aspect of the case was whether the property sold was the equity of redemption and nothing else. The Judge held, in my opinion, wrongly that what was sold was the equity of redemption only.

Now, if this were a finding of fact, we should be bound by it; but to my mind it is not a finding of fact. It is merely a determination of the legal effect of certain documents. There is no dispute as to the meaning of the words in the documents. They are the proclamation of sale and the certificate of sale, and they are undoubtedly to the effect that what is sold is the property, *i.e.*, landed property, subject to a certain charge the nature and amount of which are mentioned. It is not in terms a sale of the equity of redemption. Therefore, it seems to me, that the District Judge was wrong in deciding the case on the ground that the purchaser had bought nothing but the equity of redemption.

As to the first aspect of the case I will say a fow words. The dispute arose between the decree-holder and a third person who objected to the sale of certain properties alleged to belong to the judgment-debtor. To that dispute the judgment-debtor himself was not made a party, in any sense of the word whatever. He had no notice of the dispute and he never intervened in it. The dispute was heard in that summary manner which is adopted in such proceedings. It was not tried with the thoroughness and with that care to secure that all prsons interested are parties with which such a suit, for instance, as a mortgage suit, is tried; the decision arrived at by the Court is a decision which not only binds the parties to the dispute, but, unless a suit to set it aside is brought within one year, it is final. But, it seems to me, that it would be wrong on principle to hold that the decision arrived at binds any one whatever who is not a party to the dispute or one who derives interest from a party. Now the judgment debtor was not a party to that dispute and he is not a person who has derived interest from either of the parties. It seems to me, therefore, to be contrary to first principles to say that the decision arrived at in that dispute has any legal effect whatever as regards the judgment-debtor in the nature of *res judicata*, or for the purpose of preventing him or the auction-purchaser, if indeed the auction-purchaser can be supposed to be his representative, from re-opening that matter which was decided.

Decree reversed.

(s. c. 13 Bom. L. R. 313.)

BOMBAY HIGH COURT.

SECOND CIVIL APPEAL NO. 935 OF 1909.

March 7, 1911.

Present:—Sir N. G. Chandavarkar, KT., Judge, and Mr. Justice Heaton.

LAKMIDAS KHUSHAL—APPELLANT

versus

BHAIJI KHUSHAL—RESPONDENT.

Practice—Personal inspection—Judge not bound to record his view—The better procedure to record facts.

In a suit to establish a right of easement, witnesses examined for the plaintiff deposed that the passage as to which there was a dispute was still visible to the eye and that it could be seen at any moment, by any one visiting the spot. Both parties thereupon requested the Judge to visit the spot and see for himself whether the passage was still visible. The Judge visited the spot and in the presence of the Pleaders of the parties satisfied himself that the passage in question was not visible, he, therefore, disbelieved the plaintiff's witnesses and disallowed the claim without examining any of the defendant's witnesses.

On appeal to the High Court, it was urged that the Judge had erred in two respects,

(1 that he put his view in the place of the evidence, which the law did not warrant;

(2) that he decided the case without putting on record the result of his view so as to give the plaintiff an opportunity of meeting the impressions formed by the Judge by his inspection:

LAKMIDAS *v.* BHAIJI KHUSHAL.

Held,

Per *Chandavarkar, J.* – That there was no error in the procedure adopted by the Judge and there is no law which bound him to record his view and explain it to the parties before deciding the case.

Where the case is obscure and the evidence can be best understood by a personal view, it is the eyesight of the Judge that is the ultimate test.

Kessowji Issur v. *G. I. P. Railway Company*, 31 B. 381; 11 C. W. N. 721; 6 C. L. J. 5; 4 A. L. J. 461; 2 M. L. T. 435; 9 Bom. L. R 671; 17 M. L. J. 347, distinguished.

Per *Heaton, J.*—It would be much better, though it is not necessary, that the Judge should record the circumstances which are observed at a local inspection, but he should record only facts and not impressions or inferences from facts.

Second appeal from the decision of the First Class Subordinate Judge, A. P. at Broach, in Appeal No. 171 of 1907, confirming the decree passed by the Subordinate Judge at Wagra, in Civil Suit No. 412 of 1907.

Mr. *L. A. Shah*, for the Appellant.

Mr. *G. N. Thakor*, for the Respondent.

JUDGMENT.

CHANDAVARKAR, J.—The point of law urged in this second appeal, in my opinion, fails. The parties are the owners respectively of two fields, which are opposite to each other. Plaintiff, the present appellant, is owner of Survey No. 88, and defendants own Survey No. 87. The two properties are separated by a narrow passage. The plaintiff alleged that water from his field passed on from its south-west corner to the narrow passage; that thence it flowed on to the defendant's field and that there it ran along a well-defined passage. The plaintiff complained that the defendant had obstructed this latter passage by raising an embankment so as to prevent the water entering his field. The defendant denied the existence of any such passage for water in the field. So the question at issue was, whether there was or had been any such passage as alleged by the plaintiff. Witnesses examined on behalf of the plaintiff deposed that the passage in dispute had existed all along and was still visible to the eye.

Both parties thereupon requested the trial Judge to visit the spot and see for himself whether the passage was still visible to the eye. Accordingly the Subordinate Judge visited the spot and in the presence of the Pleaders of the parties satisfied himself that the passage in question was not visible; and, therefore, he disbelieved the plaintiff's witnesses and disallowed the claim without examining any of the defendant's witnesses.

The plaintiff appealed to the District Court and contended that the Subordinate Judge had wrongly decided the case, because he had disposed of it, not by appreciating the evidence, but by the light of his own view of the passage. The Appellate Court disallowed the contention, holding that the Subordinate Judge was "at liberty to see the disputed property," that it was necessary for him to see it, and that, having seen it in the presence of the Pleaders of the parties, he was warranted in forming his own opinion on the case.

In second appeal the same contention is repeated before us; and reliance is placed by the appellant's Pleader on some decided cases, particularly on the judgment of the Judicial Committee of the Privy Council in *Kessowji Issur* v. *G. I. P. Railway Company* (1). The other cases cited are *Joy Coomar* v. *Bundhoo Lall* (2); *Dwarka Nath Sardar* v. *Frosunno Kumar Hajra* (3), and *Moran* v. *Bhagbat Lal Saha* (4). It is urged on the strength of these authorities that the trial Judge has erred in two respects, *first*, that he put his view in the place of the evidence which the law did not warrant; and, *secondly*, that he decided the case without putting on record the result of his view, so as to give the plaintiff an opportunity of meeting the impressions formed by the Judge by his inspection. None of the cases which have been cited has any cogent relevancy to the question which we have to decide here. All that was held in those cases is, that a Judge ought not to substitute his view for the evidence in the case tried by him; that when he visits a spot and makes observations for himself, the result of those observations must be used by him only for the purposes of understanding the evidence is that in fact he should not ignore the evidence as if he had not heard it and dispose of the case merely by the light of what he saw on personal inspection. That law applies where the case is obscure and the evidence can be best understood by a

(1) 31 B. 381; 11 C. W. N. 721; 6 C. L. J. 5; 4 A. L. J. 461; 2 M. L. T. 435; 9 Bom. L. R. 671; 17 M. L. J. 347.

(2) 9 [illegible] 363.

(3) 1 C. W. N. 682.

(4) 33 C. 133.

personal view. As was said in *London General Omnibus Company, Limited* v. *Lavell* (5), in such cases "a view is for the purposes of enabling a tribunal to understand the questions that are being raised, to follow the evidence, and to apply the evidence." But there are cases of a different kind, cases where, as remarked by Farwell, J., in *Bourne* v. *Swan and Edgar Limited* (6) "it is the eye-sight of the Judge that is the ultimate test." In the present case, the witnesses examined for the plaintiff deposed that the passage, as to which there was a dispute, was still visible to the eye and that it could be seen at any moment, by any one visiting the spot; and, therefore, the parties asked the Subordinate Judge to apply the most satisfactory test available, *viz.*, to go to the field and see for himself whether the witnesses for the plaintiff were speaking the truth or not. Accordingly, the Judge visited the spot. In other words, the Judge was asked by the parties to act upon the legal maxim, *res ipsa loquitur* (the thing speaks for itself). As is pointed out by the commentators of Best on Evidence, a Jury is competent to take into consideration the *locus in quo* or to view the premises. The Privy Council decision in *Kessowji Issur* v. *G. I. P. Railway Company* (1) turns upon a different set of facts altogether. There what their Lordships decided, was that the High Court had acted illegally in deciding the question as to an event which had taken place one evening by the light of what the Judges had seen on another evening amidst possible different surroundings. That cannot be said to have been the case here. Here the Subordinate Judge was told that there was a passage which existed and which had always existed, and which could be seen *at any moment* by the eye. The eye was the Judge and the case is governed by the principle of law enunciated by Farwell, J., in the case above mentioned on the authority of some cases decided by the House of Lords. Therefore, in my opinion, there was no error in the procedure adopted by the Subordinate Judge and there is no law which bound him to record his view and explain it to the parties before deciding the case. The decree must be confirmed with costs.

HEATON, J.—I agree that the decree must be confirmed with costs. It does, however, seem to me that the first Court, the Subordinate Judge, has written a judgment which is open to a good deal of criticism. Because from the way in which he has expressed himself he has given ground for the argument that he substituted his own impressions derived from the local inspection of the place, for the evidence in the case. But the result of the argument has been to convince me that in effect he has not done this; but has only used the circumstances which were perceived at the local investigation for the purpose of understanding and appreciating the evidence. As the result of discussion, the objection taken on behalf of the appellant ultimately resolved itself into this: that the Judge had not recorded in writing the circumstances observed at the inspection, and the parties consequently had not had an opportunity of discussing those circumstances and dealing with them in so far as they affected the case. I think there is this in the objection that it would much better that the Judge should record the circumstances which are observed at a local inspection. In so saying I must emphatically add that I think he should record only facts and not impressions or inferences from facts.

But when a local inspection takes place we know that, in the ordinary course of events, the salient circumstances are pointed out on the spot; and are discussed on the spot; and there is nothing in the case to suggest that the ordinary course of events was not followed here. I assume that it was followed, and as a consequence I find that the defect in not recording the circumstances in writing is a purely formal defect, which could not have misled the parties or caused injustice in the case. For these reasons, I think the appeal must be dismissed and the decree confirmed with costs.

Decree confirmed.

(5) (1901) 1 Ch. 135; 70 L. J. Ch. 17; 83 L. T. 453.
(6)(1903) 1 Ch. 211 at p. 225; 72 L. J. Ch. 168; 87 L. T. 589; 51 W. R. 213.

MAHOMED ALLY *v.* EMPEROR.

(8 c. 4 Bur. L. T. 113.)

LOWER BURMA CHIEF COURT.

CRIMINAL MISCELLANEOUS APPLICATION No. 12 OF 1909.

August 14, 1909.

Present:—Mr. Justice Parlett.

MAHOMED ALLY AND OTHERS—APPLICANTS

versus

EMPEROR—RESPONDENT.

Transfer of case—Grounds—Discretion to refuse bail—Improper exclusion of evidence—Distinction between questions which witness cannot be compelled to answer and those which witness cannot be permitted to answer—Admissibility of the answers where the witness waives his right of not replying—Cross-examination of witness, its scope—Police papers—Evidence Act (I of 1872), ss. 121, 123, 124, 125, 126, 138.

A Magistrate has discretion to refuse bail and the fact that he has refused bail will not constitute a ground for transferring a case from his board.

An error in disallowing certain questions in the cross-examination of a witness does not afford sufficient ground for the transfer of the case.

The question of improper exclusion of evidence is not one which should ordinarily be gone into during the pendency of a case.

A distinction should be drawn between questions which a witness cannot be compelled to answer and those which he cannot be permitted to answer. The latter class of questions might properly be forbidden but questions of the former class are in no way barred; a witness has merely the right of refusing to answer such questions, without any hostile inference being drawn from his refusal. The most, therefore, that a Magistrate can do, in the case of a witness who is ignorant of his privilege, is to warn him that he need not answer. But if the witness elects to waive his privilege of refusing to answer, his answer is admissible in evidence.

Cross-examination need not be confined to matters raised elsewhere in the evidence.

The right of cross-examination given by the Evidence Act is not fettered by the fact that Police papers are in existence but have not been referred to. Section 138 of the Evidence Act gives the defence the right to cross-examine prosecution witnesses at the conclusion of their examination-in-chief and such cross-examination may be on all points and by means of all questions not disallowed by the Evidence Act. Though the defence have the further right to re-call and cross-examine prosecution witnesses after the charge has been framed, they cannot be compelled to so defer all or any of the cross-examination which they are by law entitled to make. To do so is to deprive them of part of the means available for obtaining an order of discharge.

Application for transfer of criminal case, pending before the District Migistrate, Rangoon, to some other Court for trial.

Messrs. *Patkar*, and *DeGlanvile*, for the Applicants.

The *Assistant Government Advocate*, for the Respondents.

JUDGMENT.—A transfer of this case from the District Magistrate is applied for on three grounds:—

(1) That certain accused persons in another case were refused bail by that Magistrate, but it was granted by this Court;

(2) That the Magistrate has refused bail in this case though accused consider they are entitled to it, and

(3) That the Magistrate impropely disallowed certain questions to be put in cross-examination on behalf of the accused.

The first two grounds are, of course, untenable. The first, if pushed to its logical conclusion, would entitle any accused person to object to being tried by virtually any Magistrate on the ground that he had convicted some other person who was eventually acquitted on appeal. As to the second, I have held that the District Magistrate had discretion to refuse bail; even had I held the contrary, that would not, *per se*, have constituted a ground for transfer.

It is only on the third ground that the case is seriously argued. The witness under cross-examination was a Police Officer concerned in the investigation of the case. The questions disallowed fall into three groups:—

(*a*) "Can you tell how the names of the accused, other than Mahomed Ali, were obtained." Disallowed, because the witness is not bound to disclose the information, and because the question has not so far arisen in the case.

(*b*) "Can you tell how the witnesses in the case were obtained." Disallowed, as an improper question in general terms and one referring to information which a Police Officer is not bound to disclose.

(*c*) "Any question relative to the manner in which the investigation was conducted by the Police or how the witnesses were obtained by them." Disallowed, as improper and too previous at this stage of the case, the Magistrate not having been asked to refer to the Police papers, to question the propriety of the investigation, and because the Police are not bound to disclose the

information. At the outset two minor points may be noticed.

First, the District Magistrate by improper questions apparently meant questions the answers to which would be inadmissible. I cannot accede to the contention of the learned Assistant Government Advocate that the second and part of the third group of questions were such that the Court was bound to forbid them under section 152, Evidence Act, as being "needlessly offensive in form." the use of the expression as to 'obtaining' witnesses being an insinuation that they had been suborned by the Police, and there being no reasonable grounds for thinking that imputation to be well-founded. Had the question conveyed that meaning—which to my mind is far-fetched—to the District Magistrate, he would have given that as a reason for forbidding it to be put and its objectionable form might easily have been remedied by substituting the word 'discovered' for the word 'obtained.'

Secondly, the District Magistrate appears to have treated questions which a witness cannot be compelled to answer (such as those referred to in sections 121, 124 and 125, Evidence Act,) as questions which a witness cannot be permitted to answer (such as those referred to in sections 123 and 126, Evidence Act). The latter class of questions might be properly forbidden, but as regards the former, the question is in no way barred; the witness has merely the right of refusing to answer it, without any hostile inference being drawn from his refusal. The most, therefore, the Magistrate could do, if he thought the witness was ignorant of his privilege, would be to warn him that he need not answer.

It follows from this that, though the witness could not be compelled to say how the names of three of the four accused and of the prosecution witnesses were obtained, yet the question was not one either in form or substance which could, under any section of the law to which I have been referred, be forbidden; and if the witness elected to waive his privilege of refusing to answer, his answer would be admissible in evidence. If the question regarding the discovery of witnesses was considered to be vague and general in its terms, ounsel could have been directed to make it more specific and precise.

The first question was also disallowed on the ground that the point had not yet arisen. No authority is cited for the view that cross-examination must be confined to matters raised elsewhere in the evidence, but it appears that in fact that point had arisen. There was evidence to show that complainant in his report to the Police immediately after the assault said it was committed by three men of whom Mahomed Aliand Lal Mahomed were two. The accused actually before the Court were Mahomed Ali and three others and Lal Mahomed was not among them. The point had, therefore, arisen as to how three men, other than Mahomed Ali and Lal Mahomed, instead of only one, came to be accused of the offence, and the defence were entitled to try and clear it up if they could do so.

But the third group of questions forbidden is the most comprehensive, as it includes all questions relating to the manner in which the investigation was conducted by the Police, which were ruled out on the further ground that they were premature, the Magistrate not having been asked to refer to the Police papers to question the propriety of the investigation.

This veto is clearly too sweeping. Such questions as "can you tell when the names of the accused other than Mahomed Ali were obtained?" or "Can you tell on what date such and such witness first made a statement to the Police?" though relating to the investigation, would be neither forbidden nor privileged. Learned Counsel for the defence states that in consequence of his instructions he desired to put questions regarding facts which are said to have transpired at certain identification parades: such questions should be admissible and the witness would be bound to answer them if he could. There remains the question of the prematurity of the questions, and the reference to Police papers. I do not grasp the significance of the latter point, nor, as I understand them, do the questions disallowed necessarily imply any impugning of the propriety of the investigation. The sections of the Evidence Act dealing with the cross-examination of witnesses in criminal cases make no mention of Police papers, and the right of cross examination given by that Act is not fettered by the fact that Police papers are in existence but have not been re-

ferred to. Section 162, Criminal Procedure Code, appears to be the only provision of law regarding reference to Police papers, and that relates solely to statements of witnesses which have been taken down in writing by the Police. There is no reason to suppose that the investigating officer, who was the witness under cross-examination, had himself made any statement which had been so taken down in writing, and even if he had, the employment of the usual means of cross-examining him, whether to impeach his credit or to elicit other facts, could not properly be made contingent on a request to refer to such writing. Section 138 of the Evidence Act gives the defence the right to cross examine prosecution witnesses at the conclusion of their examination-in-chief, and such cross-examination may be on all points and by means of all questions not disallowed by the Evidence Act. Though the defence have the further right to re-call and cross-examine prosecution witness after the charge has been framed, they cannot be compelled to so defer all or any of the cross examination which they are by law entitled to make. To do so is to deprive them of part of the means available for obtaining an order of discharge.

I hold that the District Magistrate erred in disallowing certain of the questions which he did, but I cannot admit that such error affords sufficient ground for a transfer in this case. The question of improper exclusion of evidence is, moreover, not one which should ordinarily be gone into during the pendency of a case, and I have already dealt with it in this instance, because it appeared that the accused might otherwise incur hardship, through being deprived of a part of the means allowed them by law to avert the burden of proof being thrown on them, as would be the case were a charge framed against them.

The application for transfer is dismissed, and the case will be returned to the District Magistrate with the direction to allow the accused to cross-examine on such points and by means of such questions as are allowed by law.

Application dismissed.

(s. c. 4 Bur. L. T. 115.)

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL No. 289 OF 1908.

August 20, 1909.

Present:—Mr. Justice Parlett.

MA LON MA AND ANOTHER—PLAINTIFFS—APPELLANTS

versus

MG. SHWE BYU AND OTHERS—DEFENDANTS—RESPONDENTS.

Husband and wife—Presumption that husband is the agent of the wife so long as they live together—Presumption rebuttable—Transfer of Property Act (IV of 1882), ss. 4, 100—Unregistered sale of land—Charge.

When a married couple are living together and the husband acts alone in dealing with the joint property, the presumption is that he is acting as the wife's agent in respect of her interest as well as his own. But the presumption can be rebutted.

Ma Shwe U v. *Ma Kyu*, 3 L. B. R. 66; *Soobramonian Chetty* v. *Ma Hnin Ye*, P. J. L. B. 568, relied upon.

A sale, which is invalid because of non-compliance with section 54 of the Transfer of Property Act as to registration, does not operate to give the purchaser a charge for the amount of the sale price against the seller's estate.

Section 100 of the Transfer of Property Act was never intended to indemnify people who endeavoured to get conveyances in violation of the express provisions of law.

Pran Nath Sarkar v. *Jadu Nath Saha*, 32 C. 729; 9 C. W. N. 627, relied upon.

Appeal against the decree of the Divisional Court of Hanthawaddy, dated the 18th September 1908, passed in Civil Appeal No. 100 of 1908, dismissing the appeal of appellants (plaintiffs), against the decree of the District Court of Tharrawaddy, in Civil Regular No. 3 of 1908.

Mr. *Villa*, for the Appellants.

Mr. *Nicol*, for the Respondents.

JUDGMENT.—Plaintiffs sued for a portion of 37·76 acres of land, the joint property of their deceased parents Maung Shwe Kyun and Ma Waing Gale. One of their sisters Ma The Hmon, and her husband Maung Shwe Pyu, claimed to have purchased 14·27 acres of this land from their parents by registered deed on 21st February 1899; and another sister, Ma Min On, claimed to have purchased another 11·47 acres from them for Rs. 500 by verbal transfer on 19th May 1905. These purchasers are the 1st, 2nd and 3rd defendants and the remaining defendants are the remaining children of the deceased couple, or the representatives of those children.

Plaintiffs alleged that their parents were in their dotage and incapable of contracting

when the sale to 1st and 2nd defendants were made; that the latter obtained the execution of that deed of transfer by the exercise of undue influence; and as regards the later transfer to Ma Min On, they pleaded that it was invalid as it transgressed the provisions of the Transfer of Property Act.

The District Court held that they had failed to prove that their parents were mentally incapable of contracting when the sales were made, or that undue influence had been exercised or that the consideration was inadequate. It further held that the sale to Ma Min On was invalid as a sale but that it operated to give her a charge of Rs. 500, the amount of her purchase-money against the estate, and that until that was re-paid to her she was entitled to retain possession of the land.

The plaintiffs appealed to the Divisional Court against all these findings, and on one entirely new ground never raised or ever mentioned above, namely, that Maung Shwe Kyu had no power to alienate the joint property of himself and his wife without the consent of the latter, and that the transfer was, therefore, null and void.

The Divisional Court confirmed all the findings of the District Court, and on the new defence raised, held that the burden of proving the absence of Ma Waing Gale's consent to the transfer lay on plaintiffs, and they had failed to discharge it, and further that even without his wife's consent, Maung Shwe Kyu could have made a valid sale of this land as it did not amount to half the estate. The learned Divisional Judge quotes the case of *Ma Shwe U* v. *Ma Kyu* (1) as authority for the latter proposition. That case, however, lays down that a husband may, without the consent of his wife, make a valid transfer of his share and interest in the hnapazon property of himself and his wife. In other words, a husband can, without his wife's consent, alienate a half share and interest in their joint property, but that is not the same thing as saying that he can so alienate the full title and interest in one half of their joint property, nor does this latter proposition by any means follow from the first. So far, therefore, as the present case goes, the ruling quoted would be merely authority for holding that Maung Shwe Kyu could, without his wife's consent, alienate a half share and interest in the 14·27 acres of land to 1st and 2nd defendants.

(1) 3 L. B. R. 66.

The grounds of appeal to this Court are practically the same as those to the Divisional Court.

I see no reason whatever to disagree with the findings that plaintiffs completely failed to prove that their parents were incapable of contracting in 1899; that undue influence was exercised or the consideration was inadequate, nor was there anything to warrant presumptions of this nature. As regards the absence of Ma Waing Gale's consent to the sale, this point ought clearly to have been raised at the outset and not left to be newly introduced in appeal.

The ruling above quoted endorses a view expressed in an earlier case *Soobramonian Chetty* v. *Ma Hnin Ye* (2) that there is a presumption that when a married couple are living together and the husband acts alone in dealing with the joint property, he is acting as his wife's agent in respect or her interets as well as his own. In the former case it was laid down that where the couple were still living together the presumption would be that one was acting as agent for the other; that so long as the marriage continues, the wife consents to the acts of her husband, but this presumption may be rebutted. There is nothing on the record to rebut this presumption, and, therefore, the presumtion prevails.

Neither of the lower Courts has cited any authority for holding that though the verbal sale to 3rd defendant was invalid as a sale, yet it operated to give her a charge upon the property for the amount of her purchase-money.

In *Pran Nath Sarkar* v. *Jadu Nath Saha* (3) it was held that even a mortgage as defined in section 58, Transfer of Property Act, which, however, was not attested as required by section 59, does not operate as a charge under section 100 of the Act. Still less could it be held, that a sale which was invalid because of non-compliance with section 54 of the Act nevertheless gave the would-be purchaser a charge under section 100 of the Act. The latter section was never intended to indemnify people who endeavoured to get conveyances in violation of the express provisions of the law.

(2) P. J. L. B. 568.
(3) 32 C. 729; 9 C. W. N. 627.

KET FOON *v.* EMPEROR.

I modify the decree of the District Court by reversing the order "that the 11·47 acres of land is subject to a charge of Rs. 500 due and payable to Ma Min On, who is entitled to remain in possession of such land until such sum is paid."

As appellants have succeeded in part in their appeal, I order that each party shall bear their own costs in this appeal.

Appeal allowed in part.

(s. c. 4 Bur. L T. 117.)

LOWER BURMA CHIEF COURT.

CRIMINAL REVISION No. 147B OF 1909.

July 23, 1909.

Present: – Mr. Justice Parlett.

KET FOON—APPLICANT

versus

EMPEROR—RESPONDENT.

Rangoon Police Act (IV of 1899), s 30, cl. (c)—Summary trial—Record must show ingredients of offence charged—Venue of trial material only where accused is prejudiced—Criminal Procedure Code (Act V of 1898), s 531.

Where an accused person was charged under section 30 (*c*) of the Rangoon Police Act for "being found between sunset and sunrise with his face covered and being unable to give a satisfactory account of himself" and where the record was silent as to what account, if any, the accused at the time of his arrest gave of himself and as to any reason there may be for considering such account to be unsatisfactory:

Held, that the record omitted a most essential ingredient of the offence of which the accused was convicted and that this omission was fatal.

The record in summary trials, however brief, should show the necessary ingredients of the offence charged.

Kuchi v. *King-Emperor*, 3 L. B. R. 3; 2 Cr. L. J. 375, followed.

Where it was contended that the accused was found within Municipal limits and not within Cantonment limits and that his trial by the Cantonment Magistrate was, consequently, illegal:

Held, that there would be no ground to interfere unless it could be shown that failure of justice had in fact been occasioned by the error of venue.

Appeal against the order of the Cantonment Magistrate, Rangoon, dated the 12th June 1909, in his Criminal Summary Trial No. 266 of 1909.

Mr. *Hamlyn*, for the Applicant.

JUDGMENT.—The first point raised was that the place where petitioner was found was not within the limits of the Cantonments and, therefore, the Magistrate had no jurisdiction. Counsel advanced no proper grounds whatever for this contention. All he did was to file letters from the Municipal authorities to the effect that the place was within Municipal limits. That has no bearing whatever on the question. The terms Municipality and Cantonment are in no way mutually exclusive; indeed, section 3 of the Burma Municipal Act of 1898 shows clearly that a Municipality may include within its limits a Military Cantonment.

If Cantonment authorities had been asked and a declaration made by them that the place did not fall within Cantonments had been filed, that might have been accepted. But obviously the proper course was to refer to the notification of the Government declaring what the boundaries of the Rangoon Cantonment are, and then to determine that accused was found outside those boundaries.

But, even if that had been done, there would have been no grounds to interfere unless it was shown that a failure of justice had in fact been occasioned by the error of venue (section 531. Criminal Procedure Code).

It is stated that accused's friends attended the Town Magistrate's Court, expecting him to appear for trial there, and they were prepared to offer a defence and vouch for his honesty. There is no proof of this; but if, as stated, the Police did inquire in his quarter and his ward headman actually vouched for him being of good character but of weak mind, it is only reasonable to except that it would at that time have been ascertained from the Police where and when the man would be tried.

Finally, it is urged that the record discloses no offence against the accused, and this objection I am bound to uphold.

The record shows the offence proved "section 30, Rangoon Police Act. Found between sunset and sunrise with his face covered." The statement of reasons for the finding states that accused "was found * * at 10 30 P. M. with his face covered."

In the warrant the offence is even described as "being found between sunset and sunrise."

Section 30 of the Rangoon Police Act clause (*e*) renders punishable "any person found between sunset and sunrise having his face covered * * and who is unable to give a satisfactory account of himself."

The record from end to end is silent as to what account, if any, accused at the time of his arrest gave of himself and as to any reason there may be for considering

such account was unsatisfactory. The record in summary trials, however brief, must show the necessary ingredients of the offence charged [*Kuchi* v *King-Emperor* (1)]. In the present instance, the record omits a most essential ingredient of the offence of which the accused was convicted, and this omission is fatal.

I reverse the conviction and sentence. The bail bond will be cancelled.

Conviction and sentence reversed.

(1) 3 L. B. R. 3; 2 Cr. L. J. 375.

(s. c. 4 Bur. L. T. 118.)

LOWER BURMA CHIEF COURT.

SECOND CIVIL APPEAL No. 227 OF 1908.

June 14, 1909.

Present:—Mr. Justice Moore.

MG. LU GALE —APPELLANT

versus

VENKATACHELLAM CHETTY AND OTHERS—RESPONDENTS.

Pleadings—Plaint and written statement both defective—Proper course—Fraud must be pleaded specially —Transfer of Property Act (IV of 1882, s. 53—Fraudulent transfer—Intent to defeat or delay creditors— Mala fide *sale.*

When both a plaint and written statement are defective, the proper course is to either return the plaint for amendment and require a fresh written statement in reply to the amended plaint, or to examine the parties in Court with a view to framing proper issues.

A party who relies upon fraud must both plead and prove it. He is bound to give particulars of the alleged fraud and can succeed upon proof of the fraud as alleged and not of any other kind of fraud.

Where, however, the question as to the *bona fide* nature of a sale was not raised in the pleadings: *Held*, that the lower Appellate Court did not exceed its powers in framing issues on this question which, though not raised in the pleadings, had governed the case from the first.

Where a judgment-debtor soon after a money-decree had been passed against her sold her land for an inadequate price to an employee of her Advocate's father who lent the money for the purchase, it is clear that her intention in selling the land for a sum considerably less than its value was to delay or defeat the claim of her judgment-creditor; according to the provisions of section 53 of the Transfer of Property Act, the sale was voidable at the option of the creditor so defeated.

Bhagwant v. *Kedari*, 25 B. 202; *Hakim Lal* v. *Mooshahar Sahu*, 34 C. 999; 6 C. L. J. 410; 11 C. W. N. 889, relied upon.

Appeal against the decree of the Divisional Court of Tenasserim, passed on the 9th September 1909; in Civil Appeal No. 65 of 1908, dismissing the appeal of the appellant (plaintiff) against the decree of the Sub-Divisional Court of Thaton, passed in Civil Regular Suit No. 23 of 1908.

Mr. *Agabeg*, for the Appellant.

Mr. *Dawson*, for the Respondents.

JUDGMENT.—Respondent got a mortgage-decree against Ma Nyo and others. Ma Nyo appealed and in Civil First Appeal No. 102 of 1906 of this Court, in which she was represented by Mr. Chit Hlaing, the mortgage-decree was altered to a simple money-decree for Rs. 662-5-0 against Ma Nyo and the legal representative of her deceased husband. Judgment in this case was delivered on the 8th July 1907.

On the 4th August 1907, Ma Nyo sold to appellant the land the subject of suit by registered conveyance for Rs. 1,000.

On the 8th August 1907, Venkatachellam got a warrant attaching the land in execution.

On 15th August 1907, appellant applied for removal of attachment. His application was rejected on 3rd February 1908 on the ground that he was not in possession of the land when attached.

On the 10th February 1908, he filed the suit now under appeal to establish his title. He alleged in his plaint that he "became owner in possession of the land on 4th August 1907."

Defendants-respondents filed a written statement in the following terms: "Defendants deny that the land in suit belonged to plaintiff at the time of attachment." The parties were not, as they should have been, examined before issues were framed. The sole issue framed was, whether the land in question belongs to the plaintiff. Plaintiff called no fresh evidence, the evidence recorded in the removal of attachment case being by consent admitted. Defendant called no evidence at all. The Judge of first instance found that the deed of sale on which plaintiff relied was "tainted with fraud,"—what kind of fraud is not clear,—and dismissed the suit. The Judge of the Divisional Court rightly pointed out that the fraud was not mentioned in the pleadings or raised by the issues. He then framed two new issues:—

(*i*) Was the purchase by plaintiff *bona fide*?

(*ii*) Was it invalid by reason of fraud or other cause? and

remanded the case for decision of these issues. Some further evidence was recorded and both Courts found on the fresh issues in favour of defendant-respondent.

The first ground of appeal argued is that the Divisional Court erred in framing these issues and in remanding the case for hearing and decision upon them, when the question of fraud raised in the issues was not raised by defendants in their written statement.

A plaintiff who relies upon fraud must both plead and prove it. He is bound to give particulars of the fraud alleged and can succeed upon proof of the fraud as alleged and not of any other kind of fraud. A defendant who is disputing a title is equally bound to state the grounds upon which he disputes it and, if fraud is one of those grounds, to give particulars of the fraud.

In the present case both the plaint and the written statement are defective. The plaint does not, as it should, disclose the nature of the title relied upon and it was impossible for defendant to file a proper written statement in reply to it.

The proper course would have been to return the plaint for amendment and to require a fresh written statement in reply to the amended plaint. Or, the Court should have examined the parties in Court before issues were framed.

It is clear from the cross-examination of plaintiff that defendant from the first sought to impugn his title on the ground that the transfer to him was for insufficint consideration and made with intent to defeat or delay defendant a creditor of the vendors and was in this sense fraudulent. And I do not think that the lower Appellate Court exceeded its powers in framing issues on this question which, though not raised in the pleadings, had governed the case from the first.

Both the lower Courts have found that the sale to appellant was fraudulent. But it is urged in second appeal that the facts which they have found proved do not justify them in holding the sale void.

That plaintiff-appellant paid Rs 1,000 for the land in suit is clearly proved, and I do not understand the lower Courts to question the genuineness of the consideration. They agree in finding that the price paid was inadequate. There is some misunderstanding as regards standing crops. The plaintiff obviously did not buy these. The land when he bought it, was being cultivated by tenants.

Plaintiff's own witness gives the value of the land as Rs. 50 per acre. The area purchased is 58·54 acres worth on this basis Rs. 2,927. Plaintiff, therefore, purchased the land at about $\frac{1}{3}$rd of its value

The Judge of the Sub-Divisional Court draws an inference unfavourable to plaintiff from his failure to inquire as to encumbrances. He also says that inquiry, if prosecuted, would have led to the knowledge that the land was encumbered or "affected." Inquiry could have led to no such knowledge as the land was not encumbered or affected. As a matter of fact, there can be no room for doubt that plaintiff bought this land because he knew that the Chief Court had held that it was unencumbered. He bought it with money borrowed expressly for that purpose from his employer U Tha Hynin, father of the Barrister who represented Ma Nyo in this Court. And in fact when he bought it, it was free from mortgage or other encumbrance.

There is nothing in itself illegal or fraudulent in plaintiff making use of his knowledge of the result of the litigation in this Court.

The only ground on which the transfer can be held voidable in this case was that, it was made with intent to defeat or delay the creditors of the transferor. In considering whether this was the case, the principles laid down in section 53 of the Transfer of Property Act are a useful guide. The scope and meaning of that section are fully discussed in the case of *Bhagwant* v. *Kedari* (1) and in *Hakim Lal* v. *Mooshahar Sahu* (2). The latter case resembles this one, inasmuch as in neither case has the transaction been a mere cloak for retaining a benefit to the grantor. There can be no doubt that Ma Nyo has parted with all her rights in the land and that appellant has paid Rs. 1,000 for the land and there is not the least reason to suspect him of any intention of restoring the land or any part of it to Ma Nyo. But if Ma Nyo's intention in selling the land was to defeat her creditors and if Maung Lu Gale knowing of that intention assisted her in carrying it out; if in other words, he assisted her in converting her land into money

(1) 25 B. 202.
(2) 34 C. 999; 6 C. L. J. 410; 11 C. W. N. 889.

because money is more easily shuffled out of sight, his title is worthless as against creditors even though he may have paid, the full price. He cannot plead that he purchases *bona fide* if he purchases knowing that he in doing so is assisting his vendor to avoid or delay payment of her debts.

Having regard to the gross inadequacy of the consideration paid and having regard to the connection between Maung Lu Gale and Ma Nyo's legal advisers, I think that there is no reasonable doubt that Ma Nyo's intention in selling her land for $\frac{1}{3}$rd its value was to delay or defeat the Chetty's claim and Maung Lu Gale knew of this intention and assisted her in carrying out. I think, therefore, that upon the principles laid down by Mukerji, J., in *Hakim Lal* v. *Mooshahar Sahu* (2), the transaction is voidable at the option of a creditor so defeated and I, therefore, confirm the judgment and dercee of the lower Appellate Court and dismiss this appeal with costs.

Appeal dismissed.

(s. c. 8 A. L. J. 341.)

ALLAHABAD HIGH COURT.

FULL BENCH.

FIRST CIVIL APPEAL No. 67 OF 1910.

February 7, 1911.

Present:— Sir George Knox, KT., Judge, Mr. Justice Banerji and Mr. Justice Karamat Husain.

BED SARAN KUAR—PLAINTIFF—APPELLANT

versus

BHAGAT DEO AND OTHERS—DEFENDANTS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), s. 11—Res judicata—Ejectment suit in Revenue Court—Question of title decided—Second suit in Civil Court barred.

A brought a suit in a Revenue Court for ejectment against certain persons on the ground of a lease. They pleaded proprietary title which was decided in their favour. *A* then brought the present suit for declaration of her title and possession in the Civil Court as against the defendants in the former suit as well as against some other persons:

Held, that the decision of the Revenue Court in the previous suit was *res judicata* so far as the defendants in that suit were concerned.

Bihari v. *Sheobalak*, 29 A. 60'; A. W. N. (1907) 189; 4 A. L. J. 545, referred to.

First appeal from the decision of the District Judge of Mirzapur,

Mr. *Haribans Sahai* (with him Nawab *Abdul Majid*), for the Appellant.

Dr. *Tej Bahadur Sapru*, for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by Sri Rani Bed Saran Kuar, appellant before us, in which she asked for recovery of possession of *mauza* Jamvanwa and for a declaration of her proprietary right to the same. One of the pleas raised in defence was, that the present suit was barred by reason of section 11, Code of Civil Procedure. It appears that, prior to the institution of the suit out which this appeal has arisen, a suit had been instituted in the Court of the Assistant Collector, First Class, under section 63 of the Local Tenancy Act. The appellant was the plaintiff in that suit. The defendants were (1) Ramnath Prasad, who was the father of Ram Kinkin Deo and Harbans Deo, two of the present respondents, and also (2) Bhagat Deo, the third respondent before us. The appellant then sued for ejectment of the defendants on the ground that they were lessees, and that the lease under which they held would expire at the end of the then current agricultural year.

The defence was to the effect that the defendants were not lessees but proprietors, and that the plaintiff had no title to the property in question. The Assistant Collector took upon himself to determine the question of title then in issue before him. We cannot help saying that the action of the Assistant Collector seems to us to have been inexpedient. He would have shown better discretion if he had required the defendants to institute a suit in the Civil Court for the determination of this question, which was particularly a question for the Civil Court to determine. Section 199 of the Local Tenancy Act, however, gave the Assistant Collector power to determine the question, and he determined it against the plaintiff, namely, the appellant before us. He held that the plaintiff had no title to the property in dispute.

The plaintiff might have carried this decision in appeal before the District Judge. Had she done so, it would have been within the power of the District Judge either to try the question of title himself, or if he had not all the materials before him necessary for the determination of the question, to have framed issues with reference to that

question, and have referred them for trial to any subordinate Court of Civil jurisdiction. That Court might, for instance, have been the Court of the Subordinate Judge. The plaintiff, however, did not take any action in this direction with the result that she has now to meet a decree against her which has become final. The decree was pronounced, it is true, by a Revenue Court but by a Revenue Court which, as we have held in previous decisions and as we now hold, is *pro tanto* a Civil Court of competent jurisdiction to decide the question of title. The rulings to which we refer will be found mentioned and considered in *Bihari* v. *Sheobalak* (1).

To return to the suit out of which this appeal arises, the Court of first instance held that the plaintiff's case was barred by the rule of *res judicata*. The lower Appellate Court also held that the suit of the plaintiff was barred against such of the defendants as were parties to the previous suit brought under section 63 to which we have already referred. With this view of the lower Appellate Court we agree for the reasons stated above. So far as the present case is concerned, the result is that the appellant's claim must be held to be barred against the respondents to this appeal. We accordingly dismiss the appeal with costs.

Appeal dismissed.

(1) 29 A. 601; A. W. N. (1907) 189; 4 A. L. J. 545.

(s. c. 8 A. L. J. 352.)

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 849 OF 1908.

July 9, 1909.

Present:—Mr. Justice Karamat Husain.

BHURA—PLAINTIFF—APPELLANT

versus

GHURE—DEFENDANT—RESPONDENT.

Civil Procedure Code (*Act XIV of* 1882), *s.* 13—*Prior mortgage of entire share—Subsequent mortgage of* ⅔rds *share—Suit on subsequent mortgage—Redemption of the prior mortgage- No prayer in the suit for possession of* ⅓rd *share—Second suit for possession of* ⅓rd *share barred*—Res judicata.

D, father of *R*, *L* and *G*, mortgaged his property with possession to *S*. Subsequently *R* and *L* mortgaged their ⅔rds share in the equity of redemption to *B*. *B* instituted a suit for sale of the property on the basis of his mortgage. *S*, the prior mortgagee, was made a party to the suit. *S*'s entire mortgage was redeemed by *B*, but only ⅔rds of the property was sold. In his plaint *B* had not prayed for possession of ⅓rd share which had not been mortgaged to him but which he had to redeem from *S*. In a subsequent suit, *B* sought possession of that ⅓rd share:

Held, that the second suit was barred by *res judicata*. *B* ought to have prayed for possession of the share in his previous suit.

Vinayak v. *Dattatraya*, 26 B. 661, relied upon.

Second appeal from the decree of the District Judge of Agra, reversing that of the Munsif of Mahaban.

Mr. *J. N. Chaudri*, for the Appellant.

Mr. *Girdhari Lal Agarwala*, for the Respondent.

JUDGMENT.—The facts which gave rise to the suit out of which this appeal arises are as follows:—

One Deojit Lal, father of Radhe Kishen, Ram Lal and Ghure, made a mortgage with possession in favour of Salig Ram, on the 25th July 1881. Subsequently, on the 3rd November 1896, Radhe Kishen and Ram Lall mortgaged their two-thirds share in the equity of redemption to the plaintiff Bhura. On the 23rd November 1903, Bhura instituted a suit upon his mortgage, Radhe Kishen, Ram Lal, Salig Ram and Ghure were impleaded as defendants. The reliefs prayed for in the plaint in that suit were to the following effect:—

(*a*) Defendants Nos. 1 and 2 may be ordered to pay the amount due on the mortgage dated the 3rd November 1896, within a time fixed by the Court, and on their failure to do so, time be given to the plaintiff to deposit the mortgage-money due to Salig Ram.

(*b*) Should Salig Ram (in the plaint not accept is to be found but this seems to be a mistake) accept the entire mortgage-debt, then the entire property covered by his mortgage should be sold, and should he accept a portion of the mortgage-money, *i. e.*, two-thirds, then the property covered by his deed, dated the 3rd November 1896, be sold.

The proceeding of the Court, dated the 17th December 1903, shows that Salig Ram demanded the payment of the entire mortgage-debt due to him and that the plaintiff expressed his willingness to pay the entire sum provided all the property covered by his mortgage, dated the 25th July 1881, was ordered to be sold. The Court gave a decree to the plaintiff under section 88 of the Transfer of Property Act which ordered him to pay the entire sum due to Salig Ram on his mortgage, but which ordered the sale of

the 2/3rds share of Radha Kishen and Ram Lal mortgaged under the deed dated the 3rd November 1896. The decree-holder, on the 23rd July 1904, applied for an order absolute in which he prayed that the $\frac{1}{3}$rd share of Ghure also be sold. Objections were taken to this application and it was rejected. There was an appeal and the following is the extract of the order of the lower Appellate Court, dated the 25th April 1905:

"When the decree absolute under section 89 of the Transfer of Property Act came to be prepared, the appellant claimed to be put into possession of the share of the 3rd brother, not covered by the mortgage. The lower Court has refused to do so, hence this appeal. It is clear that the appellant has misconceived his remedy. The decree under section 89 cannot go beyond that prepared under section 88. As matters stand, the appellant may be entitled to some relief but not by way of appeal from an order regarding the form of a decree under section 89. The obvious matter of proceeding is to apply for review of judgment in the original case."

It is admitted that there was no appeal from the above order and that no steps were taken for a review of the original judgment.

The plaintiff, on the 18th of November 1907, brought the suit out of which this appeal has arisen against Ghure, on the allegation that after the payment of the mortgage-money due to Salig Ram, Ghure, Radha Kishen and Ram Lal got their names entered instead of that of Salig Ram in the revenue papers. One of the reliefs sought in the plaint was the possession as a mortgagee over the share of Ghure. One of the pleas in defence was, that the suit was barred by the doctrine of *res udicata*. The Court of first instance decreed the claim in part. The lower Appellate Court coming to the conclusion that the suit was barred by section 13 of the Code of Civil Procedure, Act No. XIV of 1882, set aside the decree of the Court of first instance and dismissed the suit with costs. The plaintiff, Bhura, has preferred a second appeal to this Court, and it is argued by his learned Vakil that the suit is not barred by the doctrine of *res judicata*, inasmuch as the cause of action for possession did not arise till after the payment by him of the prior mortgage of Salig Ram, and that a prayer for possession was not a prayer which ought to have been made in the suit for sale which was instituted by Bhura on the 23rd of November 1903. I am of opinion that the doctrine of *res judicata* bars the present suit. When Bhura instituted his suit for the sale of the 2/3rds share of Radha Kishen and Ram Lal, he, under the law of mortgage as it was interpreted by this Court at that time, was bound to redeem the prior mortgage in favour of Salig Ram. The prayer for the redemption of that one-third share which belonged to Ghure and which could not be sold in his decree against the other 2/3rds, necessarily involved a prayer for the possession of that $\frac{1}{3}$rd. That being so, the plaintiff ought to have prayed for it and his failure to do so debars him from bringing a fresh suit for it. There can be no doubt that Salig Ram was a necessary party to the suit instituted by Bhura on the 23rd of November 1903. As soon as he was made a party, there should have been a determination of all the rights between the plaintiff and Salig Ram arising out of the prior mortgage, dated the 25th of July 1881, in favour of Salig Ram and one of the rights to which the plaintiff was entitled was the right to the possession of $\frac{1}{3}$rd in possession of Salig Ram on payment of the entire money due to Salig Ram. I am unable to hold that the cause of action for demanding possession had not accrued at the time of the former suit. The right for the redemption of that mortgage by the plaintiff, in consequence of the law of mortgage as then interpreted, had vested in him and to demand possession was part and parcel of that right. His omission to demand possession in that suit debars him from claiming it by a fresh suit. I have already said that the plaintiff ought to have prayed for possession in the former suit. Section 13, Civil Procedure Code, therefore, applies.

The remarks of Sir Lawrence Jenkins in *Vinayak Shivrao* v. *Dattatraya Gopal* (1), in my opinion, support the conclusion at which I have arrived. The result is that the appeal fails and is dismissed with costs.

Appeal dismissed.

(1) 26 B. 661 at pp. 667-668.

S. N. DAR, B. A. LL.B.
Vakil High Court,
SRINAGAR (Kashmir)

BEHARI *v.* RAM CHANDER.

(s. c. 8 A. L. J. 368.)

ALLAHABAD HIGH COURT.

LETTERS PATENT APPEAL No. 96 OF 1910.

February 17, 1911.

Present:- Sir John Stanley, KT., K. C., Chief Justice and Mr. Justice, Banerji.

BEHARI AND ANOTHER—DEFENDANTS—APPELLANTS

versus

RAM CHANDER AND OTHERS—PLAINTIFFS—RESPONDENTS.

Suit for possession by mortgagee not brought until last day of limitation Execution of mortgage admitted —Consideration denied—Presumption—Onus *on plaintiff to prove consideration.*

The fact that a usufructuary mortgagee took no step to recover possession of the mortgaged property until the last day of limitation raises a presumption that he did not consider that he was entitled to possession.

In such a case the burden of proving that consideration passed is on the mortgagee.

Achobandil Kuari v. *Mahabir Prasad*, 8 A. 641, followed.

Mahabir Prosad v. *Bishen Dayal*, A. W. N. (1904) 163, distinguished.

Letters patent appeal against the decision of Mr. Justice Karamat Husain, printed at 7 Ind. Cas. 645, where the full facts are given.

Dr. *Tej Bahadur Sapru*, for the Appellants.

JUDGMENT.—In this suit the plaintiffs seek a decree for possession of certain property usufructuarily mortgaged to them on the 15th of December 1896. It appears that from the evidence, and it is not disputed, that from the 15th of December 1896, until the 14th of December 1908, the day on which this suit was instituted, the plaintiffs never applied for mutation of names in their favour, nor did they take any step whatever to obtain possession from the defendants, and it is admitted in the plaint that they never got possession. The defence set up was that no consideration for the mortgage passed. Both the lower Courts dismissed the plaintiffs' suit holding that no consideration for the mortgage was proved. The lower Appellate Court did not place any reliance upon the oral evidence adduced on either side, but finding that no steps were taken by the plaintiffs for recovery of possession for a period of 12 years all but one day, drew the inference from this that no consideration had passed. The fact that no step was taken by the plaintiffs for so long a period raises the presumption that the plaintiffs did not consider, during this long period, that they were entitled to possession.- We think that such an inference is, under the circumstance, not unreasonable, and that the Courts below were justified, under the circumstances, in throwing the *onus* upon the plaintiffs of proving as a fact that consideration did pass. The case is very similar to that of *Achobandil Kuari* v. *Mahabir Prasad* (1). The suit in that case was for possession of land alleged to have been purchased under a registered deed of sale. The defendant-vendor admitted the execution and registration of the deed but denied receipt of consideration. The deed was dated January 1886, and the suit was not instituted until the year 1894, that is, after the lapse of 8 years. It was found that the vendor had been in possession during the whole of that period. The plaintiffs produced no evidence in proof of payment of consideration. It was held by Oldfield and Tyrrell, JJ., that although, under ordinary circumstances, the party to a deed duly executed and registered, who alleges non payment of consideration is bound to prove his allegation, the fact that the plaintiff and his predecessor had silently submitted to the withholding of possession for upwards of 8 years, combined with the continuous possession of the vendor, favoured the allegation of the latter that possession had been withheld because of the non-payment of consideration, and raised such a counter-presumption as to make it incumbent on the plaintiff to give evidence that consideration had in fact passed. We are not aware that this decision has been the subject of adverse comment, and a number of years have passed since the ruling was made. We think that the view taken by the learned Judges in that case is reasonable one. The circumstances of this case are somewhat stronger, for here we have a mortgage executed so far back as the 15th of December 1896, and no steps whatsoever have been taken for the obtaining of possession of the property by the mortgagees until the last day of limitation, namely, the 14th of December 1908, a period of 12 years. The learned Judge of this Court relied upon the ruling in *Mahabir Prasad Rai* v. *Bishan Dayal* (2). The facts of that case are unlike those in the

(1) 8 A. 641.
(2) A. W. N. (1904) 163.

present case. Then, there was no withholding of possession for a length of time as in this case. We cannot concur in the decision of our learned brother and must allow the appeal. We accordingly allow the appeal, set aside the decree of this Court and restore the decree of the lower Appellate Court with costs in all Courts.

Appeal allowed.

(s. c. 12 C. L. J. 479.)

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 1752 OF 1902.

November 30, 1904.

Present: Mr. Justice Ghose and Mr. Justice Pargiter.

ACHAMULLA SIRCAR—DEFENDANT—APPELLANT

versus

CHOLAMUNNESSA BIBI—PLAINTIFF—RESPONDENT.

Occupancy-holding not transferable—Purchase—Title of purchaser—Subsequent sale of holding in execution of rent decree obtained by some of co-sharer landlords- Estoppel—Conduct—Evidence Act (I of 1872), s. 115.

The plaintiff purchased from an occupancy-*raiyat* the holding in dispute which was not transferable without the consent of the landlord. Subsequently defendant purchased the same holding in execution of a decree for rent obtained by some of the co-sharer landlords, defendants Nos. 2—9. The plaintiff sued for declaration of title and recovery of possession:

Held, that the plaintiff got no title to the holding which was not transferable: that there could not be any estoppel against the defendants, for they were no party to the transaction under which the plaintiff claimed title, and that the suit must fail.

Appeal against a decree of the Subordinate Judge of Rangpur, dated the 23rd June 1902, reversing that of the Munsif of Rangpur, dated the 30th January 1902.

Babus *Mahendra Nath Roy* and *Biraj Mohun Mozumdar*, for the Appellant.

Babu *Surendra Chandra Sen*, for the Respondent.

JUDGMENT.—The plaintiff in this case claimed title under a purchase from one Binand Nasya, an occupancy-*raiyat*. The defendant No. 1 acquired the same property under a subsequent sale in execution of decree for rent obtained by some of the co-sharer landlords, and the question raised between the two rival purchasers was as to whose title should prevail. It appears that there was a proceeding under section 335 of the Code of Civil Procedure; and under an order made by the Court under that section the possession of the defendant No. 1 was maintained, the plaintiff's application being rejected. Thereupon, she brought the present suit to have her right as derived from the said Binand Nasya declared and possession restored to her.

The main question that was raised between the parties was, whether the *jote* in question was transferable according to custom or local usage without the consent of the landlord. The lower Appellate Court has found that it was not so transferable; but yet that Court has held that the defendants being estopped by their own conduct from denying the plaintiff's title, the latter is entitled to succeed in this action. The estoppel which she set up against the defendants was that the defendants Nos. 2 to 9 caused this very property to be sold in execution of their decree for a fractional share of the rent, and the defendant No. 1 purchased at that sale. And the Subordinate Judge has held that, inasmuch as they themselves were party to a sale of this very holding, they are not entitled to say as against the plaintiff that it is not saleable according to law.

We think, however, that there is no estoppel against the defendant either under section 115 of the Indian Evidence Act, or any other principle of law. The plaintiff in this case must succeed upon her own title. The defendants were no party to the transaction under which the plaintiff claims title nor did they, by their conduct, lead her, the plaintiff, to believe that the *jote* was transferable by custom or local usage. That being so, we think that, this being a suit in ejectment and the possession of the defendants having been affirmed by the Court under section 335 of the Code of Civil Procedure, the plaintiff must succeed, if she can at all, upon the establishment of her own title. Upon the judgment of the lower Appellate Court, she has none; that being so, we think that the decree of the Court below cannot be maintained.

The result is that this appeal is allowed and plaintiff's suit dismissed.

In the circumstances of the case, each party should bear his own costs in all the Courts.

Appeal allowed; Suit dismissed.

EMPEROR *v.* ALI CASSIM ARIFF.

(s. c. 4 Bur. L. T. 97.)

LOWER BURMA CHIEF COURT.

ORIGINAL CRIMINAL JURISDICTION.

SESSIONS TRIAL No. 89 OF 1910.

December 22, 1910.

Present:—Sir Charles Fox, Chief Judge.

EMPEROR—PROSECUTOR

versus

ALI CASSIM ARIFF--ACCUSED.

Murder—Intention—Circumstantial evidence—Conviction based on circumstantial evidence—Duty of juries—Soundness and honesty of decision—How far they should expect truth from witnesses—Moral conviction—Certainty of the conclusion.

Intention is the result of working of the brain and as one human being cannot see into another human being's brain, the only way of gathering intention is to judge from the act itself and from the circumstances under which it was done.

Circumstantial evidence is evidence of circumstances as opposed to what is called direct evidence. Circumstances, however, sometimes afford just as strong, if not stronger, grounds for coming to a conclusion as to something having happened than the evidence of any witness even of the highest stamp, who may say he saw it happen

Juries are expected to give the best of their brains to consideration of the matters brought before them and to give a sound and honest decision. If that is not done, it must bring the jury system into disrepute.

As regards evidence of witnesses, juries should not expect the witnesses to come to the reputed standard of Washington, but must take people as they are and try and discover the truth by close consideration of each one's evidence, in order that truth may prevail and that justice may be done in the acquittal of an innocent man or in the conviction of a guilty man.

Before the jury convict an accused of the offence with which he is charged, they must come to a certain conclusion on the matters brought before them. Those matters must appear to them to leave no reasonable doubt and prove with certainty that the accused and the accused alone could have been the man who committed the offence. By 'certainty' it is not meant that juries are not to act upon evidence unless it puts them in the position of having actually seen the thing done; but that they have to be satisfied upon the whole evidence beyond reasonable doubt as they would be on any important question on which they have to take action one way or the other.

Messrs. *Godfrey*, Acting Government Advocate, *Cowasjee*, *Coltman* and *Anklesaria*, for the Prosecution.

Messrs. *Norton*, *DeGlanville*, *Vakharia* and *Auzam*, for the Defence.

CHARGE.

Gentlemen of the Jury.—The prosecution alleges that on the 29th of August last, at night, the accused shot a bullet through his wife thereby killing her, and they charge him with having committed murder by that act. The definition of murder requires little explanation in this case because only a very small portion of it is applicable to the case. Murder consists in one human being voluntarily, knowingly, culpably and unlawfully taking the life of another human being, with the intention of causing that other's death, or with the intention of causing injury sufficient in the ordinary course of nature to cause death. Intention is the result of working of the brain, and as one human being cannot see into another human being's brain the only way of gathering intention is to judge from the act itself and from the circumstances under which it was done. Life is regarded as sacred amongst us and every person is held responsible for the natural and probable consequences of his act, and if he takes another's life, even in a moment of rage and without any preconceived design or apparent motive, he is held responsible for murder so long as he did it with the intention of causing the other's death, or with the intention of causing injury sufficient in the ordinary course of nature to cause that person's death There is little difficulty in the law in this case, for it is common human knowledge that if one person fires a bullet from a fire-arm at close quarters into or towards a vital part of another human being's body it is likely to, and probably will, kill that person.

The accused denies that he shot his wife and he has set up a substantive case that he was nowhere near his wife on the night on which she was killed; that he was at a place 37 minutes by train and a little further beyond the nearest station to his house, *viz.*, at Ywama. He has called evidence to prove that he was at this place, and although the Counsel for defence put this evidence forward in a somewhat half-hearted way still he has relied upon it and it is my duty to lay that before you. If you believe that evidence that he was at his house on the night of the occurrence, there is an end of the case against him; but if you do not believe it, still before you convict the accused you must be satisfied on what has been brought before you by the prosecution that it was the accused who shot the fire-arm causing the bullet to go through Aminabi's body and to kill her. To prove that the accused was nowhere near his wife that night, the evidence for the defence is that of the two Sherwins, Aga Rajib Ali and Maung Toke Gyi. Shrwin gave

us a story of his life and his present position. He appears to have started as a farm-boy, to have entered the army, to have taken his discharge in India and then to have been in employment sometimes things leaving him and sometimes he leaving them. The last employment he was in was in Calcutta on a pay of Rs. 80 a month but he says that that pay was practically nothing to him; that from his start as a farm-boy he became acquainted with Veterinary Science when treating animals, and that he has throughout his life and for a long time past made a considerable income from his private practice as a Veterinary Surgeon; that whilst he was holding this employment on Rs. 80 in Messrs. Manckintosh, Burn & Co., who, I believe, are builders in Calcutta, he made from 300 to 400 or 500 a month by private practice. He left that firm and the accused sent him a letter and asked him to come and see him (letter produced). He had known the accused before when he was here managing some dairy farm out at a place on the way to where the accused lives. Finally, they came down together from Calcutta on a sort of understanding that he was going to be the manager of a dairy farm, the accused finding most of the money; but he says that he was to find some of fit and to have a share in the business. They arrived here on the 26th August about mid-day, and they all went off together to the accused's house at Ywama. They drove out in *ticca gharies*. The first incident that he speaks to is the incident of the shooting of the fowls by the accused to provide for the dinner that first night. Mrs. Sherwin has told us that on the way they bought the food for their dinner at Insein, and she by a curious lapse of memory forgot all about the provision of this addition to their food for the dinner by the shooting of fowls by the accused. However, when it was very forcibly brought to her notice she at once said, "Oh yes, the accused shot the fowls and her husband wrung their necks." So far let us consider what credit these people are entitled to. The lady, no doubt, forgot all about this shooting of the fowls but it is not quite apparent why if she was providing dinner at all she should not have provided the full dinner and sufficient at Insein. There is, however, a reason why this shooting of fowls should be brought up, and, that is, that the accused has somehow to account for the appearance of his gun on the 31st August, which was the first day it was taken to an expert and examined by him, and later on, on the 1st September, when it was taken again to an expert and again on the 2nd. Sherwin says that the accused fired with shot no one would use a bullet to kill a fowl with—and you saw the cartridges found in the accused's box which are called Eley's lined nitro case loaded with Curtis and Harvey's smokeless diamond powder: whether this is cordite or not there is no evidence. You have seen the box opened before you: it shows a number of that description of cartridge. It must be remembered that both barrels were fired, and two fowls are said to have been killed: naturally, you would expect that if both barrels were fired they would be in the same condition later on even after being cleaned.

Nothing material happend until we come to Sunday, the 28th August. On that afternoon. Sherwin and the accused came into Rangoon together bringing some parcels which Sherwin supposed to be present which the accused had brought for his wife and child. Mrs. Sherwin says the parcels were taken away in a suit case. That night Sherwin parted with the accused at Rangoon and the accused stayed in Rangoon. That is admitted. He told Sherwin to bring him next day some clothes and Sherwin says that the next day he brought the clothes in a bag. He says he took that bag to the house of Aminabi where he left the accused the previous night; he was invited in and introduced to the lady in her room. That leather bag was left there, he and the accused going off for a ride round the lakes, and eventually between 1 and 2, or perhaps later they go back again to Ywama together. They there have their tea and then some friends come in; amongst them was this Aga and a Burman. Sherwin refers to them as several friends but Aga and the Burman were the only ones who stopped. Then time came for more food and Sherwin says that as the time appeared long he looked at his watch; he knew what time dinner was taken because he was wondering why it was coming so late, and then observed by his watch that it was 7-30. The dinner came about

7-30. That took half-an-hour—it was taken upstairs. The accused, the Aga and Sherwin came up and ate the dinner at the table in a room upstairs; Mrs. Sherwin was engaged with her child in the next room. After dinner the men came down and sat together and talked and Sherwin says he left the accused and Aga talking while for a short time he went away for some purpose and came back again and joined them again; they went on talking and chatting and then it came to time when he thought it was time to go to bed. Then he says at that time he heard a train pass: this was whilst he was still below. Then he went upstairs and according to his wife he had another smoke up in their room, and then he heard another train pass there, and finally he went to bed. He fixes the time of his going up not by his watch again but by the passing of the train, and it is relied upon that that train was the train which would pass there about 9-21 and no other trains could have passed about that time. Mrs. Sherwin does not say anything about the trains; she fixes the time at which her husband came up and the time at which she still heard the accused downstairs—coughing—as about 10 o'clock, or 10 o'clock exactly according to her, because she says at that time she looked at the clock in her room. This is how these people fix their time and are certain of the late hour at which the accused was still in that house at Ywama, and if that is correct he could not have been in Rangoon any time between 9 and 10 o'clock at night: it would be a physical impossibility and the prosecution does not ask you to believe, if that evidence is true, that he could have been in Mogul Street, Rangoon, about the time his wife must have been shot in her house. The accused, according to the Sherwins, slept downstairs that night; however on the two previous nights on which he had slept in the house he slept upstairs, as one would expect him to do he being the renter of the house and having a room to himself; but on this particular night it was said he slept downstairs, because Mrs. Sherwin's child had disturbed him on the other two nights when he slept upstairs, so he had his bed taken down that evening to the lower floor and slept there. The next morning Sherwin was up fairly early and dressed himself and had his *chota hazri* and was going downstairs when he says he met the accused coming upstairs This, he said, was about half past six in the morning; he wished him the usual good morning and went off about his private work, as Mrs. Sherwin calls it. Mrs. Sherwin also says that she saw the accused about that time; she was preparing the *chota hazri* for both of them and the accused was there in the house about 7 o'clock in the morning. If this is true, of course, the accused could not have travelled by 8 o'clock train from Rangoon to Insein on the morning of the 30th—he could not, of course, be in two places at the same time. The other witness as to the accused being in the house on that particular night is Aga Rajub Ali, the old friend of accused, who came there in the afternoon and stayed till dinner. He does not fix his time with reference to anything except that it was late in the evening when he left and because a man Toke Gyi was sent for him with a lantern, and he went home with Toke Gyi to his house at a fairly late hour with the aid of this lamp. Toke Gyi, the servant, says he went to fetch his master at 9 P. M. and they started back home at 10 P. M. He fixes his time by having, as he says, heard the jail gong strike 10 when they left the accused's house. Rajub Ali and Toke Gyi, both speak of another man, Maung Gyi, as having been present and the Sherwins talk of a Mahomedan servant of the accused who was present and took the tea up and down. Neither Maung Gyi nor that Mahomedan servant have been called for the defence, and no explanation is given for their absence. The Sherwins are very definite about all that occurred on that particular evening, even as to the number of cups of tea that were sent down. The Burman did not apparently join in the dinner but Mrs. Sherwin says that when the tea was to be served the boy came up and said there were 5 cups wanted; there were the accused, Sherwin, Aga and this Maung Gyi and the servant, Toke Gyi, that made 5; that 5 cups of tea and bread and butter were wanted, which she prepared. Toke Gyi says that he had no food or drink at the accused's house that night. We have not had Maung Gyi here to say whether he had any or not Mrs. Sherwin says that their dinner hour was always at 7-30; so there was nothing unusual on the evening in question: but Sherwin evidently thought the dinner was

rather late that night as he says the explanation of his taking out his watch was because he thought the dinner was late and he was getting hungry. All this evidence comes from people, except in the case of Toke Gyi, who were friends of the accused, two of them living in his house at the time. Sherwin strenuously denies that he was in any way beholden to the accused, even for his passage down to Rangoon. He repudiates anything of the sort and of his being actuated in his statements by filthy lucre in any way he strenuously denies having received his passage money down. His explanation of his coming down 2nd class on the steamer on which he admits he took a deck passage, is that he found the latter uncomfortable; that he changed over to the 2nd class paying the difference himself. Sherwin had not travelled between Calcutta and Rangoon for the first time, and he must have known before what discomforts deck passengers are liabe to on steamers between this and Calcutta in the month of August. However, this gentleman, who has a pay of Rs. 80 a month and making between Rs. 300 and 500 a month in private practice, says he at first took a deck-passage down and then changed into the 2nd class.

The position adopted by the Crown towards the evidence is that every thing in connection with the dinner on the 29th may be quite true, but that, put it half-an-hour back and there was plenty of time for the accused to get into Rangoon after dinner by the train which left Insein about 8.30 and arrived here at 4 or 5 minutes past 9. If the dinner took only half-an-hour and had commenced about 7, there was between half past seven and half past eight in which to get to the Insein Station: it is only a matter of lying as to half-an-hour in time and all the rest might have occurred. That is the substantive case that the accused asks you to believe: we have not got every body who might have assisted in the proof of it, and as to this I shall have to make remarks afterwards, as to the cause which led to witnesses not being called both on the side of the defence and on the side of the prosecution. Now, assuming that you believe the Sherwins, as I said before, there was an end of the case against the accused, but assuming that you do not, then we get to the crux of the case, and that is, has the prosecution satisfied you beyond reasonable doubt that accused was the person who shot his wife? If they have not satisfied you beyond reasonable doubt that he was the man who did so, then he is entitled to acquittal.

Now, what is the case which the prosecution has put before you,? I may tell you at once, that it is a case which rests purely on circumstantial evidence, for I am going to advise you that the one person who says that she saw the accused shoot her mother should not be given any weight at all: that one person is that poor little child, the daughter of the accused and his wife. She is about 5 years old, and for her age she seemed to be a most remarkably intelligent child, and if we could have got her immediately after the occurrence and heard what she had to say, I do not doubt myself that she would have been able to give quite an intelligent and true account of what she had seen. If we had got hold of her before anybody else had, I do not think there would be any question that she has sufficient intelligence to relate correctly within a few hours anything that she saw or heard. But it seemed to me after she had been questioned about the case that what she stated here was not the outcome of her own senses; that her poor little mind had been crammed with ideas not her own and that she could not really distinguish between what she had seen and what she had heard during the process of her cramming. We all know that little children are particularly liable to be influenced, they cannot discriminate between what is an idea, and what has impressed itself upon their minds by actual experience. The little child has been in the hands of the family of her mother since that time, I regret to say my impression is that she has been influenced: she has been taught what she did not know herself. She has been told a story that her mother is still alive and is only being kept in the hospital, and that all she has to do is to tell everything about her father and her mother will be released, and she will be able to see her mother again. It was, no doubt, most pathetic, when she herself, without any question at all, of her own motion came out with her words. "Now, I have told you everything about father when are you going to release my

mother." That shows the intense desire the poor child has to see her mother again, her want of knowledge that she will never see her mother again and her want of realization of what has become of her mother and what may become of her father. So, gentlemen, I will ask you, in view of where she has been, and in view of with whom she has been (about these persons I shall say something afterwards), to cast aside from your minds what she has said, at any rate, not to lay the slightest stress upon it.

The remainder of the case for the prosecution is entirely on circumstantial evidence. These words "circumstantial evidence" and "conviction on circumstantial evidence" it is customary for Counsel for the defence to hold forth as a sort of bogie to juries whom they address in defence of their clients Circumstantial evidence is evidence of circumstances as opposed to what is called direct evidence. No one of the witnesses saw or could have seen who fired the bullet into Aminabi. Circumstances, however, sometimes afford just as strong, if not stronger, grounds for coming to a conclusion as to something having happened than the evidence of any witness even of the highest stamp, who may say he saw it happen. What in ordinary life do we form our conclusions on? What do we form our beliefs on? Do you invariably require witnesses before you who tell you that they saw it or heard it and so forth? No. You, as often as not, form your conclusions, and rightly form your conclusions, with certainty on circumstances leading up to the probability of the fact that is to be decided on having taken place.

Now, as to what is expected of you. You are first of all not expected to leave your brains in your hats when you come into that jury-box; you are expected to retain your brains and give the best of them to consideration of the matters brought before you, and you are expected to sift those matters and to give a sound and honest decision. If that is not done then it must bring the jury system into disrepute, and that system must go, and with it the fair name of the Britisher for love of justice and the carrying out of justice. You are, in the words of the Evidence Act, expected to hold a thing proved, when you believe it to exist or consider its existence so probable that a prudent man under the circumstances of the particular case would act on the supposition that it exists. You are expected to hold a fact disproved when you either believe it not to exist or consider its existence so improbable under the circumstances of the particular case that a prudent man would not act on the supposition that it exists. You are expected to hold a thing not proved when it is neither proved nor disproved. In going through the process of considering the matters and coming to a decision on them, you are expected to give to those matters the reasoning of reasonable and prudent men. You are expected to consider the matters put before you in the jury-box just in the same way as you would consider them outside the Court in any serious matter which may come before you. You are entitled to come to your conclusions in exactly the same way as you would do outside, and so you are entitled to presume the existence of any fact which you think likely to have happened regard being had to common course of natural events and human conduct. It shortly comes to this, that you are to give reasonable and prudent minds to the matters and to decide as reasonable and prudent men. Now, as regards belief of witnesses. If you refuse to believe any witness because he does not come to the reputed standard of Washington, then, gentlemen, I am afraid there would be very few trials in this country. You cannot expect to hear witnesses who prove themselves to be all Washingtons; you are expected to take human nature as it is, and take people as they are, and to judge them as you would judge them outside the Court, and not to reject the statements of a witness merely because something she or he says appears to be shaky or even false; but it is your duty to try and discover the truth by close consideration of each one's evidence in order that truth may prevail and that justice may be done; that justice may be done in the acquittal of an innocent or in the conviction of a guilty man.

Now, what are the matters which the prosecution have put before you? First of all I will say it is not a mere case of a woman killed in a room in Mogul Street, a cartridge found there, and the accused at Ywama in possession of a gun through which one of such cartridges might have been shot; that is not the circumstantial evidence on which

the prosecution base their case. If it was such a case, of course, you may just as well take up Mr. Ady and bring him here and say, "Oh, here's a cartridge, you have got a paradox gun and you must be the man who shot the woman" that is merely a nine-pin set up to be knocked down at once. What is the case for the prosecution? The case is that Aminabi was the daughter of a wealthy Mahomadan gentleman who lived in Calcutta where she was brought up; that she was married to the accused about 9 years ago; that she bore him 4 children; she was at any rate brought up as women of her class are brought up, that is to say, when she came to the sense of adolescence she was veiled or adopted what is known as the *pardanashin* system, the system under which the ladies of the community give up the chance of intercourse with male friends, except their husbands and their very near relations. She married into a family in which it has been said that system is being departed from, and she herself is said to have thrown it off to some extent, *viz.*, to the extent of going to a public entertainment unveiled; but whether she liked this or not is another question. You must remember that she was brought up in a family of strict Mahomedans; one of the causes of annoyance or animosity between the accused and his brother-in-law, Dawood Bham, is put forward as being that Dawood Bham is a strict adherent to the old customs, whereas the accused was one of the young men who wished their women to have greater freedom. At all events, the lady herself was brought up in this family, some of the members of which regard the system strictly. She and the accused came down here together in February last and for a time they went and lived at what is called "The Lallkoti" in Merchant Street; that is a house occupied by the cousins of the accused. Most of his family live in Calcutta where they have their family house. After a time the accused and she go off and live in this house in Ywama. It is found from one of his letters he prefers a country-life to a town life: these are his tastes. Whether she did the same is *naturally a question* for her; if she retained these ideas of not mixing with anybody but her near relations, it could not have been a very lively life with no one to talk to, and it is conceivable that she naturally would prefer to live in a town where she could pay visits to and receive visits from her family friends. We have it that at first they got on very well together but there were disputes subsequently. This is put forward by one witness in an exaggerated way but the evidence of the old gentleman, Sande Khan, is accepted and his evidence comes to this, that one evening the lady came over to him and complained against her husband. It must have been something serious for naturally it would take a Mahomedan *pardanashin* lady a great deal of strength of mind to go out of her house and be off to another person's house in the evening like that to make a complaint. However, serious or not serious, it not very material. The old gentleman says that he went back to the house with her. He thought it was a case of a passing quarrel between young people, and he got the accused to promise that he would behave properly and that he would never beat her. That was what she complained of and then this affair was over. Then, later on, she comes into Rangoon by herself leaving him at Ywama. Then we come to the stage of lawyer's letters. On the 13th July a lawyer's letter was written to him out at Ywama on her behalf. As to this the defence say that it was the outcome of Dawood Bham's (his brother-in-law) instructions that if she wanted to have such a letter sent, she could have sent for Mr. Burjorjee or have gone over to his office herself. However, I do not think that is very material; she may not have wanted to do any more with him at that time. Later on, she goes to the house No. 18 in Mogul Street to live by herself, because she was expecting her confinment, and she went there about the 15th of July. He does not appear to have joind her there at all, but he went to Calcutta, according to Mulvi's and Sande Khan's statement, on the 21st July. Then the child is born, the exact date is not given, but Jessie says that she was in the lady's service for 13 days, and that when she was taken into service, she was told that the child was six days old; that would make the birth 19 days before the murder; that is to say, a time when the woman would be recovering her strength after the strain on her consequent on the delivery of a child. She was living there alone with servants. This has been questioned by the defence who say that if there were servants, none of those

who have been called were among them. Now, here is a matter upon which you have to form a judgment. Is it or is it not likely that the lady who had means would, in her then weak state, with three children living with her in the room, have left herself without anybody in the house on any single night? There was no question of money, she was a lady well able to pay for servants and recovering from the effects of having borne a child. Is it at all likely that she would leave herself without any servant at all? But one of the things which the defence has to do is to get rid of everybody from that house on the night of the occurrence, so that there might not be witnesses who could say anything about what happened. The persons who say they were servants at the time are, Farik Ahmad and Jessie: there is a cook, Noori, but she admittedly did not live in the house. There was another woman, Piyari, who said she was taken there only that very day because the lady wanted another servant, and she accounts for her presence there by saying that Noori took her there; and she remained talking over and discussing whether she would come or not; that was decided that she was going, but the lady asked her to remain that night there. Well, on that night these people say that the cook came and prepared the dinner and the lady had her food; the food for others being laid out for them before the cook left. Farik says he took his food. The others say they did not take theirs. The doors were bolted; the doors leading to the entrance were bolted with bolts up and down. Well, is that a thing to be disbelieved? Would you expect otherwise? Is it likely or not likely that in the ordinary course, the entrance door would have been firmly bolted that night? These witnesses say they were. Then they each gave their account of what happened; it amounts to this. About 9 o'clock, as to accuracy in time they are not very much to be relied on, no native of that class is, but they say it was 9 when a knock came at the door and a man came in, the boy was at the time in the middle room already laid down to sleep, and of the two women, one says that they were with the lady talking and the other says that they were in the middle room where they had lain down to sleep; they heard some words, and then followed an explosion the result of which was that all three of them got out of the house as quickly as they could, and went to their respective homes. They all say that the lady unbolted the door to the person who came in. Now, who are these people? Fakir is a young boy, who was taken on a small wage to do *chokra's* work for the lady. Is there any reason to doubt that he was the boy? He did not know the accused well before, he was engaged not long before the occurrence, but he had seen him on Sunday and he saw him also on the morning of that Monday, the accused still being there. He says the accused left and came back at 2 o'ock and then went off again. The boy showed us how he was lying down, and you can well understand that the boy may have been in a very drowsy condition when the occurrence took place. He says that some one knocked at the door near the outer stair-case, some one opened the door, that Jessie and Piyari were with him and that none of them opened it: consequently the only person who could have opened it must have been Amina herself. Then he says he heard conversation which he could not distinguish but he says the voice struck him like that of the accused which he had heard the day before and on the morning of that day. Then he says this person closed the door by which he had come in: that of course, he could not tell himself. He says that after the conversation a man opened one of the doors leading into the room in which three of them were; he then went back to the mistress's room and spoke to the lady again. The boy says he could not hear all they said but that he heard him say "Will you come or will you not" (*challagi ya nahin challagi*)—that his mistress said words—meaning, "I am weak, I have given birth to a child, I cannot go." Then he heard a noise of shoes shuffling on the floor like thati of a man stamping on the floor, then the lady shouted "*Are Allah are*" and then he heard a noise "*dan*;" that at this he got up and ran away by the backstairs. He unbolted the bolts of both upper and lower doors and all three servants got away, he first and Jessie and the old woman after him. He went away to a house of his friends in 35th Street and he told that night a Mulvi, who was there. Neither the Mulv

nor he did anything that night. This is commented on as very extraordinary conduct on the part of a person who had been in a room in which something had happened, which had so frightened him that he ran fast from the house; he simply goes away to his house where his friends were and tells them and does nothing more. But is it sufficient to make you disbelieve that he was there, and that he had heard what he says he did hear, and saw what he says he saw? He says that in the day time the accused wore trousers tight round the calf and loose above; he wore an English coat with a band round the waist; that he did not observe that night what this man was wearing and did not recognise the man that night as it was only a glimpse he had of him at the door. He then described what happened the next day. He says he went to the house the next morning and seeing a lot of people there came away. Eventually he met Dawood Bham's tutor who asked him what had happened and he said he did not know what had happened but he said to him "a man had come in English dress and what happened I do not know." Was not that, an intelligible answer? He did not know what had happened except that a man had come in English dress and he did not know what had been the result of what had frightened him away. In a sense it is quite a correct answer, but it is seized upon by showing that he was never there at all, and what had happened he knew nothing at all about. Of course, he did not know, but he must have suspected that some one had been killed.

This witness repudiates in this Court the statement which he made to the Magistrate in the lower Court as to his having recognised the accused by the dress he wore. In the lower Court he said he recognised the accused by his clothes: that he repudiates here. He says his former statement was drummed into him by a man connected with the Bham family one of the Doopleys. He says he was told to say about the dress of this man. However, he says it was the only lie he told the Magistrate. Now this boy's evidence you are asked to entirely reject because it is said he has been under the malicious influence of the Bham family. The boy himself says that he was kept in Bham's house for some days and that he was asked to say things, the child was also asked to say things and they were threatened with various threats, the only thing he does not say is, that he was tempted with money. However, he sticks to all his former statements except that he recognised the clothes of the man who went into the room on the night of the murder. Possibly he may think he may be safe in repudiating that, because it was or may have been a difficult thing for him really to have recognised the man by his clothes. However, there is a great difference between English clothes and native clothes and he admits himself that on the following day he told the first man he met connected with the family that a man in European clothes had come to the house. Now what does Jessie say? Jessie is a Madrasi *ayah* and I am very sorry to say that from a Christian woman the most manifest of many falsehoods told in this case has come. She was engaged by Mrs. Mackay to look after the baby. She made statements in the Magistrate's Court which were against the accused, and, of course, she was called here because she had made those statements, and because it was believed that those statements were true, but hardly had she begun to be questioned when she comes forth with this, "On the night she died I was not in Amina's house. At about 5 P. M. on Monday I took leave and went away. I was not in her house again until past 7 A. M. next day when I found she was dead." Now, Gentlemen, this is one of those absolutely silly falsehoods that some natives who come to Courts give out barefacedly. She sticks to this, but as she went on she gave us the history of what happened on the occasion on which she was frightened and left the house with the young boy and the old woman. It practically comes to this. She has adopted the device of trying to put all this on the 28th, the Sunday, instead of on the Monday. The accused admittedly slept in the house that Sunday night, and nothing whatever happened, and what she speaks to could only have happened on the Monday. The accused was there in the morning on Monday: he was there all night on Sunday. It is for your consideration what cause her device is due to. Each side makes against the other the suggestion that there has been money flying about, and that each party has tried to get hold of

the other's witnesses. You have got to form your own conclusions as to whether that is the case or not. Here is a woman coming forward to say that she did not know what happened on the night of the murder, yet giving us all the details spoken to by the boy and the old woman, who say they were there at night, and these details are practically to the same effect. Moreover, she admitted, when her deposition to the Magistrate was read over, that everything in that deposition was true except that she handed a napkin to her mistress, not on the Monday but on the Sunday. Well, I will pass over this attempt to get over what she said to the Police as she would not have been put forward as a witness if she had not said something of the sort and you may take it as to what she said here and in the lower Court, she was referring to what happened on the night on which Amina was murdered. She said that she, Piyari, and the boy were in the middle-room about 8 or 9 o'clock. There were two doors between their room and their mistress's room, one was bolted and the other was just closed. Then she heard a knock at the door as she was going to bed; that she heard Amina open the door and her husband talking to her; she had seen him on two or three occasions; she did not hear what they were saying; she heard him say "Will you come" and she said "No"; that the husband said "come" and the wife said "No"; that he came into the room where they were and said "All right" and then went back into the lady's room; she saw him when he came into the room; he went back and a little while after she heard a noise; she denies having said to the Magistrate she heard the report of a gun; and goes so far as to say she did not know what the report of the gun was like. She says, "I have heard Amina cry out 'Allah.' If I said in the Magistrate's Court that I did, it must be true. I and the old women and *chokra* got frightened and ran downstairs," and then she says she went off to her home and told her husband of having heard a noise and becoming frightened and having run away. Then, as to the noise she wishes to minimise that, and says it was not a loud noise because tom-toms were being beaten downstairs. You, gentlemen, will know well whether a gun fired off within that circumscribed place would make a loud noise or not; it must have been a loud noise sufficient to have awakened the little child and it must have made a loud noise to have caused the servants so alarmed that they hurried off as fast as they could. She also says that the accused was in English costume when he looked into their room. She says that "All my statements in the deposition to the Magistrate are true except that on Monday I was in my house. On Tuesday I was taken from my house. There is nothing else which is not true in that deposition." Then there is the old woman, Piyari. She, as I told you, was taken to the house that night. She says that she and the *ayah* were with their mistress (as, no doubt, they would be likely to be) talking to her, for you must remember that it is common ground, that there was *tamasha* going on down below and there was a great noise from the tom-toming. You may imagine the effect of that upon a weak woman just recovering her strength after the birth of her child; the tom-toming certainly would not be a thing to put the lady to sleep; rather it would keep her awake in her weak state, and if she was awake, is it improbable that she would have her servants with her? Piyari puts the time at 9 o'clock. She says "I talked to Amina and about 9 P. M. a *sahib* came. (In the lower Court she said "*sahib* has come".) She (Amina) got up and opened the door. I saw her open the door. She told me and the *ayah* to go into the next room. She always says" : they went into the next room where the *chokra* was; when they got there the *ayah* and she sat down near the closed door; then the *sahib* came through the other door (she did not see him as she is near sighted) and went back into Amina's room; there was a talk between them which she could not hear; then after a time she heard a report of a gun, and they all got afraid and went down the backstairs the *chokra* going ahead and the *ayah* helping her down the stairs. All that she saw of this *sahib* was a white *topee* on his head. In regard to this woman, she, of course, is also said, like the *chokra* and Jessie, to have been under the influence of the Dawood Bham family when they made their first statements. In regard to this old woman there was an incident which may be thought of some value. She was one of the witnesses who was taken

to the indentification parade. It is suggested that all those witnesses had been coached up to pick out the right man by photos of the accused in his earlier days being shown to them. Well, I do not think any one would, if he wanted to coach the witnesses to pick out the right man, have chosen these photos: one can hardly recognise the same man in these photos, as he is in them a clean shaven man. This showing of the accused's photos is put forward as one of the Machavelian schemes indulged in by the Police. The incident I was referring to was as to what happened at the identification. She went up and picked out the wrong man, but does it strike you or not that she made a remarkably good shot? Did not the young man Ramos resemble to some extent the accused? Does it not go to the *bona fides* of her evidence that she should have made a mistake in picking out the wrong man, and does it not show that she had some idea of the man she saw that night? Next we come to Noori's evidence. Her evidence is really unimportant; she was the cook and was there in the day time only. She speaks to the biscuit-seller incident. What she says amounts to very little. On the morning of that day the accused was apparently in a bad temper and kicked the seller of the biscuits. The *chokra*, Jessie and Piyari are the only important witnesses of what occurred in that house that night. I will deal next with the evidence of what happened the next morning. The witnesses to these are Mohamed Moolla, Ma Budhi, Fakir Bux and Ahmad Kachialia. Ma Budhi is a friend of the family. Now, gentlemen, I will give you my opinion at once that this old lady told lies when she said that she had gone to the house at half past nine on Monday night and heard the voice of accused in that room. You have been able to place yourselves and you could judge for yourselves whether it was not impossible to hear anyone inside the room standing as she said she was at the foot of the steps. When it was put to her afterwards she changed her statement and said she went to the top of the steps: she says she saw the *durwan* on the steps and had to pass him. She did not say anything of the kind to the Magistrate and you may put all this down as absolute invention. All that she really knew was as to what happened on the morning of the 30th November; about this it is quite natural that she, an elderly lady friend should have sent over to inquire for Amina; and she says she sent the old man, Fakir Bux, over and in consequence of his report three others of the house-hold, *viz.*, the cook, Ebrahim Mulla and Kachialia went over to the house with her. The men who had been called say they saw the *durwan* still outside waiting. Now I will say something as to the alleged bias of witnesses like Ma Budhi and Sakina and Mrs. Mackay, who are alleged to have used improper influence on the child. It was fairly evident that Ma Budhi and Sakina entertained strong feelings against the accused. Mrs. Mackay may do so also. They are all women: women have more intense feeling than men. They are all women who had been closely associated with Amina Bibi. I do not think it is going too far to imagine, after having seen that charming little child, that the mother of the child must have been herself a charming woman, not only charming in appearance but also in disposition, to have excited in that child the very great affection which the child evidently has towards her mother. Two of these women have seen that mother lying in her gore; it is realism to them. It is not talking calmly about a woman being murdered, as we are doing this in Court. The woman they knew and probably loved, was before their eyes that morning dead and covered with blood, and the man they firmly believe to have murdered her is the accused. It is enough to arouse in any body feelings of great and just indignation against a man who did that, whoever he was. Their indignation is certainly just but at the same time nothing could justify their telling falsehoods in order to get the accused convicted. But considering the three women's position in life, is it not human nature for them to have allowed them to go to excess? Ma Budhi has gone to excess in saying she heard the voice of the accused in Amina's room on the Monday night, but is that a sufficient reason why she should be disbelieved as to every other circumstance she spoke about? Her having heard the accused in the room that night is probably absolutely false, but as to

the rest what she speaks to *viz.*, as to, what happened on the following morning, I do not think there can be very much doubt about it being true. The party found the front door closed and the children crying inside, so the men went round to the back of the house where they found the door open. They went upstairs and got into the front room and there found the body of Amina. As the defence wished it, it was brought out that what the child said, when they were outside the door, was that her mother was asleep. She believed her mother was sleeping, and she still believes that her mother is in this life. You cannot have what the little girl said afterwards, because that was taken by a Police Officer and the law forbids the statement made to a Police Officer being admitted unless the defence brings it out in cross-examination.

The doctor was one of the first to arrive and he tells you that he found the body lying flat on the back with the legs straight out and between the legs there was this metal bullet base. She was lying on the bed with a cloth carelessly thrown over her. He described the wound, which leaves little doubt that the bullet passed through the body downwards; he showed the inclination in which the weapon must have been in order for it to go through as it did. The position of the wound and the inclination of the bullet points to the woman having been sitting up at the time, and some one having fired the gun when he was standing up above her. It could not have been fired within a foot of her because otherwise the doctor says he would have expected to find marks of powder. However, that would depend upon what sort of powder was used. There was this big wound going through her body: there was the hole in the panel of the door on the opposite side; there were some few copper coins which had blood on them on the bed and there was the wound on the thumb. What does that all point to? It points to the woman having held out her hand when the gun was aimed at her, and the shot having been fired bruising her thumb and going through her chest and back; then to her having been laid out on the bed and cloth having been thrown over her. What was found in the room also points to the person who fired the shot, whoever he was having made a hasty retreat, for in the room were found this loaded ball cartridge (showed it and read on it Eley's loading Nitro Paradox Holland and Holland) und this loaded cartridge, (showed). This empty cartridge case was found under the bed by Inspector Brown. The loaded cartridges were on a sort of ledge or shelf behind the bed. This nickel base was found by Captain Whitmore between the legs and this fragment of wad was found also on the bed. Now, whoever the man was, who was in that room that night, he must have come in with a gun. The bullet could not have gone in Amina's body unless it was fired from a gun and the probabilities are, the bullet that killed her came from that empty cartridge case found under the bed. We have it now and it is quite plain that these cartridges—Kynoch's grouse ejector—are made up with ball with a metal base to the ball. We have it from Mr. Crump, who has the largest trade experience of any of the witnesses called as experts, that you do not find rifles with grooves of such width, and he says he came to the conclusion that this metal base must have been fired out of a paradox or a similar gun because you do not find grooves and lands of such width in rifles. This paradox system is a patent system, and there are very few of those guns in Burma and in his opinion that metal base must have come from some gun made on this system of paradox gun. Consequently, we have it that the man who fired the gun in Amina's room must have had a paradox gun or a gun with rifling of wide grooves and lands like a paradox. There can be little doubt that the metal base bullet was fired out of the gun. How otherwise could it have come between the woman's legs and be found there the next morning? That man, whoever he was, must have been the man who left these cartridges and this empty cartridge case in the room. Who could that man have been? In the first place, who was the man and the only man who had a right to be in the lady's room that night? The answer must be, her husband. Who was the man and the only man that a virtuous woman must have knowingly admitted into the room that night? The answer must be, her husband.

I had hoped, gentlemen, to have been able to tell you that throughout the case, admits

a flood of suggestions put forward by the defence Counsel, not a breath of suggestion of misconduct had been made against the poor woman who died in the way she died. I thought that at least her fair fame for virtue might have been left absolutely unsullied, but I was disappointed. It was unnecessary as regards her virtue to be made. The defence might have said "it is not for us to suggest":—that it was for the prosecution to prove their case. At the end of the learned Counsel's address, however, after the whole armoury of defences had been brought out, floods of suggestions made, and vituperation showered on Dawood Bham and the Police; at the end comes, "If I were to speculate I might suggest that the lady had a lover." I can only imagine that the learned Counsel thought he was forced to make this suggestion because he must have felt that in the process of eliminating all other probabilities which any one who had to decide might undertake, the question would occur, "Who except her husband would a virtuous woman have admitted to her room that hour of night"? If Amina was a virtuous woman she is entitled to keep her fair fame now that she is dead. The accused to his credit has not suggested nor have her brother-in-law suggested anything against her virtue. She is entitled to keep her credit now and for ever unsullied. Surely, the only person to whom Amina, if she was a virtuous woman, could have opened her door willingly on that night was her husband. You have no right to even think she was not a virtuous woman. In case, however, the poison has stuck in your minds in the silghtest degree, ask yourselves what sort of man must her lover have been? He must have been a lover who was possessed of a gun like the gun which her husband had: he must have become possessed of a cartridge or cartridges such as the husband had at the time. Again, why should a lover have shot Amina? Can you think yourselves of any possible reason why any lover would have turnd on that woman with a gun—a woman who had recently borne a child and who was only then recovering from the effects of a child-birth? Is it not human nature that any lover would have respected a woman's feelings under these circumstances even with his passions aroused and she refusing him what he asked her to do? In my opinion that poison of a suggestion of a lover should be cast out as an unworthy suggestion. Then, to whom else should this woman have willingly opened her door? There may have been a man—all things are possible no dubt—who imitated her husband's voice. Is it likely she would have opened to anyone unless she recognized the voice? Is it likely she would have been mistaken about her husband's voice? Supposing she was, who could this person have been? Again, this unknown person coming in for some unknown object must have had a bullet with a metal base and must have had cartridges of this description and must have been careless enough to have left these cartridges in the room. Again, let us take another supposition.—I would ask you to go through the whole process of elimination. Supposing it was the case, as the defence set up, that the lady had left herself without any servants that night, the servants going away on one excuse or another, one wanting a bath and one having a headache and she was incautious enough to leave the back door open and some man got in somehow, what would you expect from a woman? Would you expect no sound whatever or would you expect screams that would have been heard above the sound of tom-toms, a scream that would have been heard by the persons upstairs? No scream was heard from that woman. What does it point to? Does it not point to the man, the man who came into that room being the only man entitled to go into that room, namely, her husband? We have, no doubt, had cases of robbers getting hold of guns, and getting into houses, and no noise being made, but as regards these sorts of robbers, you may be pretty well certain that they have ascertained before hand that they will get some loot in the house they attack. The possession of guns by robbers is too precious to risk the use of their guns in places where they have not a fair idea of what they are going to get beforehand. But, supposing we have come to there having been at that time in Rangoon a sort of Jack-the-Ripper prowling about, and that he somehow got into Amina's room either from the front or by the back-stairs, and passed through the back and middle rooms and got into the room where this poor woman was with her two children. Again, we come to this that, that Jack-the-Ripper must have had a cartridge designed

for and adapted for a paradox gun or some gun rifled as that paradox gun is; that he must have left some of his ammunition in that room and that he must have left his spent cartridges in that room. Now, gentlemen, we are human beings and, of course, we have to form our conclusions by human probability. Is there any probability, I almost say any possibility, of anyone but her husband having been in that room and shot that bullet through Amina Bibi that night?

The next evidence I will take you to is the evidence called to show that the accused was in Rangoon that night, but before I come to this it was put to Mr. Brown as to whether he did not consider it necessary to get further evidence than the things and the people in the rooms of Amina. This was put to him in cross-examination and Mr. Brown said he thought it necessary, to get further evidence. It was a catch question. He explained to you why he though it necessary to get further evidence of accused's presence in the house and of his further movements. In any case, it is not a question whether Mr. Brown thought the evidence sufficient or not, it depends upon whether those who have to decide upon it consider it sufficient. The duty of the Police was to get all available evidence they could in regard to what happened and as to the accused's movements, but it does not follow that because they have not got altogether credible evidence on all incidents of that night that the real basis of the case for the prosecution should be disregarded. Now, as to Kuverji, the ice-cream seller, Mahomed, the clerk, and Morad, their evidence is certainly open to comment, but I won't say to the comments that the learned Counsel for the defence made up for them. I do not think I ever heard a greater flood of animadversion than in that somewhat long speech, but it is certainly open to comment for this reason, none of them profess to recognize the man whom they say they saw on that night except the clerk, who says the man said he was Ali Pome; all that evidence is incomprehensible: it throws no light on the subject at all. It simply goes to show that the accused may have been in Rangoon. It is rather against the prosecution than against the accused if it shows anything at all. Why should he have been going one entrance in a building and then coming down and going up another and saying something about Gori. We heard that that is the name of one of Dawood Bham's relations. Why the accused should have asked for her is really incomprehensible. Why that evidence was put ferward I do not know. Mr. Brown took the advice of the Public Prosecutor as to this and the latter may have had reason for putting it forward. His reason may have been, "put forward all that you have got, and let those who have to decide the case judge it." I do not think it is of any importance against the accused. I will pass that over. The defence wish you to gather from this evidence that it shows the cloven foot of Dawood Bham's family throughout and that the Police were trying to get up a case at any costs against the acused. I think the clerk was the man who received the most chastisement in words, and it is suggested against him that he concocted his story to advance his firm's name and his own pocket. I will pass over that evidence as being of no weight against the accused. I will deal now with the evidence of the young-man Willis. He is another witness said to be under malevolent Police influence, and to have given his evidence in the hope of getting a reward and he has received a reward for giving it by his having got a position of Rs. 40 a month as ticket collector on Burma Railways. Well, gentlemen, if that appointment was obtained as a reward, he has not shown his gratitude very well, for if ever there was a man who made a fool of himself in the witness-box it was that man Willis. He deposed to having seen the accused arrive in Rangoon about 9 o'clock on Monday night and going back to Insein about 8 o'clock the next morning. In this Court he did not say anything about the accused having carried the gun next day, yet he told the Magistrate so, and his statement in that Court is so absolutely different to what he said in this Court that he could scarcely have been coached up, at any rate before he came here, as to what he was to say. This malevolent Police influence, which brought him to give his statement on the 31st August, and his statement to the Magistrate which is against the accused, ceased for some reason or other when it came to the climax of having a convicting statement before the persons who were to judge of his evidence and to act on it. Of the Police and their malevolence all sort of things have been said to you : they receive

many kicks and I suppose that they think they receive few half-pences. They are said to be a scheming and malevolent lot. Mr. Brown, whom you have seen, is put forward as a malicious inventor and tutor of witnesses; a man who must have got this gun fired off on the 31st after Tomkins saw it in order that Tomkins should see marks on the 1st and 2nd September when he said he did see them.

This malevolent schemer by some curious lapse forget all about keeping Mr. Willis up to the mark. Mr. Willis certainly does not seem to be endowed with many brains, and one would have thought if a man wants to keep such a man up to the mark he would have done so: but he certainly made a hopeless mess of his evidence and the only thing which he says he remembers was that he saw the accused on that Monday night arriving by the 9 o'clock train: he says that he not only saw him but spoke to him: he got on the steps of his carriage and spoke to him. The accused asked him to come along with him. He says a *durwan* was with the accused carrying a gun, a ram rod and a bundle. In this Court he clean forgot about having seen the accused on the Sunday, though in the Magistrate's Court he said he had, and clean forgot having said anything about the accused having carried a gun on Tuesday morning. On this evidence you are naturally asked to place no reliance but it is for you to judge whether this man was an absolutely false witness brought up under the malevolent Police influence or under the influence of money to say what he did say and whether you should give any weight to what he said. It was through something he stated to Mr. Brown, that Mr. Brown says he wrote that letter. Now, gentlemen, in regard to that letter a great deal has been said about it. I may say that that letter was an improper and injudicious letter or letter sent *bona fide* is quite another mattter. Taking the situation Mr. Brown was investigating this case: he had got and seen certain witnesses; he got hold of Willis and some information out of him and I think it may be taken for granted that he believed the accused was the man who committed this murder. This Willis comes and told him that he has had an offer of money from Sherwin; then Mr. Brown writes this letter warning Sherwin and advising him as to what he is liable to if he tampers with witneses or attempts to divert with justice. Is it the act of a malicious and scheming policeman, or is it the act of a European who felt the indigration of one European against another who he thought was trying to prevent the person who committed a gross crime from getting his just deserts. That is for your judgment. The next witness of the group is Mr. Frank Smith. It is said of him that he is another of the people under Police influence: at any rate Mr. Smith has a definite and a good employment. He is an Engine driver on the Railway. He says he saw the accused on that night and he travelled by the same train. Of course, if Mr. Smith saw him come in that train at 8-47 from Kemmendine the accused could not have been at Ywama at that time. Smith's evidence is attacked as being evidence which he has given at the request of Mr. Cloquhoun, his friend. He tells you how he came to say anything about what he knew. On the ground that there is no trace of any 2nd class ticket having been sold on that night, you were asked to discard his evidence. Here, gentlemen, comes the question whether before you believe a man you should require him to be a Washington. I understood that Mr. Norton and Mr. DeGlanvelle understood that Smith meant he had bought a 2nd class ticket that night, but it came out in his explanation that he did not buy a 2nd class ticket bought a 3rd class ticket and travelled 2nd class. Is he to be entirely disbelieved because he did this? It is evident that he sometimes travelled without a ticket: he practically had to acknowledge that he did. We have it that these Railway employs take tickets but they do not always do so. Are you going to reject this evidence as to having seen the accused that night simply because he may have told a lie as to his having taken a ticket on the occasion? In connection with Smith there is Colquhoun who gave you the same story as to how it happened that Smith came to tell him he knew something about the accused.

Now, the defence relies considerably on the evidence of Mr. Burke, as to the probability of the accused not having travelled by either the train from Insein to Rangoon on Monday night or the train from Rangoon to Insein on Tuesday morning. Well, it is quite true that the Railway has

most elaborate checks for checking the number of passengers and as to how many travelled in each class; but all checks come down to the human element and the human element in regard to checking tickets is that of men of the class of Willis and Barton. Now, I do not wish to suggest for a moment that anybody is dishonest simply because he does not get a large pay or is poor, but there is no doubt that the poor man is more open to temptation and has more temptation thrown in his way than the well-to-do man, and some of them give way to it. This is not confined even to the poor man, for, sometimes the rich man gives way when the temptation comes in his way. It is a question for you to consider in connection with Barton whether he is not a man who has given way to temptation as the prosecution alleges that he must have done. He was the travelling ticket-collector by the train on the morning of the 30th. He says he travelled by that train but never saw the accused in it, and never saw the accused in his life before he saw him in the Magistrate's Court. Now, is that probably true or not true? He told you he was a ticket-collector for a year on the Local train between Rangoon and Insein. Here is the accused living out near Insein for certainly 2 or 3 months. Barton says he goes up and down with this train daily. Is it likely that he truly said that he had never seen the accused in his life? A number of statements were put to him as to what he said to the Police when examined by them being contrary to what he said here. You cannot have the statements that he actually made to the Police but you have this from him, you have his admissions that he told the Police that he saw a European of dark hair and he gave a description of the passenger he had noticed on the 30th August as sitting in a 3rd class compartment in the train leaving 8 A.M. from Rangoon; that this European had a parcel behind him and something projecting from the end. That European he did not know, and he has never seen him again, and knows nothing about him. He says that man cannot possibly be the accused because that European was a much bigger man than the accused, and he was clean shaven whereas the accused had a moustache. Well, even if he did not tell the Police, that he had seen Ariff, why should he have said anything about the European to the Police? How did the mention of a European come into his statement at all? He admits he spoke about a European: the accused is plainly not a European. How came he to state that a European with a parcel something sticking out behind travelled by that 8 o'clock train that morning? You can sometimes see where the wind lies from what the witness does not intend to say just as well as from what he says. Are you going to believe Barton when he says that he did not see the accused in that train that morning? His evidence is relied on by the defence as entitled to equal credit with that of Willis's. Willis puts down the whole of his mistakes to want of memory; his memory being so bad that he does not remember even the most important matters. Barton's statements, if not true, must be due to wilful perjury.

I come now to the expert evidence. As I told you before, the whole Armoury of Counsel for the defence is brought forth to be used on this occasion. You are warned of the dangers of acting on expert evidence. The Beck case and its results were re-called to you. What connection is there between expert evidence as to hand-writing, and the evidence of a gun-smith and an Armoury Seargent accustomed to handling guns all the days of their lives about a gun and ammunition? I confess I fail to see it. It is acknowledged that all this evidence is probably honest, but it is said it is only opinion evidence: each of them, however, has given you reasons for his opinion.

It is for you to judge whether those opinions are not well-founded. Palmer was the first who saw the gun on the 31st August, and Palmer says that the gun had been cleaned, but he cannot say when. He says he noticed a very slight trace of cordite on the breach: he took the gun to you and pointed it out to you. In the barrels he did not notice any such trace: there was only a residue of oil in them. Then the gun was taken to Tomkins and he ays he did not see anything in the gun that day. According to him also it had recently been cleaned. It was taken to him on the following day and he says, and has no doubt about it, that he saw traces of cordite in the left barrel. In the other barrel he says there was no trace of cordite. He says from his experience, he can tell at once when a cor-

dite cartridge has been shot through a rifle or a fire arm and he was positive that on the second occasion when he examined that gun there were distinct traces of cordite down that left barrel, and that those forces would be there even after the gun had been shot off two or three days before and cleaned afterwards because the sign of cordite goes on repeating itself even after cleaning for six or seven days; that being due to chemical action of the cordite on the barrel, Palmer does not speak so definitely as to this. But if it is so, then we have it that a cordite cartridge was fired out of the accused's gun, not many days before Tomkins saw it. When and where? There is no explanation from the accused. If the shot cartridges fired at the fowls were of cordite powder, would not there be marks of cordite in both barrels? The only occasion on which he is said to have fired his gun since arriving from Calcutta was that Friday evening when he fired off both barrels at fowls. If that is the case, what is the explanation of the mark of cordite in one of the barrels and no marks of cordite in the other?

There is another circumstance for your consideration on which the prosecution relies. We had evidence also that these particular guns are scarce in Burma. That is the evidence of Mr. Crump. Here is a case of a conclusion from circumstantial evidence. From what does he draw his belief on? He draws it from the fact that Orr and Sons have very few guns of that sort in for repair. We have also the evidence of the bailiff of the Commissioner of Police's Office and the clerk in the Hanthawaddy office as to who have licenses for these combined guns. In these two districts of Rangoon and Hanthawaddy there are only three of them. It may be of course that robbers have got hold of such guns. It is possible there may be guns like rifles coming in ships from Europe and have been brought by ill-disposed persons. But is it likely?

Well, gentlemen, there is very little more to bring before your notice in the evidence for the prosecution. There is the woman Sakina. I do not propose to dwell on her evidence; she too was extravagant in her atement. She is a woman who had to do with Amina; she was her *ayah* and may have gained possibly a great affection for her and she may have been led to say what she did say by her strong feeling of indignation against the man whom she believed to be the murderer of her mistress. She told us here of his conduct when he came from Calcutta, about his threatening Amina with a pistol, and she and Amina hiding in a neighbouriug house; but she never said anythiug about that before. Evidently what happened in Insein, she exaggerated. We have a better account from the old Moulvie, Sande Khan, which is not disputed. Sakina has been with the child; and it is not surprising that the child has been crammed with the ideas that have got into her head. Then there is the man Sharp. It is quite true that it has not been shown by direct evidence that accused had a cartridge of the description of the empty cartridge, but it is not impossible that he could have had such a cartridge. Sharp is the man from Rodda's and knows nothing about sales personally. No man from Rodda's who sold to accused has been called. Their books simply show, *firstly*, the sale of a number of Holland and Holland cartridges and the next entry is of "Ditto" cartridges. That does not prove that the cartridges referred to in the second entry as "20 Ditto Long Range" are Kynoch grouse ejector loaded with ball. We have it on Mr. Crump's evidence that this kind of cartridge was on the Rangoon market in 1908 and it certainly is in Calcutta market now, as Mr. Sharp produced one. We have Mr. Curmp's evidence that this particular cartridge with a metal base is a cartridge that is well adopted to a paradox gun.

The Bhams were called as witnesses: they were both in Calcutta when the murder was committed and only came down to Rangoon by the next boat, in the same steamer as Sakina. A great deal is attached to this as showing that they had an opportunity of influencing this woman. Dawood Ariff Bham against whom invectives were launched was the man who had a row with the accused sometime ago and about whom the accused is said to have written the letter put before you. It was suggested that the brothers are at the bottom of this case and bring a false case against this man. In support of this suggestion, a telegram not sent by

them but to them from Rangoon after the occurrence is much relied on by the defence. That telegram came to them from Moolla Abdul Rahim, and on it a suggestion of corruption is found. This suggestion must necessarily be against one of the elders of the Mahomedan community, Moola Abdul Rahim, simply because he sends these two telegrams: one is "may I spend for your sister's funeral on your account," the other "Amina found shot dead this morning. Police inquiring, what instructions. Spending money." On the wording of these telegrams is based the suggestion that the spending of money in the case was started by and came from Moolla Abdul Rahim, one of the elders of the Mahomedan community here, not one of the family at all, who had nothing to do with the Bhams except that he holds as executor some portion of what is left of Amina Bibi's fortune. Then, we had evidence about the letter written by Mr. Burjorjee. I do not think it necessary to trouble you about that: whether that letter was written under her instructions or not it is certain that the lady subsequently became reconciled to her husband. It is admitted that the husband was received by her on the Sunday night that he spent the night with her and he was there on the Monday morning. So what happened before she was reconciled to him is unimportant. The motive of financial difficulties on the part of the accused is out of the question as his brothers show he is well off. The explanation of why he killed her cannot rest on previous quarrels with his wife. If a Mahomedan wants to get rid of his wife, he has only got to say to her the word *Talak* three times, and that is all he has got to do. What the witnesses say they heard him say on that night does not point to a want to get rid of her but points to him wanting her to come with him. So there could scarcely have been a pre-conceived design on his part to kill her. If the accused did kill his wife, it was the act of a self-willed intemperate man, roused to sudden passion by his wife not conforming to his requests. Still, if he did in unthinking rage, simply because the wife refused to go with him to Insein, he is responsible for that act, as he would be if he had gone deliberately into her room with the intention of killing her.

Now, gentlemen, I think I have put before you the bulk of the case. I cannot put before you everything that has been said on both sides. You must think for yourselves what were the main points on which the Counsel on either side relied on. I cannot put it as well or as forcibly as either of the gentlemen who addressed you. As I told you, the case is one of circumstantial evidence, and the main ground on which the learned Counsel for the defence told you he relied was, that the evidence which the prosecution have put before you did not prove that the accused was the murderer and that before you hold him guilty you must be convinced beyond a moral conviction that he was the man. He gave you his idea of what a moral conviction is. We have not to deal with words or phrases. Moral conviction may be given two or three meanings, but what I tell you is that before you convict the accused of the offence with which he is charged, you must come to a certain conviction on the matters brought before you. Those matters must appear to you to leave no reasonable doubt and prove with certainty that the accus d, and the accused alone, could have been the man who fired from a gun the bullet which killed his wife. In ending I will quote to you some words of a very eminent Judge in a similar case, similar in the sense that the case rested on entirely circumstantial evidence as this case does. This learned Judge said "Mr. So and So (that is the Counsel for the defence in his speech used two or three times the words 'certainty." Rightly understood, it is not a word, and rightly understood, it is not a misleading word, but if by that it was to be supposed that juries were not to act upon evidence unless it put them in the position of having actually seen the thing done then, of course, it was a misleading expression. They had to be satisfied upon the whole evidence beyond reasonable doubt as they would be on any important question in their lives on which they had to take action one way or the other. They must be satisfied upon the evidence that the Crown had made out their case: if they had not, the prisoner was entitled to an acquittal."

Gentlemen with these remarks I will ask you to consider your verdict.

FINDING.

The Jury are unanimous in finding that Ali Cassim Ariff is guilty of the offence

specified in the charge, *viz.*, that he on or about the 29th day of August 1910, at Rangoon, committed murder by intentionally or knowingly causing the death of his own wife Amina Bee Bee and has thereby committed an offence punishable under section 302 of the Indian Penal Code. The Judge enters judgment accordingly and sentences the said Ali Cassim Ariff to be hanged by the neck till he is dead.

(s. c. 15 C.W.N. 735.)

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 1 OF 1898.

January 5, 1898.

Present:—Mr. Justice Hill and Mr. Justice Stevens.

In re Mohunt DEV DAS—PETITIONER

Extradition Act (*XXI of* 1879), *s.* 14, *inquiry under—High Court—Power to transfer—Power to control procedure.*

The High Court has no power to order the transfer of an inquiry under the Extradition Act, section 14, because the competency of a Magistrate to hold an inquiry under that section depends on the authorization of the Executive Government.

There is no provision of law which empowers the High Court to request the Government to appoint another Magistrate to whom, if appointed, the High Court could transfer the inquiry.

As the High Court does not possess any power to control or interfere in the conduct of an inquiry held under section 14 of the Extradition Act, it cannot declare by what procedure the Magistrate should be guided in the further conduct of the inquiry.

FACTS.—The prosecution was started at the instance of the Nepal Durbar. The allegation was that the petitioner Mohunt Dev Das was implicated in the commission of two murders, that he had been summoned to appear before the Durbar, but that he had absconded into Durbhanga, with all the moveable property of the Shrine. The Durbar asked that the petitioner might be prevented from misappropriating the property and that he might be surrendered to Nepal.

The Governor-General accordingly directed that the Magistrate of Mozufferpur should, with the permission of the Lieutenant-Governor of Bengal, hold an inquiry in accordance with the provisions of section 14 of the Extradition Act and report the result.

The Magistrate then commenced his inquiry. The petitioner applied to the High Court for transfer of the proceedings.

Messers. *Jackson*, *Palit* and *L. M. Ghosh* and Babu *Digambar Chatterjee*, for the Petitioner.

JUDGMENT.—This application arises out of an inquiry pending before the Magistrate of Mozufferpur under the provisions of section 14 of Act XXI of 1879.

We are asked on various grounds, to which it is unncessary to refer more particularly, either to transfer the inquiry from the Magistrate of Mozufferpur to some other Magistrate, and, if necessary, to request the Governor-General in Council to appoint another Magistrate for that purpose, or to direct the Magistrate of Mozufferpur to re-open the inquiry and to conduct it in accordance with law; and to obviate further difficulty we are also asked to declare by what procedure the Magistrate should be guided in the further conduct of the inquiry.

As to the first of these prayers we think that we have no power to order the transfer of the inquiry, if for no other reason, because the competency of a Magistrate to hold an inquiry under the section depends on the authorization of the Executive Government nor are we aware of any provision of the law which would empower us to request the Government to appoint another Magistrate so as to enable us to transfer the inquiry to that Magistrate, if appointed. With regard to the alternative prayer of the petition we do not think that we possess any power to control or interfere in the conduct of an inquiry held under section 14 of the Act. We accordingly refuse the application.

Application refused.

(s. c. 15 C. W. N. 732.)

CALCUTTA HIGH COURT.

CRIMINAL REVISION No. 56 OF 1911.

February 17, 1911.

Present:—Mr. Justice Holmwood and Mr. Justice Sharfuddin.

Rai JAGDISH KUMAR SINHA—ACCUSED—PETITIONER

versus

ATMA RAM—COMPLAINANT—OPPOSITE PARTY.

Charges—Misjoinder—Criminal Procedure Code (*Act V of* 1898), *s.* 235.

JAGDISH KUMAR *v.* ATMA RAM.

The accused was charged under section 170, Indian Penal Code, with personating a Police officer and thereby, in such assumed character, doing or attempting to do an act under colour of such office; he was further charged on three charges of extortion in respect of three sums, and in the alternative on three charges of cheating in respect of the three sums, and finally of an attempt at extortion in respect of a certain sum, under section 384, Indian Penal Code, read with section 511, Indian Penal Code:

Held, that there was no misjoider of charges, the offences charged having been committed in the same transaction.

Queen-Empress v. *Wazir Jan*, 10 A. 58, followed.

Rule against the order of the City Magistrate of Patna, dated September 21st, 1910, convicting the petitioner under sections 384, 384/511 and 420, Indian Penal Code, and sentencing him to two years' rigorous imprisonmentt and under section 384, Indian Penal Code, to a fine of Rs. 500, which order was, on appeal to the Sessions Judge of Patna, modified on December 15th, 1910, by setting aside the conviction and sentence under sections 384 and 420, Indian Penal Code.

Babu *Monmatha Nath Mukherjee*, for the Petitioner.

Mr. *S. P. Sinha* and Babu *Manindra Nath Banerjee*, for the Crown.

JUDGMENT.—This was a Rule calling upon the District Magistrate to show cause why the conviction and sentence of the Petitioner should not be set aside on the ground that there has been a misjoinder of charges.

It is alleged that the petitioner, purporting to be an official of the Criminal Investigation Department, and also to be a reporter of the *Englishman* newspaper, mixed himself up with a scandal which had arisen in a family belonging to the Kayestha community, one of the leaders of which is Babu Atma Ram, the Principal of the Patna Law College. By means of his reports and seeking to mix up the name of Babu Atma Ram with the scandal in question, he succeeded in obtaining certain sums of money from Babu Atma Ram on various dates. He was charged under section 170, Indian Penal Code, with personation of a Police officer and thereby in such assumed character doing, or attempting to do, an act under colour of such office; he was further charged on three charges of extortion in respect of three sums of Rs. 8, Rs. 19 and Rs. 15 and in the alternative on three charges of cheating in respect of the three sums and finally of an attempt at extortion in respect of Rs. 50 under section 384 read with section 511.

The principal contention of the learned Vakil who appears in support of the Rule is that the charge under section 170 is complete in itself and does not form part of the same transaction. We are unable to accede to this proposition.

The personation of a Police officer and the acts done in that character form the backbone of a series of frauds which the petitioner was thereby enabled to commit. The case seems to us to fall exactly within the principles laid down by Mahmood, J., in *Queen-Empress* v. *Wazir Jan* (1), where in a trial for offences under sections 170 and 383, Indian Penal Code, committed in the same transaction, it appeared that but for personating a public servant the accused would not have been in a position to commit the acts of extortion complained of—whether extortion or cheating is admittedly immaterial.

The only other ground which was taken was that as regards Rs. 8; but it is admitted now that that was substantially in the course of the same transaction and there can be no doubt that the obtaining of these three sums was in the same transaction.

It is true that the 8th charge of attempting to extort Rs. 50 overlaps the 6th and 7th charges to a certain extent, inasmuch as Rs. 19 was sent to meet the demand of Rs. 50 and subsequently Rs. 15 is said to have been sent in pursuance of that demand. Although the charges overlap, they had to be framed separately and had the case been before a jury, the jury would have to decide separately on each of the facts stated in those three charges and would have been at liberty to find that either one or two or three of those charges were established on the evidence. Therefore, there has been no misjoinder in this regard.

For all these reasons, we discharge the Rule.

Rule discharged.

(1) 10 A. 58.

JOY CHANDRA SARKAR *v.* EMPEROR.

(s. c. 38 C. 214.)

CALCUTTA HIGH COURT.

CRIMINAL APPEALS NOS. 509 AND 746A OF 1910.

September 8, 1910.

Present:—Mr. Justice D. Chatterjee and Mr. Justice Richardson.

JOY CHANDRA SARKAR—ACCUSED—APPELLANT

versus

EMPEROR—OPPOSITE PARTY.

Sedition—Newspaper article—Single expression—Penal Code (Act XLV of 1860), ss. 124A, 153A—Attempt to incite one class against another.

One single expression that the people of Bengal are trodden under the feet of strangers, used in a newspaper article which is innocent in other respects, does not make the whole article seditious.

A newspaper article which imputes wholesale bribery to the ministerial officers of Courts and to the lower officers of the Police force, and expresses doubts as to whether Government ever inquire into the truth of the grievances, so much is it occupied with investigations of boycott, dacoity and seditious matters, published at a time when the seeds of sedition are being sown broadcast and the minds of people are under excitement, cannot be taken to have been actuated by loyal motives.

Where in a newspaper article, both *Babus* and *Mcahs* are inveighed against, as robbing the poor Mohamedan *raiyats*, and Christian missionaries are referred to as illustrating their treatment of converts, it cannot be said that there was an intention to create enmity between them and any other subjects of the King, nor was it a deliberate attempt to incite one class against another, consequently, a conviction in respect of such article under section 153A of the Indian Penal Code is bad.

Appeal from the order of the District Magistrate of Rungpur, dated May 26th, 1910.

FACTS appear from the judgment.

The charges under sections 124A and 153A were based on three articles entitled *Pratikar*, *Bijoya* and *Sipahir Katha* published in *Sartabaha*, a Newspaper published from Rungpur.

The article *Pratikar* contained the following:—

"Prayer for redress (of grievances) is made before the British Government by lamentations, requests and supplications through newspapers. But, far from real redress, it is a matter of grave doubt whether Government take any measures at all to find out the real truth. The Magistrate, the Commissioner, the translator, all of them, read newspapers. Besides, it is not a fact that at least one or two extraordinary scholars of the Police Department—scholars who seem to consider themselves as having eaten the salt of the Government—do not read them. How is it then that there turns up no redress?. To this we shall reply that everybody from the British Raj down to a (menial) servant and *chaukidar* is worked to death in putting down three things *viz.*, sedition (treason), the checking of the purchase of *belati* articles, and dacoity. Consequently, (the) vigilance (exercised) in any other matter happens to be very little. We know that one or two extraordinary scholars of the Police (Department), some Kotwal or Court (sub-Inspector) Babu gather the sum and substance of a newspaper and read (it) to the Police Superintendent, (presumably) a great scholar; and, forthwith, permission is (sought) for the institution of a suit, and instantly, too, preparations and earnestness are manifested of sweeping (the people of) the Provinces away by a flood of (the river of) sedition.

"Do what you like, we do not wish to speak a word about it. But how is it, oh! Government, that resorting to your Courts of Justice means that you have to be propitiated with the present of Court-fees. Redress, even though provided by law, is very difficult of attainment: it fails to give you the present. Let that too pass. Giving you that present means that the giver has to make presents to all your officers, such as the *nazir* and the like. You are constantly hearing of this present through the medium of newspapers, but have you remedied it? Of course, you will say "we can remedy it" on the strength of the evidence alone, is not it? Wherefrom does the evidence in a case of sedition come?. . . . If any body asks "why do you give unlawful (present of) money at all in this way?" To this we shall reply: "A man cannot have the power of deciding as to who is the best *ojha* (exorcist) when the snake has (actually) bitten, when fear of snakes one must needs worship Manasa (the goddess of snakes). Hundreds of people are every day harassed into offering such money in every town: if the owner of a bullock cart does not offer any present at the feet of the *sepoys*, they will contemptuously ignore a thousand arguments, give him a sound beating, and, lastly, impress him. The pretext, too, of having committed nuisance in roads and rivers is not inconsiderable. It enables the *chaukidar* who has assumed the position of a *saheb* European) to meet his *bazar* expenses. Untold are the kind of presents that have to be given by one who

wants to have a document registered. If no remedy is available for all these matters, the Government had better make a rule that, whenever a Government *sepoy* is comeacross, some money must be paid to him as a tribute of respect to Government. We will give, destined as we are to only give. But say, once for all, how much to whom is to be given, so that the belly may have its fill. It is sedition and dacoity alone, Government, that you have taken notice of. Why is there no remedy for gambling, which though prohibited by law, has been going on everywhere. Thanks to these presents. Mention may be made of many such matters (but) what will be (gained) by (our) doing (so). How many thefts and how much bribery are going on in a prison, in a hospital, in a charitable dispensary. But who would take notice of them? Who would remedy them? . . . . .

"Our only prayer at present before the Government is, that it will try not only to go itself informed of the above matters by holding a secret inquiry, but also to redress the same. On the other hand, our prayer before society is that persons despicable in the eye of reason and morality be adequately punished by ex-communication, otherwise the country will be burnt to ashes by fire of unrest and oppression.

"The English will laugh at your prayer of this kind. They will say that 'we are so worthless and mean that we are publishing (the acts of) immorality (of persons) of our race, and are holding up the same before the gaze of outsiders (foreigners).' But what else we can do? You (Europeans) are seated laying such a trap that we are forced to cast aside our pride and politeness, are at our wit's end, fall into your snares and catch hold of your feet. You are the teachers, and we the disciples. Hence this our condition. . . . ."

The article *Bijoya* contained the following passage.

"Mother, the reliever of sorrows, every year do you appear for three days in this crematorium of a city for the purpose of ensuring protection to your childern. It is difficult to ascertain, mother, how many Bengalees were killed by the pest you produce in the shape of a terrible cyclone when you came down this year. It was to teach a lesson to your children that are destitute of knowledge, devotion and observance (of religious ceremonies), and weak and trodden under foot by the outsider. What lesson of yours is this, mother!"

The article *Sipahir Katha* was translated thus:—

"We shall tell a tale to-day, and relate a story of two *sepoys*, one a Hindu, and the other a Mahomedan. They are two *sepoys* of the Governmentand, at thesame time, well-wishers of the country. . . . . They asked us many questions about the *swadeshi*, and we replied. But, instead of being pleased with our answers, they made refutations. We thought that when we had told them news of the Parliament, of His Excellency the Governor-General of India, of great men of our country, when we told them who attacked His Excellency, and who made an attempt on the life of His Honour the Lieutenant-Gevernor, and, lastly when we told them also of the nine Bengali virtuous men who had been deported, of Madan Lal Dhingra, Khudiram, Arabindo, Barin and others, too, we had told them satisfactorily, and we thought that we had much strengthened their determination in favour of *swadeshi*; but, by Jove, we stood speechless when we heard what they said (in reply). We realised that all people were not willing to listen to our (empty) vociferation; that all our words were mistaken. "Babu," said the *sepoy*: "most of you are thieves. You will serve under the Government, and fill your stomachs: how shall you then serve your country? Whenever we approach you for employment, you ask for money (as bribes). It is your habit to earn money by disreputable and unfair means, by making reason look like a fallacy and fallacy a reason—if you could only get it (money). . . . . We said: "Whatever difference" they may exist between us in our wordly or professional matters, you and we should stand shoulder to shoulder while serving the country forgetful of those differences. Whatever we Hindus and Mahomedans may be, we are brothers. Though we (Hindus and Mahomedans) observe widely different customs, should we, or can we, keep silent when someone comes forward to insult our mother—simply because we are Hindus and you are Mahomedans. Fie upon your life, fie upon your vow, and fie upon our relationship as brothers if we suffer our mothers to shed tears in our presence either insult or starvation of want." "Quite so" said the sepoy. "Fie upon your

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"Mother, the old state of faith in which good works were done for their own sake, and not for securing a good name in this world or happiness in future, has now degenerated by the intervention of desires for the goods of this world." The word *Chandika* is rendered both by Wilson and Macdonell as the goddess Durga, but the learned translator renders it as "*Fury*," as if there were any analogy between the Furies of Greek mythology and our *Chandika*. This translation appears to me to be almost perverse. The learned Magistrate has very fairly admitted that some of these translations were incorrect. He cannot, however, be expected to understand the full sense of the Bengalee articles, and I have no doubt the mistranslations have to some extent influenced him against the prisoner. Going into details upon the three articles, I find there is absolutely nothing objectionable in the article "*Bijoya*." It is the rhapsody of a devout heart on the termination of the religious festivities of the Durga Pujah. The goddess is invoked not to inflict calamities like the cyclone of October last on the country, but to come the next time in her world-fascinating Durga form, *i. e.*, with the goddesses of wealth and learning, with the gods of protection and success surrounding here. It deplores the degeneration of faith and calls upon her to give them the power of uniting in her worship without envy, malice or malevolence. The key to the seditious trend of the article is found in the word *para-padadalita* as a description of the sons of Bengal; literally the words mean "trampled under the feet of others": it really signifies a conquered nation, and the figure of speech used is immaterial. Reading the article even with the light of the comment of the learned Magistrate and the learned Counsel for the Crown, I am unable to consider that this article was an invitation to the people to unite for overturning the British Goverment, and the article "*Anandamoyir agaman*" does not throw much adverse light.

The same thing cannot, however, be said of the other two articles. Although the sense is considerably disfigured by the mistranslations, there is one idea clear as running through the two articles, that the Government does not care for ascertaining the real truth about grievances which exist, especially about the administration of justice. The first article, the "*Pratikar*," says that bribery in some form or other is rampant in the Courts of Justice, barring, of course, the judiciary who are beyond suspicion, and, therefore, poor. The writer, therefore, prays that a secret Commission might be appointed by Government for investigating the truth of the allegations, and asks society to excommunicate such ignoble bribe-takers. The sting of the article, however, lies, according to the prosecution, in the concluding statement, that "Englishmen will laugh at such a request (for a Commission to inquire into the bribery prevalent in Courts, etc.), and say these people are so worthless that they expose the failings of their own countrymen to the scrutiny of others," but the writer says: "You have laid such a trap that we must disregard all questions of dignity and honour, and fall into them: you are the teachers, we are the disciples." Literally read, the word "trap," as applied to a judicial system, is objectionable, but stripped of the figure of speech it means a "complicated system," and the writer means that people cannot help giving bribes, because otherwise they would not have their work done at all or done promptly. This is the article "*Pratikar*" or redress of grievances. The learned Magistrate has misunderstood the meaning of the sentence "the English will langh, etc." I do not see in this sentence, read with its context, any intention in the writer to excite feelings of hatred on the part of the Indian subjects of the Government towards its English subjects.

The next article is the "*Sipahir Katha*." This article contains a severe diatribe against *swadeshi* agitators of the lawyer class. The sepoy says: "You Baboos and Meahs, *i. e.*, educated Hindus and Mahomedans, owe your existence as such to the British Government, in whose Courts you act as *amla* and take bribes, or as pleaders and *muktears*, in which capacity you foster litigation, and then suck the life blood of the poor cultivating class who fall into your clutches. Your agitation for the *swadeshi* cause cannot attract the poor classes to the same. We cannot joint your *swadeshi* cult so long as you do not look upon us in the same light in which you look upon yourselves. You call us brothers simply

for making us join with you, but all the same you do not cease to treat us hatefully whenever you can, just as the Christian missionaries make converts by calling them brothers, and after conversion treat them with contempt." The learned Magistrate might have accepted the defence theory that no mischief was meant, and that the sepoys only taunted Baboos with their wrong methods of serving the country by boycotting foreign goods, and murdering some officials, and recomended a real brotherhood for the good of the country. To my mind the article is intended to expose the so-called *swadeshi* agitators, and condemn not only their methods of boycott and terrorism, but also the insincerity of their professions of brotherhood to those whose blood in the shape of hard-earned money they are said to be sucking and feeding themselves fat upon.

The commentary of the learned Magistrate upon the words "*swadeshi desh*" is wholly erroneous, and this error is due to his not fully understanding the language and being without the aid of the translator, who said there was no sense in it. I wonder how the learned translator said so. The words are *Ibara sarkari sipahi athaba swadeshi desher hitakangkhi*. The hyphen mark after *swadeshi* is not a hyphen connecting the words "*swadeshi*" and "*desh*." It is a *dash* meaning, "that is to say," *i.e.*, "*swadeshi*, that is to say, well-wishers of the country." This is the most obvious reading of the sentence, and I wonder the learned translator was nonplussed.

The sin, however, of these two articles is that they impute wholesale bribery to the ministerial officers of Courts and to the lower officers of the Police force, and express grave doubts as to whether Government ever inquire into the truth of the grievances, so much is it occupied with investigations of boycott, dacoity, and seditious matters. If these aspersions have the effect of bringing into hatred or contempt the established Government of the country, or serve to create feelings contrary to affection to the Government, we need not stop to inquire whether any part of them is true. To my mind these aspersions against the Government may have the effect of making people think that the Government is not doing its duty, and is not, therefore, a good Government. I think they go beyond fair comment, and, written at a time when the seeds of sedition are being sown broadcast and the minds of people are under excitement, they cannot be taken to have been actuated by honest and loyal motives. I think, therefore, that, under the circumstances of the case, the conviction of the prisoner under section 124A is right. The articles are, however, more or less "crazy," and the sedition is only indirect: and I think a sentence of six months' rigorous imprisonment will serve the ends of justice. As regards his being the editor, all doubt is removed by his use of the editorial "we" in respect of his last imprisonment.

The offence under section 153A is not so clear, as there does not seem to be any deliberate attempt to incite one class against another. The sepoys inveigh both against *Babus* and *Mealis* as robbing the poor Mohomedan *ryots*, and the reference to the missionaries is a foolish illustration not intended to create enmity between the missionaries and any other subjects of the King. The conviction under this section must, therefore, be set aside. This disposes of both the appeals by the prisoner.

RICHARDSON, J.—I have had the opportunity of reading my learned brother's judgment, and concur with him generally in the conclusion at which he has arrived.

In regard to the article "*Bijoya*", the only word to which objection can fairly be made is "*para-padadalita*" (trodden under the feet of strangers), which, if intended to be so applied, is not a just description of the condition of the people under the Crown. But in the context, in which it occurs, I agree that this one word is not sufficient to make the article seditious. No doubt references to demons, whether they be the allegorical demons of passion or the embodied demons of mythology, sometimes cover attacks of a political character. But if a particular article is charged as being seditious, on the ground that it says more than appears on the face of it, it is, of course, the duty of the prosecution to show that it has, in fact, the guilty meaning or intention attributed to it. In the present case the proof of any such intention appears to fall short.

As to two articles "*Pratikar*" and "*Sipahir Katha*" I agree that the sweeping and unqualified character of the imputations which

they make against the administration of affairs in this country, leaves no doubt that they were intended to stir up feelings of disaffection towards the Government esta blished by law, and that in respect of these two articles the conviction of the appellant under section 124A of the Penal Code should be affirmed. The conviction under section 153A certainly rests upon a much more slender foundation. I may add that, in considering these articles, I have fully accepted my learned brother's authoritative opinion in regard to certain expressions, the meaning of which has been the subject of controversy.

The District Magistrate did his best, on the evidence before him, fairly to appreciate the effect of the articles, and, in regard to two of the controverted expressions (*khair khah* and *ripur tarana*), he adopted the translation suggested on behalf of the defence, and now found to be correct. He may, however, have been led into taking a more serious view of the effect of the articles as a whole owing to some misconception as to the meaning of particular expressions used in them other than the two above referred to. This is more especially true of the article "*Bijoya*" which from its religious and impassioned character, is the most difficult of the three articles to interpret. But it is also true in respect of the words *swadeshi-desh*, which occur in the article entitled "*Sipahir Katha*."

With these brief observations, I accept the orders which my learned brother proposes to make on these appeals.

(s. c. 38 C. 227.)

CALCUTTA HIGH COURT.

CRIMINAL APPEALS NOS. 497 AND 746B OF 1910.

September 8, 1910.

Present:—Mr. Justice D. Chatterjee and Mr. Justice Richardson.

SURENDRA PROSAD LAHIRI—ACCUSED—APPELLANT

versus

EMPEROR—OPPOSITE PARTY.

Printing Presses and Newspapers Act (XXV of 1867), s. 7—Printer and publisher—Responsibility for seditious article—Absence when article published—Bona fides.

The declared printer of a newspaper is responsible for seditious articles published therein unless he can establish that in fact he had nothing to do with them.

The editor of a newspaper was committed to jail on December 22nd, 1907, and the appellant in this case gave his declaration on June 16th, 1908. The editor was released on December 22nd, 1908, and resumed his work. The appellant was absent from the place of publication on August 28th, 1909, and thirteen days after one seditious article was published. The appellant returned on November 29th, 1909, but three days previously another seditious article appeared. The appellant took no interest in the paper and was occupied in his own business as a photographer; he, however, allowed his name to remain as the printer:

Held, that he had failed to establish the *bona fides* of his absence from the place of publication and that legally he was guilty under section 124A, Indian Penal Code.

Appeal from the order of the District Magistrate of Rungpur, dated May 26th, 1910.

Messrs. *P. Mitter*, *K. N. Chaudhuri*, Babus *Bhudeb Chunder Roy Chowdhry* and *Naresh Chunder Sen*, for the Appellant.

Mr. *Donogh* and Babu *Atulya Charan Bose*, for the Crown.

JUDGMENT.—The prisoner was the declared printer of "*Rangpur Bartabaha*," and he has been convicted of offences under sections 124A and 153A of the Indian Penal Code in respect of the same articles *Pratikar*, *Bijoya* and *Sipahir Katha*, in respect of which the editor, Joy Chandra Sarkar, has been convicted. We have held in the appeal of *Joy Chandra* v. *Emperor* (1), that the article *Bijoya* is harmless, or at all events not seditious, but that the articles *Pratikar* and *Sipahir Katha* are seditious in the sense of containing wholesale denunciations of the Administration of Justice in India. The prisoner being the declared printer would be responsible for the said articles unless he can make out on sufficient evidence, that he had in fact nothing to do with them. The *Pratikar* appeared on the 10th of September 1909, and the *Sipahir Katha* on the 26th of November 1909. The learned Magistrate finds on the evidence that he was absent from Rangpur on these days and, it is argued that the knowledge of those articles must, therefore, be brought home to him before he can be convicted. It appears, however, that Joy Chandra went to jail on the 22nd December 1907, and the prisoner gave his declaration on the 16th June 1908. Joy Chandra came out of jail on the 22nd December 1908, and evidently resumed his work. The prisoner left Rangpur on the 28th August 1909, and

(1) 38 C. 214; 10 Ind. Cas. 948.

the *Pratikar* appeared thirteen days after. The prisoner came back to Rangpur on the 29th November 1909, and the *Sipahir Katha* appeared only three days before. It appears that he did not take any interest in the paper, and was occupied in his own business as a photographer and general dealer. But he allowed his name to remain on the record as the printer, and we think he has not made out the *bona fides* of his absence from Rangpur. He is, therefore, legally guilty under section 124A, and we confirm the conviction. In consideration, however, of his expressed intention to sever his connection with the paper we reduce his sentence to what he has already suffered. We think the conviction and sentence under section 153A ought to be set aside. This disposes of both the appeals and the prisoner will be released at once.

(S. C. 38 C. 153.)

CALCUTTA HIGH COURT.

SECOND CIVIL APPEAL No. 839 OF 1909.

August 10, 1910.

Present:—Mr. Justice Woodroffe and Mr. Justice Teunon.

DURGA PRASAD SINGH—PLAINTIFF—APPELLANT

versus

RAM DOYAL CHOWDHRI—DEFENDANT—RESPONDENT.

Judgment based on materials not evidence—Personal knowledge of Judge Validity of judgment.

A judgment based on materials which are not evidence and which have been improperly admitted, or on the personal knowledge of the Judge, is wrong in law and invalid.

Vallabha v. *Madusudanam*, 12 M. 495, referred to.

Appeal from the decree of the Judicial Commissioner of Chota Nagpur, dated February 25th, 1909, affirming that of the Sub-Judge of Purulia, dated March 31st, 1908.

Dr. *Rash Behary Ghose* and Babu *Lalit Mohan Ghose*, for the Appellant.

Babus *Golap Chandra Sarkar* and *Dwarka Nath Mitter*, for the Respondent.

JUDGMENT.

WOODROFFE, J.—The main ground which has been argued in this appeal is that the judgment of the lower Appellate Court is wrong in law, inasmuch as it is based on materials which were not evidence and which have been improperly admitted. It is not necessary to go, with detail, into the various points on which the judgment of the learned Judicial Commissioner is attacked. It is sufficient to point out one or two instances which are the grounds for the order which I propose to make. It appears from the judgment itself that certain books which were described as text-books, namely, Rabinson's Land Tenure Reports, Cotton's Memorandum of Land Tenure in Bengal and Webster's Report on the Land Tenure of Chota Nagpur, were referred to, and, (so far as I understand the judgment) relied on by the learned Judicial Commissioner. These books were referred to by him after the case was closed and the parties had no opportunity of dealing with the matters therein mentioned. Assuming (as to which I say nothing) that these reports would have been evidence; the Judicial Commissioner states that he delayed giving judgment in the case, as he had been endeavouring to obtain books of acknowledged authority in relation to the Land Tenures which were the subject of discussion in the judgment until he could obtain them from Calcutta. I may refer in this connection to what was said in *Vallabha* v. *Madusudanan* (1).

Then, in the judgment, he refers to the Porahat settlement and to the Settlement Officer's report in connection with that settlement, though that Settlement Report was not in evidence or referred to by the parties.

Then, there are other matters which appear to have been relied upon, for which there is no evidence and in respect of which the learned Judicial Commissioner appears to have relied upon his own personal knowledge. It is stated, for instance in the judgment, "that in some cases it is believed that landlords have for some years been deliberately inducing ignorant tenants to sign documents describing themselves as temporary lessees, *ticadars* or *ijaradars*, with the object of evicting them from their hereditary tenancies when it is thought advisable." There appears to be no evidence in support of this statement. There are other passages upon which reliance has been placed in this connection.

I am of opinion, therefore, that the decree of the lower Appellate Court must be set

(1) 12 M. 494.

aside and the case remanded to the Judicial Commissioner for a re-hearing in accordance with law and upon such evidence as the law allows.

The costs will abide the result of the hearing of the appeal on remand.

TEUNON, J.—I agree.

Case remanded.

(s. c. 13 Bom. L. R. 296.)

BOMBAY HIGH COURT.

SPECIAL BENCH.

SPECIAL BENCH CASE No. 5 OF 1910.

October 6, 1910.

Present:—Sir Basil Scott, KT., Chief Justice, Sir N. G. Chandavarkar, KT., Judge, and Mr. Justice Heaton.

EMPEROR—APPELLANT

versus

VINAYAK DAMODAR SAVARKAR—RESPONDENT.

Criminal Procedure Code (Act V of 1898), s. 188—Illegal arrest, effect of.

Where a man is charged in India with an offence under the Indian Penal Code, it will not avail him to say that he was brought there illegally from a foreign country.

Muhammad Yusufuddin v. Queen-Empress, 24 I. A. 137, distinguished.

Mr. *Jardine*, acting Advocate General, (with him Messrs. *Weldon*, *Welinkar* and *Nicholson*), for the Crown.

Mr. *Baptista*, for the Accused.

JUDGMENT.—The accused, Vinayak Damodar Savarkar was committed to this Court by Mr. Montgomerie, First Class Magistrate of Nasik, for trial upon charges framed under sections 121, 122 and 123 of the Indian Penal Code. At the commencement of the trial here the accused said that he would take no part in the trial but asked for an adjournment and for facilities to make to the British and to the French Governments representations regarding what he contended was his illegal arrest in Marseilles after he had escaped from the custody of Police Officers charged with the duty of bringing him from England to Bombay. His application was refused on the ground that it was beyond the province of this Court to do anything more than try him for the offences in respect of which he had been committed for trial. The trial then proceeded against him and other accused jointly charged with him. After certain witnesses had been examined, Mr. Baptista, appearing for certain of the accused, wished to put questions to one of the police witnesses regarding the escape and re-arrest of Vinayak at Marseilles with a view to show that the re-arrest was illegal and with the intention of contending thereon that the trial of Vinayak was without jurisdiction and that, if so, the trial could not proceed against the prisoners charged jointly with him.

The Court upon this heard arguments as to what would be the effect on the trial of proof that the arrest was illegal.

The learned Advocate-General, without admitting any of the allegations made regarding the re-arrest at Marseilles, contended that the circumstances of Vinayak's re-arrest were irrelevant.

This contention is, in our opinion, correct. It appears that Mr. Montgomerie, a First Class Magistrate at Nasik, upon a complaint, duly authorised under section 196 of the Criminal Procedure Code and sanctioned so far as it concerned offences committed out of India under section 188, issued a warrant directing that Vinayak should be brought to Nasik from Bombay where he was expected to land on or about the 22nd of July 1910 to be dealt with according to law. Vinayak arrived in Bombay as expected, having been sent out to India under the Fugitive Offenders Act by a Magistrate in London, and was taken to Nasik under Mr. Montgomerie's warrant. The charges against him were there investigated by Mr. Montgomerie under the procedure prescribed by the Criminal Law Amendment Act, 1908, and he was then committed for trial to this Court as already stated. For the purpose of argument we will assume that Vinayak escaped from custody at Marseilles and was re-arrested there by the British Police under circumstances not authorised by the warrant which they held, or by section 63 of the Criminal Procedure Code, or section 28 of the Fugitive Offenders Act.

The argument based by Mr. Baptista on these assumptions is one which had often been advanced before but, so far as we are aware, always without success.

Where a man is in the country and is charged before a Magistrate with an offence under the Indian Penal Code it will not avail him to say that he was brought there illegally from a foreign country. This appears very clearly from Lord Chief Justice Cockburn's

charge to the Grand Jury in *The Queen* v. *Nelson and Brand* (1). It was held that George William Gordon had been by an illegal and unwarrantable act arrested and conveyed by the Governor and Custos of Kingston in Jamaica to Morant Bay in that island, and there placed before a Military Court-Martial administering Martial law in Morant Bay but not in Kingston. The Lord Chief Justice, however, held that having been brought within the ambit of Martial law he was liable to be tried under it. He said (at pages 118 and 119): "When Mr. Gordon was brought within the ambit or sphere of the jurisdiction of Martial law—assuming always, on this part of the case, that there was such a jurisdiction—it seems to me that it was not for the parties administering the Martial law to inquire how he had been brought there. I will illustrate the matter by a case which has happened before now. Suppose a man to commit a crime in this country, say murder, and that, before he can be apprehended, he escapes into some country with which we have not an Extradition Treaty, so that we could not get him delivered up to us by the authorities, and suppose that an English Police-Officer were to pursue the malefactor, and finding him in some place where he could lay hands upon him, and from which he could easily reach the sea, got him on board a ship and brought him to England, and the man were to be taken in the first instance before a Magistrate, the Magistrate could not refuse to commit him. If he were brought here for trial, it would not be a plea to the jurisdiction of the Court that he had escaped from justice, and that by some illegal means he had been brought back. It would be said 'Nay, you are here; you are charged with having committed a crime, and you must stand your trial. We leave you to settle with the party who may have done an illegal act in bringing you into this position; settle that with him.' So here, although if Mr. Gordon had been put to death, but had been subjected to some minor punishment, some of those scourgings or other things that we have heard of in Jamaica—if he had come to England and had brought an action for damages against Governor Eyre, it my well be that a jury of Englishmen, presided over by an English Judge, would have awarded him exemplary damages for the wrong that had been done him; but that does not affect the question we are now considering, namely, whether, having been brought within the ambit of the Martial law, he was liable to be tried under it. I cannot but think that he was."

The report of *In re Parisol* (2) affords two instances in which the same view was taken by the Court upon protests being made by prisoners as to the illegality of the arrests outside the British Islands. In one case the arrest was in Brussels; in the other in Jersey.

In *In re Susannah Scott* (3) the alleged illegality of an arrest in Brussels was held to be irrelevant.

The principle upon which these cases are based underlies also section 188 of the Criminal Procedure Code which, in that Vinayak a Native Indian subject, is charged *inter alia* in respect of certain offences committed in London, applies to this case. Under that section it has been held in *Empress* v. *Magantal* (4) that a Native Indian subject arrested without a warrant by British Indian Police in a Native State and brought to Ahmedabad was 'found' in Ahmedabad so as to give jurisdiction to the Magistrate at that place.

This decision followed that of fourteen Judges sitting in the case of *Queen* v. *Lopez* (5) where it was held that a man is 'found' for the purposes of Criminal jurisdiction under 15 & 19 Vict. c. 9, section 21, wherever he is actually present whether or not he has been brought to that place against his will.

Mr. Baptista has, however, relied upon the judgment of the Judicial Committee in *Muhammad Yusufuddin* v. *Queen-Empress* (6) as being inconsistent with the cases relied upon by the prosecution since the Judicial Committee held that an arrest of a Hydrabad subject at a station on a Railway line in the Hydrabad State over which the Queen-Empress had no general Criminal jurisdiction was illegal and advised Her Majesty that the warrant and arrest and the proceedings thereon should be set aside.

It is to be observed, however, that the

(1) Charge of Lord Chief Justice Cockburn to the Grand Jury, 2nd Edn., in the case of *Queen* v. *Nelson and Brand*, p. 118.

(2) (1889) 5 T. L. R. 344.
(3) (1829) 9 B. and C. 446.
(4) (1882) 6 B. 622.
(5) 1858 27 L. J. M. C. 48; 7 Cox. C. C. 431.
(9) 24 I. A. 137.

Lord Chancellor in delivering judgment was careful to point out that their Lordships were called upon to pronounce their opinion as to the legality of the arrest, but they had nothing to do with the question whether or not if the accused had been found within British Territory he could have been lawfully tried and convicted; nor with the consequences of the arrest being lawful or otherwise. The judgment does not purport to deal with the question whether an illegal arrest in foreign territory vitiates an inquiry by a Magistrate into an offence against the Indian Penal Code charged against the person arrested when brought before the Court; nor does it appear from the report that the question was argued. That has, therefore, no bearing upon the question now under consideration.

For the above reasons we hold that both, under section 188 of the Criminal Procedure Code, as regards offence committed in London, and apart from that section, as regards offences committed in British India, neither the jurisdiction of the Magistrate to inquire into the case nor the jurisdiction of this Court to try it can be affected by any illegality in connection with the re-arrest of Vinayak which may have occurred at Marseilles.

(s. c. 15 C. W. N. 736.)

CALCUTTA HIGH COURT.

CRIMINAL REVISION MISCELLANEOUS No. 62 OF 1911.

May 12, 1911.

Present:—Mr. Justice Caspersz and Mr. Justice Sharfuddin.

RUDOLF STALLMAN—PETITIONER

versus

EMPEROR—OPPOSITE PARTY.

Extradition Act (XV of 1903), s. 3—Bail—High Court's power.

The Extradition Act provides for bail to be furnished by persons accused of certain crimes, and the matter is one which must be regulated by the provisions of the Criminal Procedure Code. The High Court has the fullest discretion in the matter but regard must be had to the provisions of section 496 and the circumstances of the case.

Rule granted upon the District Magistrate of 24-Pergannahs to show cause why the amount of security demanded should not be varied or reduced.

FACTS.—The petitioner was arrested under section 4 of the Extradition Act at the instance of the German Government. He was produced before a Deputy Magistrate of Alipur who directed the petitioner to furnish two sureties in the sum of Rs. 5,000 each in addition to his own recognizance and cash deposit of Rs. 2,000.

Against that order the petitioner obtained this rule.

Messrs. *Jackson*, *K. N. Chaudhuri* and Mr. *Chippendale*, for the Petitioner.

Mr. *Kenrick*, *K. C.*, Advocate-General for the Crown.

JUDGMENT.—The question arising for our determination in this Rule is, whether the amount of security demanded from the Petitioner should be varied or reduced.

The petitioner is the subject of certain proceedings under the the Indian Extradition Act of 1903 pending before the District Magistrate of Alipur. When he was first arrested and produced in Court on the 27th April 1911, a sum of Rs. 2,000, out of the properties found with him, was given to him in order to enable him to furnish cash security of that amount. Subsequently, on the 9th May last, the security was increased by Rs. 10,000, namely, two sureties in the sum of Rs. 5,000 each.

The Extradition Act provides for bail to be furnished by persons accused of certain crimes, and the matter is one which must be regulated by the provisions of the Criminal Procedure Code. We have the fullest discretion in the matter; but regard must be had to the provisions of section 496 and the circumstances of the present case.

Now, section 496 coupled with the form given in the Schedule to the Code (Form XLII, Sch. V) contemplates two kinds of security, namely, (1) the simple recognisance of the principal, and (2) security with sureties. The word "bail" is properly applicable to the second kind of security and that is the meaning which has been attached to the word in the practice and procedure of the Courts. The vernacular expression for bail is quite different from that for personal recognisance

The question, therefore, is whether, in all the circumstances of the case, we should vary or reduce the amount of bail for rupees ten thousand demanded.

The accused is a stranger in this country. We are not concerned to inquire why or how he has come to India, but we may consider

the difficulties of his position to a reasonable extent. It seems to us that five or ten thousand rupees is too heavy a sum for him to find security to that amount.

The amount which appears to us suitable in the present circumstances, regard being had to the improbability of the accused obsconding during the present inquiry, is rupees three thousand, that is to say, he will furnish two sureties in the sum of Rs. 1,500 (rupees fifteen hundred) each for appearance at the proceedings, and the bond will be, *mutatis mutandis*, in the Form given in Schedule V of the Criminal Procedure Code. The cash deposit of Rs. 2,000 will remain in custody of the Court.

The Rule is, therefore, made absolute in these terms.

Let the record be sent down at once.

Rule made absolute.

(s. c. 2 M. W. N. 355.)

MADRAS HIGH COURT.

CRIMINAL REVISION No. 187 OF 1911.

(TAKEN UP No. 16 OF 1911.)

April 3, 1911.

Present:—Mr. Justice Sundara Aiyar.

MADIRA NAGADU *alias* AVALU SUBBADU, *alias* CHALLA RAMUDU *alias* VEERABHADRADU—ACCUSED

versus

EMPEROR—OPPOSITE PARTY.

Criminal Procedure Code (*Act V of* 1898), *s.* 110—*Habitual offender—No conviction for an offence against property recently committed—Evidence—Security for good behaviour.*

Where the only evidence against a person was that he was found hiding himself in a bush and when his person was searched certain articles, not claimed by him to be his own, were found upon him, there is no presumption that he was there with a view to commit an offence, so that he may be deemed to be a "habitual offender" within the meaning of section 110 of the Code of Criminal Procedure.

ORDER.—The District Magistrate's order does not set out the evidence on which Nagudu *alias* Subbadu was directed to give security for good behaviour. The judgment of the Deputy Magistrate does not show that there is evidence which could be regarded as sufficient in law to justify the order. The Deputy Magistrate says that "the accused is a Kathira," that he is of bad character, that he left his gang without permission, that he was seen on the

night of the 6th June in a prickly pear bush with four others and that he *must* have been there only "with a view to commit crime" and, when his person was searched, certain articles, which he did not claim as his own, were found on him. He was not charged with any offence with regard to those articles. The accused had been directed to give security for good behaviour in 1908 and the Deputy Magistrate observes that convictions for theft previous to the order of 1908 having been taken into account against him then, they cannot be taken into account for passing a fresh order. There was no subsequent conviction against him, and there is nothing but the suspicion arising from his being found in a prickly-pear bush and his caste to justify the present order. These facts are quite insufficient to justify an order under section 110 of the Criminal Procedure Code. The accused is an old man of seventy, and he admitted his inability to find any surety. It is inadvisable to pass a fresh order under section 110 without evidence of subsequent information of the nature referred to in the section. I set aside the order and direct that the accused Madira Nagadu *alias* Avula Subbadu *alias* Challa Ramudu *alias* Veerabhadradu be discharged from the prison and set at liberty.

Order set aside.

(s. c. 8 A. L. J. 525.)

ALLAHABAD HIGH COURT.

CRIMINAL REVISION No. 55 OF 1911.

March 3, 1911.

Present:—Mr. Justice Tudball.

KRISHNA NATH TEWARI—APPLICANT

versus

EMPEROR—OPPOSITE PARTY.

Penal Code (*Act XLV of* 1860), *ss.* 363, 355—*Kidnapping committed in British territory and offence of shoe-beating committed in Nepal territory—Certificate granted by Political Officer in Nepal only in respect of kidnapping—Magistrate convicts the accused under s.* 355 *only—Jurisdiction—Criminal Procedure Code* (*Act V of* 1898), *ss.* 188, 227.

K was kidnapped in British India and shoe-beaten within the territory of Nepal. The Political Officer in Nepal granted a certificate under section 188, Criminal Procedure Code, to the effect that a charge under section 363 of the Penal Code ought to be inquired into against the accused in British India. The Magistrate who tried the case acquitted the accused under section 363 but convicted him of shoe-beating under section 355 of the Code;

KRISHNA NATH TEWARI *v.* EMPEROR.

Held, that the Magistrate had jurisdiction to convict the accused under section 355. The certificate granted by the Political Officer under section 188 of the Criminal Procedure Code, in respect of a certain set of facts, covered every charge which the facts disclosed in the proceedings would suffice to sustain. The Magistrate was not restricted to the section which was mentioned in the certificate.

Criminal revision against the order of the Magistrate, first class, of Benares.

Mr. *Satya Chandra Mukerji*, for the Applicant.

The *Assistant Government Advocate*, for the Crown.

JUDGMENT.—One Kheru Lal Bania made a complaint against the applicant Krishna Nath Tewari and certain other persons to the effect that he had been seized by the servants of Krishna Nath Tewari in the village of Bhagwanpur which is in British territory, and had been conveyed by them across the border to the village Bairihwa in Nepal territory whereaftar he had been placed before Krishna Nath Tewari, the latter ordered his servants to shoe-beat him. Krishna Nath Tewari is a British subject, but in recent years has taken up his residence in the above-mentioned village across the Nepal territory. According to Kheru Lal, the complainant, the kidnapping was aided and abetted by the accused Krishna Nath Tewari. It will be seen that part of the transaction took place in the British territory and part within the Nepal territory. An application was made to the Political Officer in Nepal who granted a certificate under section 188, Criminal Procedure Code, to the effect that the charge under section 363, Indian Penal Code, against Krishna Nath Tewari, was one which ought to be inquired into in British India. The Magistrate who has tried the case, while finding that Kheru Lal was kidnapped as stated, held that there is nothing to show that that had been done with the knowledge and sanction of Krishna Nath Tewari. He, therefore, acquitted him of the offence under section 363 read with section 109, Indian Penal Code. He found it proved that when Kheru Lal was placed before Krishna Nath Tewari, the latter, as a matter of fact, had the man shoe-beaten. He, therefore, convicted him of the offence under section 355 read with section 109, Indian Penal Code, and sentenced him to a fine of Rs. 20. Krishna Nath Tewari has now come in revision to this Court, and it is urged that inasmuch as the certificate granted by the Resident in Nepal relates only to the offence under section 363 of the Code, the Magistrate had no jurisdiction to convict the accused of an offence under section 355, Indian Penal Code, which is not mentioned in the certificate. It is quite clear that the offence of kidnapping was committed within British India, and that, really, in respect of that offence, no certificate was necessary. But, as in the course of the transaction of which complaint was made, the applicant had committed an offence under section 355, Indian Penal Code, a certificate was certainly necessary as he was a British subject who had committed the offence in the territory of a Native Prince. The facts disclosed in the complaint and in the proceedings which led up to the grant of the certificate clearly disclosed the offence of which the applicant has been convicted. It is true that the charge was one which was entered as an offence under section 363. But it seems to me quite clear that the certificate granted under section 188 was only necessary to enable the whole matter to be inquired into in British India. In my opinion it cannot prevent the Court making the inquiry or conducting the trial from taking action under section 227 of the Criminal Procedure Code. The mere circumstance that the offence under section 363 alone was entered in the certificate does not necessarily lead to the conclusion that that certificate was granted for the purpose of trial only on that a charge and not in respect to any other offence disclosed by the facts proved. In my opinion the certificate granted under section 188 in respect to a certain set of facts will cover every charge which the facts disclosed in the proceedings will suffice to sustain. In my opinion there is no force in the contention of the applicant. The certificate is granted on the allegation of certain facts which constitute the charge against the accused and the Magistrate is not restricted to the section which is mentioned in the certificate but at the utmost to the facts. The conviction under section 355, read with section 109, Indian Penal Code, is perfectly legal. The application is, therefore, dismissed.

Application dismissed.

PATESHRI PARTAB NARAIN SINGH *v.* NAGESHAR PERSHAD.

(s. c. 8 A. L. J. 358.)

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 284 OF 1909.

March 2, 1911.

Present:—Sir John Stanley, KT., Chief Justice, and Mr. Justice Banerji.

PATESHRI PARTAB NARAIN SINGH —DEFENDANT—APPELLANT

versus

NAGESHAR PERSHAD PANDE AND OTHERS—PLAINTIFFS—RESPONDENTS.

Civil Procedure Code (Act V of 1908), *s.* 11—*Suit for possession—Mortgage from an ostensible owner party Plea of estoppel not raised by mortgagee—Suit by mortgagee*—Res judicata—*Transfer of Property Act (IV of* 1882), *s.* 41—Bona fide *transferee—Transferee making no inquiry as to his transferor's title.*

R mortgaged the property in dispute to *N*. *P* brought a suit against *R* and *N* for possession and *P*'s title was denied therein. The result of the final decision in that suit was that *P* got a decree for possession. *N* then on the strength of his mortgage brought this suit for sale of the property and pleaded that *P* was estopped from denying his title as mortgagee:

Held, that *N* could set up this plea in the former suit. As he did not do so, the decision in that suit operated as *res judicata*.

N when the mortgage was executed by *R*, did make no inquiry as to *R*'s title. He used to live in the same locality and lend money to the family of *R*. Apparently he was acquainted with all the circumstances of *R*'s family:

Held, that he could not claim to be a *bona fide* transferee without notice within the meaning of section 41 of the Transfer of Property Act, 1882.

A transferee from an ostensible owner can defeat the real owner only if after taking reasonable care to ascertain that the transferor has power to make the transfer, he acts in good faith.

First appeal from a decree of the Additional Subordinate Judge of Gorakhpur.

Dr. *Tej Bahadur Sapru* (with him Mr. *Motilal Nehru*), for the Appellant.

Mr. *Govind Pershad* (with him Mr. *Sundar Lal*), for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff-respondent for sale upon a mortgage executed by one Rudra Narain Singh on the 21st of January 1895. The property which the plaintiffs seek to sell for realisation of the amount of the mortgage is a share in the village Saondih. The plaintiffs' allegation is that this village belonged to Babu Chet Singh and was sold by him to his wife Dulhin Rup Kunwari in the year 1847; that Dulhin Rup Kunwari was the owner of the property and continued to be so till her death in 1887, and that upon her death it was inherited by Rudra Narain Singh as the next heir to her husband, he being the nephew of Chet Singh. One Bishun Shukul obtained a money-decree against Dulhin Rup Kunwari and in execution of it caused the property in question to be attached and advertised for sale. Before the sale could take place, however, Dulhin Rup Kunwari died, and after her death Rudra Narain Singh first executed a usufructuary mortgage on the 14th of March 1893, and subsequently, in lieu of the amount secured by that mortgage, the mortgage of the 21st of January 1895, on which the present suit is based. It is said that with the money raised by Rudra Narain Singh he discharged Rup Kunwari's debt to Bishun Shukul, re-paid other debts and defrayed the expenses of her Gaya Shradh. The defendant, Raja Pateshri Partab Narain Singh, is the Raja of Basti. He brought a suit against Rudra Narain Singh for possession of several villages, one of which was the village Saondih. The defendants to that suit were Rudra Narain Singh and various transferees of the property including the present plaintiff. He claimed a declaration that he was entitled to the property and he prayed for possession of it. His claim was dismissed by the Court of first instance but this Court decreed it, and the decree of this Court has been affirmed by their Lordships of the Privy Council. In that suit it was held that by virtue of a *saprudnama* dated the 21st of March 1848, executed by Chet Singh and a Will of *Musammat* Rup Kunwari made by her in 1858, the Raja of Basti became entitled to the property held by Rup Kunwari, and that Rudra Narain Singh had no right to it. In the present suit the plaintiff seeks to go behind the decision in that suit. As has been stated above, he was placed in the array of defendants. In the 29th paragraph of his written statement he contended that the then plaintiff, that is, the present appellant, the Raja of Basti, had no right whatever to question the validity of the transfers made in his favour. He referred in specific terms to the transfers made by Dulhin Rup Kunwari and the hypothecation of the disputed villages by the defendant first party, namely, Rudra Narain Singh. An issue was framed to the effect whether the Court-fee was insufficient, the suit being for possession by avoidance of the transfers made by Rup Kunwari and Rudra Narain Singh This issue proceeded on the assumption that the suit was also a suit to avoid the transfers made in favour of the present plaintiff. The

issue was decied by the Court of first instance against the defendants to that suit and no exception was taken to that decision in the Appellate Court. The result of the final decision in that suit was, that the present appellant, the plaintiff to that suit, was declared entitled to the property claimed by him, and it was further declared that he had a right to recover possession of it from Rudra Narain Singh who was then in possession. The question of the title of the plaintiff to that suit was one of the material questions in the case and it was determined in favour of the plaintiff against the present plaintiff who was a party to the suit. It is true that no specific mention of the mortgage now in question was made in the judgment in that suit, but we think the present plaintiff, as defendant, did raise the question of the validity of the mortgage in his favour and was entitled to do so with a view to resist the plaintiff's claim for establishment of his title. He could assert, as he does now, that by reason of the operation of the rule of estoppel, the then plaintiff, the Raja of Basti, was precluded from setting up his right to the property mortgaged to him; but he did not do so. We think that it is too late for him now to assert that the decision in the former suit to which he was a party and which has become conclusive as between all persons who were parties to it, should be ignored in the present suit and the question of title of the appellant, Raja Pateshri Partab Narain Singh, should be considered and determined independently of that judgment. It having been held between the parties to the present suit that Raja Pateshri Partab Narain Singh and not Rudra Narain Singh is entitled to the property in question, it was not, in our opinion, open to the Court in this case to hold otherwise.

On the merits also we are of opinion that the plaintiffs have no case against the appellant, Raja Pateshri Partab Narain Singh. As we have said above, and as was found in the previous suit, the Raja of Basti acquired an absolute interest in the property held by Dulhin Rup Kunwari by virtue of the *supradnama* of 1848, and the Will of Rup Kunwari of 1858. It may be that the *supradnama* is not binding on Rup Kunwari as she was not a party to it and as a sale-deed had been executed in her favour before the date of the *supradnama* but the Will was made by her, and by virtue of it Raja Sitla Bakhsh Singh, the father of the appellant. Raja Pateshri Partab Narain Singh, became the owner of the property upon her death. She died in 1887, and, therefore, on the date on which the mortgage now in question was executed, the owner of the property was Raja Sitla Bakhsh Singh or the appellant, Raja Pateshri Partab Narain Singh and not Rudra Narain Singh, who made the mortgage.

The Court below was of opinion that the mortgage is bindig on the appellant inasmuch as Rudra Narain Singh's name was entered in the revenue papers after the death of Rup Kunwari, and he was the ostensible owner of the property. The learned Subordinate Judge apparently relies on the provisions of section 41 of the Transfer of Property Act, but he overlooks the proviso to that section, which is to the effect that a transferee from an ostensible owner can defeat the real owner only if after taking reasonable care to ascertain that the transferor had power to make the transfer, he acted in good faith. There is nothing in this case to show that the plaintiff made any inquiry whatever to ascertain the title of his mortgagor, Rudra Narain Singh It is true, the name of Rudra Narain Singh was entered in the revenue papers, but if inquiry had been made, it would have appeared that at the time when mutation of names was applied for, objections were preferred on behalf of the Raja of Basti and that the name of Rudra Narain Singh was entered simply because he was in possession. Further inquiry as to Rudra Narain's title would have led to the discovery of the fact that there was a Will, by virtue of which the Raja of Basti was the owner of the property after the death of Rup Kunwari. It cannot be said that the name of Rudra Narain Singh was entered as ostensible owner with the consent of the real owner, the Raja of Basti. On the contrary, his name was entered in spite of opposition put forward by the Raja. The present plaintiff is a person who has been lending money to the family for a long time. He resides in the same locality and was apparently acquainted with all the circumstances of the families concerned. He cannot, therefore, claim to be a *bona fide* transferee without notice so as to be in a position to defeat the title of the real owner.

DURGA KUNWAR *v.* MATHURA KUNWAR.

The only other ground on which the learned Subordinate Judge has decreed the plaintiff's claim is, that the money which the plaintiff advanced to Rudra Narain Singh was applied to the discharge of debts due by Rup Kunwari. That circumstance, however, would not make a mortgage made by Rudra Narain Singh binding on the appellant.

For the above reasons we are of opinion that the plaintiffs are not entitled to a decree against the appellants for sale of the village Saondih. We accordingly allow the appeal, and so far vary the decree of the Court below that we dismiss the suit for sale of the village Saondih as against the appellants. The appellants will have their costs in both Courts.

Appeal decreed.

(s. c 15 C. W N. 717.)

PRIVY COUNCIL.

APPEAL FROM THE ALLAHABAD HIGH COURT.

May 4, 1911.

Present:— Lord Macnaghten, Lord Robson, Sir Arthur Wilson and Mr. Ameer Ali.

DURGA KUNWAR—PLAINTIFF—APPELLANT

versus

MATHURA KUNWAR AND OTHERS—DEFENDANTS RESPONDENTS.

Fact, question of—Weight to be attached to opinion of Trial Judge—Strong case of plaintiff—Not rebutted—Personal testimony of defendants.

The plaintiff sued to recover certain jewellery, or its value, alleged by her to have been deposited with the defendants (who were husband and wife for safe custody She produced receipts purporting to be signed on behalf of the defendants by their son for the jewels but the defendants alleged these were forgeries. The defendants denied the deposit and said that the only jewels they had received from the plaintiff had been deposited with them by way of security for two loans Rs. 2,500 and Rs. 1,000 respectively they had made to her. In support of this story they produced promissory notes for those amounts purporting to be signed by the plaintiff, which she in her turn denounced as forgeries:

Held, that the dispute being one of fact, great weight naturally attached to the finding of the Trial Judge, that the evidence as to the notes did not suffice to displace the case of the plaintiff in regard to the jewellery, especially in the absence of any denial by the defendants and their son, and that the case of the plaintiff had not been rebutted.

Appeal from the decree of the Allahabad High Court, dated November 21st, 1906, reversing that of the Additional Sub-Judge of Moradabad.

Sir *R. Finlay*, K. C., Mr. *Cowel* and Mr. *Bhagwandin Dube*, for the Appellant.

Mr. *L. DeGruyther*, K. C., and Mr. *Ross*, for the Respondents.

JUDGMENT.

LORD ROBSON.—The appellant was plaintiff in this action and obtained a decree in her favour from the Additional Subordinate Judge of Moradabad in January 1905, which has been reversed by a decree of the High Court at Allahabad.

The appellant's action was to recover certain jewellery alleged by her to have been deposited with the respondents (who were husband and wife) for safe custody, or Rs. 29,000 their value. She produced receipts for this large quantity of jewels, purporting to be signed on behalf of the respondents by their son, Sheo Narain Singh, which the respondents alleged to be forgeries.

The respondents denied this deposit and said that the only jewels they had received from the appellant had been deposited with them by way of security for two loans they had made to her of Rs. 2,500 and Rs. 1,000 respectively. In support of this story they produced promissory-notes for those amounts purporting to be signed by the appellant which the appellant in her turn alleges to be forgeries.

The dispute is, therefore, one entirely of fact, and under such circumstances great weight naturally attachs to the finding of the Trial Judge. The High Court, however, on appeal, directed that the evidence of a witness not called before the Trial Judge should be taken, and no that evidence, together with the general facts of the case, they came to a conclusion opposite to that reached by the Trial Judge.

The appellant, *Musammat* Durga Kunwar, was the mistress of one Chaudri Dhayan Singh who died in 1898. During his life she lived with him in a separate portion of his family dwelling-house, and after his death she continued there with his widow Jamna Kunwar and his son-in law Dharam Singh. For some time they kept on good terms, but disputes arose as to property and the appellant became solicitous about the security of her jewels. According to her story, she then decided to send the bulk of them, amounting to more than Rs. 30,000 in value, for safe custody to the respondents, who were relatives of Chaudri Dhayan Singh, but on bad terms with his re-

latives. This, she says, she did by the hand of her servant Himia (who was a niece of the female respondent Mathura) at the end of January 1903. Afterwards, on some date in February of the same year, she succeeded with much difficulty in getting away from the house where she had been living with the late Dhayan Singh's family, and went to live at a house of her own. Acting under the advice and with the assistance of the respondent Amir Singh she, on the 9th June 1903, instituted proceedings against *Musammat* Jamna Kunwar and Dharam Singh in respect of a *zemindari* called Phulpar which had been bought with her money. Her Pleader in this litigation was the Pundit Pirthi Nath whose testimony plays an important part in this case on her behalf. This gentleman is a lawyer in undoubtedly large practice and is described by the Additional Subordinate Judge as "a respectable and independent witness" and "a Pleader of uncommon integrity and reputation for independent character." He testifies that before the appellant had left Dhyan Singh's family, Amir Singh told him that her ornaments had already been sent to his (Amir Singh's) house. He adds that the first expenses of the litigation were defrayed by the sale of some of her jewels which were brought to Cawnpore by Amir Singh, and another witness, Chaudri Chandrabans Singh, for sale. The correspondence between Pirthi Nath and the appellant also shows that in January 1904 the appellant was demanding a return of the jewels from Amir Singh and was being met, as she says, by "promises as usual." As a result of this Pirthi Nath says he saw Amir Singh, who told him that he would return the jewels after the Phulpar litigation was over, and begged him (Pirthi Nath) to remove the appellant's suspicions as to his intentions in reference to her jewels. The Phulpar case was compromised on the 14th January 1904, but the jewels were not returned.

The respondents say that in March 1903 and in December 1903 the appellant had given to Amir Singh the two promissory notes for Rs. 2,500 and Rs. 1,000, mentioned above, which still remain unpaid. It is clear, however, that the appellant received a large sum of money on the Phulpar compromise, and was certainly in a position then to redeem her jewellery if it had in fact been pledged to secure these notes. Instead of demanding that this should be done, Amir Singh himself gave her a promissory note for Rs. 1,000 to secure money payable to her by Dharam Singh, and the demands by the appellant for her jewellery during this period, which are evidenced by the correspondence, met with no written refusal or explanation on the part of the respondents.

Evidence of similar admissions by both respondents was given by one of their relatives, Chaudri Chandrabans Singh. He spoke also to conversations with Jot Singh, a son of Amir Singh, in which Jot Singh said the jewels would be ret rned, and on behalf of his parents asked Rs. 3,000 as a fee for keeping them. It also appears, both from some apparently genuine correspondence and from the evidence of Pundit Damodar Dat, that Jot Singh was actively concerned in the dispute as to the jewels, and made varying promises in reference to their return. It is unnecessary to deal here with this evidence in detail. It is enough to say that, if believed, it amply establishes the appellant's case, and was certainly strong enough to make it incumbent on the respondents to meet it by personal denials.

Notwithstanding this, neither Amir Singh nor his wife Mathura Kumar (who was said to have received the jewels personally), nor Jot Singh ventured into the witness-box at the trial.

Another important witness was Himia, who, according to the appellant, had carried the jewels to the female respondent. No doubt, she ought, *prima facie*, to have been called by the appellant, but she was a relative of the respondents; she had left the appellant's service some time previously, and had been summoned by the respondents, whose conduct suggested that they were going to make her their witness. It was not unnatural, therefore, that the appellant should leave them to call her, but they did not do so. Under these circumstances, their Lordships think that the Additional Subordinate Judge was well justified in giving credence to the story told by the appellant and corroborated by witnesses of whose respectability and credit he had perhaps exceptional advantages for forming an opinion,

PADMA PRIYA DEBYA *v.* DHARMA DAS.

The respondents appealed. In the meantime Himia had died, but they asked and obtained leave from the High Court to take the evidence of one Amir Husain. This witness was called before the Subordinate Judge of Moradabad, and deposed that he had himself written the disputed promissory-notes and had seen the appellant sign them. There are some contradictions and peculiarities about the evidence on behalf of the respondents in regard to these notes, which cast a good deal of doubt on its value, but, without placing too much reliance on such discrepancies, their Lordships are of opinion that the evidence as to the notes does not suffice to displace the case of the appellant in regard to the jewellery, especially in the absence of any denial by the respondents and their son Jot Singh.

Their Lordships feel unable to concur in the view of the High Court that there was nothing established in the plaintiff's case which called for a reply from the defendants. Standing alone it was a strong case. All that the respondents have put against it is a denial by their son Sheo Narain of his alleged signature to the receipts for the jewellery and their evidence on a collateral question, *viz.*, the two promissory-notes. On the question of the signature to the receipts the Additional Subordinate Judge had the means, which he appears to have used, of testing Sheo Narain's handwriting, and his opinion was adverse to Sheo Narain's evidence.

On the question of the promissory-notes, the respondents' case was supported by the evidence of three witnesses. Two of them, Ganeshi Lal and Umed Singh, are men of low position. Ganeshi Lal's evidence is analysed by the Subordinate Judge and is shown to be of a character far from satisfactory. Umed Singh was a servant of Amir Singh, and Husain was, to say the least, a somewhat belated witness, considering that the genuineness of the promissory-notes was in issue at the trial.

Under such circumstances it is impossible to overlook the significance attaching to the refusal of the respondents and their son Jot Singh to enter the witness-box. It raises a presumption against them which Husain's evidence, and the rest of their case, certainly do not dispel, and on the whole, their Lordships think that the judgment of the Trial Judge should be allowed to stand.

Their Lordships will, therefore, humbly advise His Majesty that this appeal should be allowed, the decree of the High Court set aside, and that of the Subordinate Court restored with costs in both Courts. The respondents will pay the costs of the appeal, but they will be entitled to set-off in respect of the costs of the appellant's petition to admit further evidence which was dismissed on the 9th February last.

Appeal allowed.

Solicitors for the Appellant: *Messrs. Ranken, Ford, Ford* and *Chester.*

Solicitors for the Respondents: *Messrs. Barrow, Rogers* and *Nevill.*

(s. c. 15 C. W. N. 728.)

CALCUTTA HIGH COURT.

REGULAR CIVIL APPEAL NO. 27 OF 1909.

April 7, 1911.

Present:—Mr. Justice Chitty and Mr. Justice N. Chatterjea.

PADMA PRIYA DEBYA—OBJECTOR—APPELLANT

versus

DHARMA DAS DEB SARMA—PETITIONER—RESPONDENT.

Will—Proof—Execution—Handwriting—Government expert not cited and not cross-examined—Opinion not admissible.

The propounder of a Will should prove to the satisfaction of the Court beyond all possible doubt that it was executed in accordance with law and that the testator at the time of the execution was in a state of mind and body to be able to execute the Will and to fully appreciate what he was doing in the disposition of his property.

The opinion of the Government expert in handwriting who was not called and, therefore, not cross-examined, is inadmissible in evidence.

Appeal from the decree of the District Judge of Gauhati, dated November 9th, 1908.

Babu *Jadu Nath Kanjilal*, for the Appellant.

Moulvi *Nuruddin Ahmed* and Mr. *N. Bardalai*, for the Respondent.

JUDGMENT.—This appeal arises out of a petition of Dharama Nath Deb Sarma for Probate of an alleged Will of Narendra Narayan Sarma, dated the 24th of *Jaista* 1315. A caveat has been filed by *Musammat* Padma Priya Debya, the widow of the deceased Narendra Narayan. The learned Judge,

after considering the evidence, has ordered that Probate should issue, and the caveatrix has appealed.

Narendra Narayan died on the 25th of *Jaista* 1315, Sunday, at night. He is said to have executed this Will on the previous day. He died of cholera with which disease he was attacked on the 24th of *Jaista*, the Saturday. In these matters of Probate it is essential that the propounder of a Will should prove to the satisfaction of the Court beyond all possible doubt, or, as it has been said in a well-known case which is often cited, he must "satisfy the conscience of the Court," that the Will was executed by the alleged testator, that it was executed in accordance with law and that the testator at the time of the execution was in a state of mind and body to be able to execute the Will and to fully appreciate what he was doing in the disposition of his property. The question before us is, whether in this case the propounder has discharged this onus. After hearing the Pleaders on each side and carefully reading the evidence, we are of opinion that he has not. In the first place, as to the testator's condition of mind and body, he was, as we have said, seized with cholera, and it is suggested that though in the throes of that disease he still was able to summon the propounder, who was his nearest male relation, to get him to call in writers and witnesses, to dictate this Will which covers a page of foolscap paper, to have a draft prepared, to have the Will fresh copied and then to execute it. To show that the testator was in a position to do this, having regard to his condition and the illness from which he was suffering, very cogent evidence would have to be called. We have on the record the evidence of Dharma Nath Deb and of the writer Bali Narayan Choudury and of the witnesses. But they say very little with regard to the condition of the testator's mind or body. All they say is that the testator was in his sound senses. That is hardly, in a case of this kind, sufficient. Then, there are material discrepancies in the evidence of the witnesses themselves, particularly with regard to the removal from the house of all the moveable property and as to a list of the property being prepared when it had been removed into the courtyard: they do not agree with regard to the making of this list. Again, there is an element of doubt as to whether the Will was legally executed in the sense that it was executed by the testator in the presence of the witnesses. We are left in some doubt as to whether they actually saw the testator sign or whether he saw them sign. Their exact positions are not precisely stated: the testator is said to have been reclining on a cot just within the door of his house, and the witnesses are said to have been under the eaves in the courtyard—whether they could see or not does not appear. Then there is some doubt with regard to the signature itself. The signature is extremely like the one on Ex. A, which was made by the testator 15 years before. The similarity is very striking indeed—so striking as to cause suspicion. We may say that the learned District Judge was clearly in error when he took into consideration the opinion of the Government expert in hand-writing, who was not called as a witness in the case and, therefore, not subjected to cross-examination by the other side. The opinion of the expert was clearly inadmissible under those circumstances. Then we have a fact which appears from the Will itself, the fact as to the death of the testator's son. In the alleged Will the testator is made to say, 'I had a male child, but it lived only for two months and then died.' That would rather indicate death at some distance of time. One of the witnesses, Bali Narayan, says that the child died 4 or 5 days before the testator. The mother, however, and the child's uncle who are in a much better position to give evidence with regard to such matters and who were under no inducement to tell an untruth,—both swear that the child died the same day as the testator, that is to say, on the Sunday. If that is so—and there is no reason to disbelieve that evidence—it is impossible that the testator should have made such a remark in his Will, which (be it remembered) he is said to have dictated; he must have known whether his child was alive or dead at the time he dictated the Will. Under those circumstances, it appears to us that there are considerable elements of suspicion in the case and that Probate ought not to issue to the petitioner.

We accordingly set aside judgment and decree of the learned District Judge and dismiss the application for Probate with costs in both Courts. We fix the hearing fee in this Court at three gold *mohurs*

Appeal allowed.

(s. c. 13 C. L. J 503.)

CALCUTTA HIGH COURT.

APPLICATIONS FOR LEAVE TO APPEAL TO THE PRIVY COUNCIL.

Nos. 4 TO 9 OF 1910.

December 19, 1910.

Present:—Mr. Justice Mookerjee and Mr Justice Coxe.

BANGA CHANDRA DHAR—PLAINTIFF—PETITIONER

versus

JAGAT KISHORE ACHARYYA CHOWDHURY—DEFENDANT—OPPOSITE PARTY.

Civil Procedure Code (Act V of 1908), s. 110 and O. XLV, r. 4—Consolidation of suits—Pecuniary valuation—Appeal—Privy Council.

Where certain cases are tried together and decided by the same judgment, and the fundamental question in the cases, which goes to the root of the matter, is common to all the suits, they should be treated as consolidated for the purposes of pecuniary valuation for appeal to the Privy Council, although a substantial question of law arises in some of the cases only, and not in the others.

Applications for leave to appeal to the Privy Council.

Babus *Gobind Chunder Dey Roy* and *Gunada Charan Sen*, for the Petitioners.

Babus *Dwarka Nath Chuckerbutty* and *Satis Chunder Ghose*, for the Opposite Party.

JUDGMENT.—This is clearly a case governed by Order XLV, rule 4, of the Code of Civil Procedure of 1908. The fundamental question in the cases, which goes to the root of the matter, namely, whether the plaintiffs are the reversionary heirs of the last full owner, is common to all the suits. It is further not disputed that the cases were tried together and decided by the same judgment. But it is suggested that because a substantial question of law arises in some of the suits, rule 4 is not applicable. In our opinion, the case falls within the principle of the decision of this Court in the case of *Joogulkishore* v. *Jotendro Mohun Tagore* (1), which is in accord with *Khajah Asharulla* v. *Karoonamoyi* (2), *Bijnath* v. *Graham* (3) and *Deonarain Singh* v. *Guni Singh* (4), and has substantially been approved by the Legislature in rule 4. For the purposes of pecuniary valuation, the cases must consequently be treated as consolidated.

A certificate will, therefore, be granted.

(1) 8 C. 210.
(2) 4 C. L. R. 125.
(3) 11 C. 740.
(4) 34 C. 400.

This order will also govern the applications for leave to appeal to His Majesty in Council Nos. 5 to 9 of 1910 in which certificates will also be granted.

Leave granted.

(s. c. 4 S. L. R. 225.)

SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL SUIT No. 301 OF 1909.

October 3, 1910.

Present:—Mr. Leggatt, A. J. C.

GOKALDAS JETHANAND—PLAINTIFF

versus

CHANDIBAI WIDOW OF TOLARAM AND ANOTHER—DEFENDANTS.

Hindu Law—Partition—Evidence necessary to prove—Presumption—Burden of proof—Partition of part—Agreement to separate—Conduct of members—Statement in Will—Admissibility—Evidence Act (I of 1872), s. 32—Construction of document—Use of technical terms of Hindu Law.

There can be no partition without an intention to separate and though such an intention may be satisfactorily proved by evidence of conduct, direct proof of an intention to remain united will outweigh many acts which, though they may be more consistent with a state of partition, are not entirely inconsistent with a state of union

It is open to a family to effect partition of part only of the family property and leave the remainder undivided.

Muthusami Mudaliar v. *Nallaku Lantha Mudaliar*, 18 M. 418; and *Tottempudi Venkataratnam* v. *Tottempudi Sheshiamma*, 18 B. 611; *Appovier* v. *Rama Subba Aiyar*, 11 M I. A 75; 8 W. R. (P. C.) 1, relied upon.

Vaidyanath Aiyar v. *Aiyasamy Aiyar*, 32 M. 191; 9 M. L. J. 94; 5 M. L. T. 49; 1 Ind. Cas. 408, distinguished.

An agreement to separate is sufficient to effect partition: actual division of the property is not necessary.

Appovier v. *Rama Subba Aiyar*, 11 M. I. A. 75; 8 W. R. (P. C.) 1; *Musammat Porbati* v. *Chaudri Naunilal*, 11 Bom. L. R. 878; 6 A. L J. 597; 5 M. L. T. 427; 13 C. W. N. 987; 3 Ind. Cas. 195; 31 A. 412; 10 C. L. J. 121 and *Balkishen Das* v. *Ram Narain Sahu*, 30 C. 738, relied upon.

The question whether members of a joint Hindu family have separated or not is a question of fact to be decided according to the particular circumstances of each case.

Where an estate was originally ancestral and belonged to a joint Hindu family, the presumption is that it remains joint and he who alleges the contrary must prove partition or acts of separation.

Musammat Cheetha v. *Baboo Mihcen Lall*, 11 M.I.A. 369, followed.

Cesser of commensality, separate lodging, separate use of money for an apparently separate business and the conduct of the parties are all items of evidence which must be taken into account and to which due weight must be attached.

Ganesh Dutt Thakoor v. *Jewach Thakoorani*, 31 C. 262; 6 Bom. L. R. 1; 31 I. A. 10; 14 M. L. J. 1; 8 C. W. N. 146;

GOKALDAS *v.* CHANDIBAI.

Murari Vithoji v. *Makund Shivaji Naik Golatkar*, 15 B. 201, referred to.

A statement in the Will of a deceased co-parcener that he and his brothers were living, earning and holding property separately, is not evidence of separation, as it is not admissible under any clause of section 32 of the Evidence Act, nor under any other section of the Act.

Tottempudi Venkataratnam v. *Tottempudi Sheshamma*, 27 M. 228, relied upon.

When a Hindu uses about himself or his property terms which have a special technical meaning in Hindu Law, he must, in the absence of evidence to the contrary, be held to attach to those terms their special technical meaning.

Mr. *Wadhumal*, for the Plaintiff.

Mr. *Harchandrai*, for the Defendants.

JUDGMENT.—Plaintiff in his plaint, as finally amended, seeks for—

(*a*) a declaration that the property shown in the schedules annexed to the plaint was the joint property of plaintiff and his brothers, and that plaintiff is the owner thereof as sole survivor;

(*b*) possession of the properties shown in Schedule C in possession of defendant 1:

(*c*) for an injunction restraining defendants from interfering with the property, or recovering money from the arbitrator or debtors or rent from the tenants;

(*d*) and for costs.

Plaintiff alleges that at the death of his father Jethanand, Jethanand's brother, Versimal and Lalchand, and Jethanand's sons, Tolaram and Chotirmal and plaintiff formed a joint Hindu family; that Chotirmal died about 6 years ago; that on the 26th July 1905 Jiamal was appointed arbitrator, and on the 21st October 1908 he divided the property between Versimal and Lalchand and Jethanand's heirs, but not between Jethanand's heirs, *inter se*, as he was forbidden to do so by the reference; that Tolaram was joint with plaintiff and died about 6 months ago leaving plaintiff as sole survivor; that defendant No 1 claims the property as heiress under the Will and defendant No. 2 claims that her husband was separate from his brothers; that Tolaram executed the Will when he was not in a sound state of mind and owing to the undue influence of defendant No. 1; that Tolaram had no power to make the Will which is void; that defendants are attempting to induce the debtors to recognize them as the persons entitled to the property.

Defendant No. 1 in her written statement contended, *inter alia*, that plaintiff and deceased Tolaram were separate in estate, that plaintiff was not in possession of the property, but after Tolaram's death has, in collusion with the arbitrator, taken possession of it; that the defendant No. 1 is entitled to the property both under the Will and as the widow of a separated Hindu; that Tolaram was in a sound state of mind and not under undue influence when he made the Will; that the property was not joint and plaintiff has no cause of action; that Versimal and Lalchand were separate from Jethanand; that before the reference to arbitration the parties thereto were already separate, the arbitrator being only required to divide the property by metes and bounds.

Defendant No. 2 in her written statement contended that Versimal and Lalchand were separate from Jethanand, and Tolaram, Chotirmal, and plaintiff were separate *inter se*, that the parties to the reference were already separate and the effect of the award was merely to divide the property by metes and bounds, that plaintiff has obtained possession of property by collusion with the arbitrator, that defendant No. 2 claims to be owner because her husband Chotirmal was separate.

The following issues were settled:—

1. Does the suit lie, and is it duly stamped for declaration and injunction instead of possession or partition of the two properties?

2. Were the sons of Jethanand separate?

3. Were the properties Nos. 2, 6, 7 and 8 of the schedule to the plaint and the jewellery, and if so what jewellery, the separate estate of Tolaram?

4. Did Tolaram make a valid Will of these properties in favour of defendant No. 1?

5. In any case can they be claimed as heiress by defendant No. 1?

6. Were the Rs. 10,000 cash and the jewellery, and if so what jewellery, the separate estate of Chotirmal?

7. Can these properties be claimed as heiress by defendant Nos. 2?

8. Is defendant No. 2 entitled to one-third of the remaining properties?

As I have already found that plaintiff has really asked for possession, and as plaint-

iff has paid the necessary Court-fee, issue No. 1 does not arise.

Plaintiff having compromised with defendant No. 2, issues 6, 7 and 8 are dropped.

I find on all the remaining issues in the negative, for the following reasons:—

Issue 2 is the important issue in the case, for, if the finding on that issue is in the negative, Tolaram had no power to make a Will affecting joint property, and the widows of plaintiff's deceased brothers have no rights of ownership.

A large number of authorities have been qucted on both sides in order to show what is, or is not, proof of separation, but I think it is clear that each case must be treated on its own merits. Certain general principles are, no doubt, applicable to all cases, but the value of each kind of evidence must differ with differing circumstances.

Cesser of commensality, separate lodging, separate use of money for an apparently separate business, and the conduct of the parties are all items of evidence which must be taken into account and to which due weight must be attached, but the question still remains, what do these various items of evidence prove in the circumstances of the particular case. There is no doubt that where an estate was originally ancestral and belonged to a joint Hindu family the presumption is that it remains joint and he who alleges the contrary must prove partition or acts of separation; *Musammat Cheetha* v. *Baboo Miheen Lall* (1).

It has been laid down by the Privy Council that cesser of commensality in an element which may properly be considered in determining the question whether there has been a partition of joint family property but it is not conclusive. *Ganesh Dutt Thakoor* v. *Jewach Thakoorani* (2).

In *Murari Vithoji* v. *Makund Shivaji Naik Golatkar* (3), it was held that the conduct of the parties to that case proved a tacit agreement of enjoyment according to their shares. In that case, however, the several branches of the family had lived separate for forty or fifty years, had enjoyed during that period separate and distinct portions of the family property or portions of the property in regular rotation—had dealt with the separate portions in every respect as their own property, and in the survey records the lands were entered in the names of the several branches in respect of their separa e shares. There was, therefore, in that case, evidence far stronger than can be found in the present case and, as I shall show later, even the evidence of this kind which we have is, in this case, much weakened by other considerations.

Mr. Harachandrai contended that there has in this family been partial partition and that the presumption is that there has been entire partition, and he relies on the case of *Vaidyanatha Aiyar* v. *Aiyasamy Aiyar* (4) but there is no doubt that it is open to a family to effect partition of part only of the family property and leave the remainder undivided. *Muthusami Mudaliar* v. *Nallaku Cantha Mudaliar* (5) and *Tottempudi Venkataratnami* v. *Tottempudi Sheshiamara* (6). And the same is clear from the ruling in *Apporier* v. *Rama Subba Aiyar* (7) which is also an authority for the proposition, that an agreement to separate is sufficient to effect partition, and that actual division of the property is not necessary, and where the members of a family agree that the joint family property shall belong to and be enjoyed by the different members of the family in specified shares, the effect of it is that, as to the property so dealt with, there is a division of rights; the status of the family is changed, the tenancy of the property severed and converted from something, to use the language of the English law, like a joint tenancy into a tenancy in common, and the previously undivided family became by operation of law divided. *Musammat Parbati* v. *Chaudri Naunihal* (8) and *Balkishen Das* v. *Ram Narain Sahu* (9).

In the present case the joint family consisted originally of Versimal, Lalchand, Jethanand and Jethanand's sons Tolaram, Chotirmal and Gokaldas. Jethanand died in 1897 and in 1908 a reference to arbitration was made, Jiamal being appointed arbitrator. By

(1) 11 M. I. A. 369.

(2) 31 C. 262; 6 Bom. L. R. 1; 31 I. A. 10; 14 M. L. J. 8; 8 C. W. N. 146.

(3) 15 B. 201.

(4) 32 M. 191; 19 M. L. J. 94; 5 M. L. T. 49; 1 Ind. Cas 408.

(5) 18 M. 418.

(6) 18 B. 611.

(7) 11 M. I. A. 75; 8 W. R. (P.C.) 1.

(8) 11 Bom. L. R. 878; 6 A. L. J. 597; 5 M. L. T. 427; 13 C. W. N. 987; 3 Ind. Cas. 195; 31 A. 412; 1 C. L. J. 121.

(9) 30 C. 738.

his award he separated the shares of Versimal and Lalchand from that of the sons of Jethanand and from each other, but did not effect partition among the sons of Jethanand, and it is contended by Mr. Wadhumal that the sons of Jethanand remained undivided. Such a position is perfectly possible and intelligible. In *Durga Dei* v. *Balmakund* (10) where by an award the property of a joint Hindu family was partitioned, one share being given to the uncle and one to the two nephews and nothing was said as to the shares to be taken by the nephews, it was held on the evidence that the nephews still continued joint, but an agreement amongst the remaining co-parceners to remain united must be proved like any other fact. *Bala Bux* v. *Rukhmabai* (11).

It is then necessary to consider carefully the facts of the present case, the conduct of the parties, and their intentions as appearing from their conduct. Mr. Harchandrai admits that there is no direct proof of actual partition, but asks the Court to infer partition from the conduct of the parties. Their conduct must, therefore, be scrutinised with some care and it is necessary to bear in mind that before holding it proved that the family did partition the property, we must be satisfied that the parties definitely intended to do so. There can be no partition without an intention to separate, and though such an intention may be satisfactorily proved by evidence of conduct, direct proof of an intention to remain united will outweigh many acts which, though they may be more consistant with a state of partition, are not entirely inconsistent with a state of union.

There is not much dispute about the facts in the present case, though the parties differ widely as to the inference to be drawn from those facts. The following facts are all either admitted or proved by unimpeachable evidence:—

Before 1897 the family consisted of Versimal, Lalchand, Jethanand's sons Tolaram, Chotirmal and Gokaldas.

In 1897 Jethanand died leaving the others still undivded. There was a family business or *karkhana* in the name of Jethanand Nenumal in which all were interested. Jethanand lived separately from Versimal and Lalchand though they were admittedly still joint. Up to 1899 Tolaram used to draw from the firm Rs. 100 a month for his expenses and Chotirmal Rs. 50 and plaintiff Gokaldas Rs. 30. In 1900 plaintiff and his brothers began to live and mess separately and when they did so plaintiff's allowance was increased to Rs. 50 a month. All sums drawn by plaintiff and his brothers were entered in the firm's books in the account of Jethanand Nenumal, Versimal and Lalchand each having a separate account; in Jethanand's account, however, the entries mostly show by whom the money is drawn. In 1900 Versimal and Lalchand each drew Rs. 20,000 from the family business and Tolaram drew Rs. 8, 000 and Chotirmal and plaintiff who was then a minor each drew Rs. 7,000. Up to 1905 Tolaram drew all together about Rs. 19,000 and plaintiff drew about Rs. 8,700, while Chotirmal who died in 1904 had up to then drawn about Rs. 7,400. The sums they used in the purchase of *hundis* or deposited in the Bank, and plaintiff and Chotirmal each made his deposit in the name of himself and his wife making the money deposited payable to either or the survivor; and Tolaram bought immoveable property and had the *sanads* transferred to the name of his wife before he died. These sums of money were kept quite separate from the joint estate and the profits accruing from them do not appear any where in the family books. On the 15th January 1903, plaintiff wrote Ex. 1I to Tolaram calling upon him to hand over the keys of the safe in plaintiff's house, and to remove his goods from the house. On the 20th Tolaram, through Mr. Crouch, sent the reply (Ex. 3) in which he said that the house in which plaintiff was residing and the safe to which he referred were joint property and the interest of Tolaram was equal to that of plaintiff. In 1904 Chotirmal died and the expenses of his illness and funeral were debited to the account of Jethanand Nenumal in the family books as had been the expenses of Tolaram's illness two years before. Chotirmal had been getting an allowance of Rs. 50 a month, but after his death his widow (defendant No. 2) received only Rs. 25 a month. In 1908 by a reference dated the 26th July Versimal and Lalchand and Tolaram and plaintiff and defendant No. 2 appointed Jiamal arbitrator. In that reference (Ex. 1)it is stated that Jethanand and Versimal and Lalchand were "joint in business property, etc.," and it goes on to say that disputes have arisen between the

(10) 29 A. 93; 3 A. L. J. 683; A. W. N. (1906) 287.

(11) 30 C. 725; 5 Bom. L. R. 462; 7 C. W. N. 642; 30 I. A. 130.

parties to the reference "concerning settlement of the business partnership, separation from each other in property, business, etc., partition of property moveable and immoveable, goods and chattels, money, ornaments, cash, etc." Para. No. 2 of the reference states in express terms that the arbitrator has no power to decide disputes, if any, existing between the heirs of Jethanand and the reference provides that the partition shall be between Versimal of the first part, Lalchand of the second part and the heirs of Jethanand of the third part. In his award, dated the 21st October, the arbitrator stated that he was appointed to decide disputes regarding the partition of the joint property of the joint family; he decided that Jethanand and Versimal and Lalchand were members of a joint Hindu family. In paragraph 4 he states, -

"It appears that after Jethanand's death the parties have drawn large sums of money from the business to their separate account. The party of the third part raises a contention that all the acquisitions from the said drawings by the parties be put in hotchpot. The parties have taken moneys on their separate individual account and done business on their own personal account independently of the family business and treated themselves separate regarding these separate businesses for about 11 years I hold that it will be unjust and inequitable to put those acquisitions in hotchpot. I disallow the prayer of the third party."

Para. No. 12 enumerates the joint family property. Para. No. 14 speaks of the immoveable properties belonging to the joint family.

During arbitration proceedings, Tolaram built on a plot of land now in the possession of defendant No. 1; there is, however, no entry or document about his getting this plot from the arbitrator, and it is not at all proved that he intended to treat this as his own separate property.

In April 1909 Tolaram died and the expenses of his funeral were incurred by Versimal who gave defendant No. 1 a bill showing the amount due to him. Versimal also gave plaintiff a bill as defendant No. 1 said she had not the money then, but would pay later. Tolaram left a Will stating that he and his brothers were living, earning and holding property separately, but the Will is not evidence of separation, for, it is not admissible under any clause of section 32 of the Evidence Act nor under any other section of that Act: see also *Tottempudi Venkataratnam* v. *Tottempudi Sheshamma* (12). The present suit is the result of the disputes which arose after Tolaram's death.

There is no doubt that some of the facts which I have detailed are more consistent with the theory that plaintiff and his brothers had separated than with the theory that they had not, but I do not think that there is anything which is absolutely inconsistent with the latter theory which appears to me to be affirmatively proved by the conduct of the parties as evidenced by some of the above facts.

The withdrawal from the family business, of large sums by each brother just at the time they began to live and mess separately is certainly an indication of partition, as is also the deposit of the money in the names of the man and his wife or the transfer of *sanads* to the name of the wife; but it cannot be said that either of these facts is utterly incapable of explanation if the brothers were not divided. It is possible that the withdrawals were made so that each brother might make use of the joint funds for the benefit of the joint family and that, subsequently, each brother attempted to appropriate to himself the amount he had withdrawn and the profits he had made while still retaining his interest in the joint property, but an attempt of that nature would neither prove nor effect partition. Cesser of commensality is evidence of partition but is compatible with a state of union. The exclusion by the arbitrator from partition of the sums drawn from the family business by the parties to the reference would at most show that the parties were separate in so far as that money was concerned, but it is after all merely a decision by the arbitrator that that property is not to be brought into hotchpot, a decision he, as arbitrator, was entitled to make even were it never alleged by any one that there had been any partition at all. It is, moreover, noticeable, as stated by the arbitrator in para. No. 4 of the award, that the suggestion that this money ought to be brought into hotchpot, was actually made by Tolaram, plaintiff and defendant No. 2 so that clearly they themselves considered even that property to be joint. The fact tnat defendant No. 2 was a party to the

(12) 27 M. 228.

reference certainly does not show that there had been any partition between plaintiff and his brothers. If there had been, she would, as a party to the reference, be bound by the partition, and if there had not been, her joinder as a party to the reference would be unnecessary but would do no harm. It was, therefore, obviously advisable to join her, as the question whether there had or had not been a separation between plaintiff and his brothers was not before the arbitrator; and it is proved by defendant's own witness, Versimal, that plaintiff and Tolaram both objected to defendant No. 2 being a party to the reference. The fact that Versimal gave a bill for the expenses of Tolaram's funeral to defendant No. 1 proves nothing. He was separated and, provided he was re-paid, would not care from whom the money came.

Against this somewhat inconclusive evidence we have the fact that, though partition is alleged by defendant No. 1 to have taken place in or before 1900, Tolaram himself stated in 1903 that the house in which plaintiff lived was joint property and in 1908 the parties and the arbitrator all stated that the property then in dispute was the joint property of a joint family. These statements cannot be explained on the theory that there had been partition among the members of the family. Mr. Harchandrai contends that the words "joint property" and "joint family" in the letter (Exhibit No. 3) and in the reference and the award, are not used in the strict interpretation put upon them when used in Hindu Law, but really connote something analogous to a tenancy in common but I think it is clear that when a Hindu uses about himself or his property terms which have a special technical meaning in Hindu Law he must, in the absence of evidence to the contrary, be held to attach to those terms their special technical meaning.

The proof afforded by the statements contained in Exhibit No. 3 and in the reference and award is still further strengthened by the fact that the sums drawn by all the brothers from the family business were entered in one account, and the fact that after Chotirmal's death his widow only got half the allowance which he had been getting, which certainly looks as if she was merely receiving maintenance. Besides this, plaintiff Gokaldas has gone into the box and has denied the allegation that there was any partition; defendant No. 1, however, has not been examined even on commission. It is true that her brother has been examined, but he is now only 23 years old and cannot, of course, know what happened in 1900, and the partition is alleged to have taken place in or before that year, and cannot be expected to know very much of what has happened more recently in the family into which his sister has married. Quite apart from this, however, I feel no doubt on the facts mentioned above that no partition or separation of interest has ever been effected between plaintiff and his brothers, and plaintiff is now the sole survivor of the joint family of which they were members.

From my finding on this issue it follows that the properties, jewellery, and cash were not the separate estate of Tolaram; that he had no power to make the Will he did, and that the property cannot be claimed as heiress by defendant No. 1.

Plaintiff has compromised with defendant No. 2 and wishes the suit against her to be dismissed.

I, therefore, decree that a declaration do issue that plaintiff as sole survivor is the owner of the properties shown in Schedules A., B., C. and D. annexed to the plaint, and I direct that he do recover possession of the properties specified in Schedule C. from defendant No. 1; and I direct that an injunction do issue prohibiting defendant No. 1 from interfering with any of the property and from recovering any of the cash, *hundis*, debts, or rents.

Defendant No. 1 to bear plaintiff's costs and her own.

The suit against defendant No. 2 is dismissed.

Suit decreed against defendant No. 1.

(s. c. 4 S. L. R. 236.)

SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL SUIT No. 377 OF 1908.

October 10, 1910.

Present:—Mr. Leggatt, A. J. C.

PRAG NARAIN BARAGVA—PLAINTIFF

versus

THE KARACHI PORT TRUST—DEFENDANT.

Karachi Port Trust Act (VI of 1886), *s.* 87—*Bombay*

PRAG NARAIN *v* KARACHI PORT TRUST.

General Clauses Act (I of 1904)—'Person', meaning of—Limitation—Suit against Port Trust for compensation—Conveyance from Wharf to Import-Yard—Liability of Board—"Carrier", meaning of—Limitation Act (XV of 1877), Sch. II, Art. 30.

The word "person" in section 87 of the Karachi Port Trust Act includes the Board as well as any officer or servant of the Board, and any person acting under the orders of the Board.

Consequently, a suit brought against the Port Trust for anything done or purporting to have been done in pursuance of the Act must be brought within six months from the accrual of the cause of action.

A carrier is one who is employed to carry goods for others for reward. It is essential that the conveyance of goods should be for hire or reward, otherwise the person carrying is not technically a carrier.

Where, for the convenience of storage till delivery to consignee, the Board of the Port Trust remove goods from the Wharf to their Import-Yard and no fee is chargeable for such removal, such removal and storage is merely part of the act of landing and delivery just as the removal from one part of the Wharf to another would be.

The Board is not, therefore, acting as a carrier when taking goods to the Import-Yard for delivery to the consignee and Article 30 of the Limitation Act does not apply to a suit for compensation for damage done to the goods.

Mr. *Raymond*, for the Plaintiff.

Mr. *Tekchand*, for the Defendants.

JUDGMENT.—Plaintiff sues to recover from defendants Rs. 1, 133-7-1 with interest, alleging that in February 1908 a Litho-Machine was consigned to plaintiff and was handed over to defendants by the B. I. S. N. Co., who received from defendants a clean receipt for the same; that while it was in defendants' custody part of the machine was damaged by the careless and negligent handling of defendants' servants; and that the cost of replacing the damaged part would be Rs. 1,133-7-1; that the cause of action arose at Karachi about the end of February when the damage was discovered.

Defendants in their written statement contend that the suit is time-barred; that the receipt given to the ship does not show that every part of the machine was sound: that no damage was done to the machine while it was in defendants' custody, nor by the careless handling of defendants' servants; that the amount claimed is excessive.

Of the issues framed, the following were, by the request of both sides, tried as preliminary issues.

1. Is the suit barred under section 87 of the Karachi Port Trust Act?

2. Were the defendants in possession of the goods as carriers? If so, is the suit in time having regard to Article 30 of the Limitation Act?

I find on the first issue in the affirmative and on the first part of the second issue in the negative, for the following reasons:—

The machine with which this suit is concerned was consigned to plaintiff in one of the steamers of the B. I. S. N. Co. It was landed at Keamari by defendants under the provisions of the Karachi Port Trust Act, VI of 1886, which provides, in section 32, that the Board shall land all goods from any vessel coming to a wharf. The Board gave the ship what is called a clean receipt, which is one on which no apparent injury to the goods is noted, as required in the form of receipt given in Schedule C of the Act. Plaintiff contends that the fact that a clean receipt was given shows that the damage was not done on board the ship, but must have been done while landing the goods or while conveying them from the wharf to the Import-Yard. I am not now concerned with the question whether such a contention is correct, but must assume that it is, while considering the question of limitation.

For reasons which I will give when discussing the second issue, I think it is clear that defendants, when conveying the goods to the Import-Yard, were not acting as carriers; but that such conveyance was a necessary part of the landing of the goods and their delivery to the plaintiff. This being so, there can be no doubt that all that defendants did for the purpose of landing and delivering the goods, was done, or purported to be done, under the provisions of sections 32, 37, 43 and 46 of the Act, and, therefore, it was done, or purported to be done, in pursuance of the Act within the meaning of section 87. But that section provides that no suit shall be commenced against any person for anything done, or purporting to have been done, in pursuance of the Act after six months from the accrual of the cause of action of such suit. The plaint states that the cause of action arose at the end of February 1907, and as the suit was not filed until the 14th October 1908, it is apparently time-barred. Mr. Raymond for the plaintiff, however, contends that the word "person" used in section 87 does not include the Board, and points out that in the very next section the Board is spoken of as distinct from any servant or officer, and that throughout the Act the body of

Trustees, as a body, is always referred to as the Board. I think, however, that the word "person" in section 87 must be deemed to include the Board. The word is not defined in the Act, but we find in the General Clauses Act, Bombay Act I of 1904, that the word person shall include any Company or Association or body of individuals whether incorporated or not; and, according to sections 3 and 4 of the Act, the word person is to be so interpreted in any Act whether passed before or after Bombay Act I of 1904, unless there is something repugnant in the subject or context. I think there is no difficulty in giving the word person such a meaning in section 87 of the Karachi Port Trust Act. There appears to be no valid reason why the Board should not have the privilege of special notice and a special period of limitation which is undoubtedly enjoyed by the servants of the Board under the provisions of the section in question. The same principle would apply to a Municipality, and we find in section 167 of the District Municipal Act, Bombay Act III of 1901, a provision that no suit may be commenced against a Municipality or against an officer or servant of a Municipality or against any person acting under the orders of a Municipality for anything done in pursuance of the Act after 6 months from the date of the Act. The word person in section 87 of the Karachi Port Trust Act is not qualified as it is in the Municipal Act and is wide enough to include the Board as well as any officer or servant of the Board, and any person acting under the orders of the Board, and I must, therefore, hold that a suit brought against the Port Trust for anything done or purporting to have been done in pursuance of the Act must be brought within six months from the accrual of the cause of action, and this suit having been brought after the expiry of that period is, therefore, time-barred.

I now turn to the question whether the Port Trust are carriers, within the meaning of Article 30 of the Limitation Act, when conveying goods from the wharf to the Import Yard. After careful consideration, I am decidedly of opinion that they are not. It is, no doubt, open to the Port Trust to enter into a contract to carry goods and in that case they would undoubtedly be carriers, but such a business is not contemplated by the Act, and it would not be carried on in pursuance of the Act. Part V of the Act, from section 29 to section 59, relates to the powers and duties of the Board. Section 32 provides that the Board shall land and ship all goods from and in any vessel coming to the wharf and shall provide for the convenient shipment and landing and storing the goods. Section 43 gives the Board power to frame a scale of charges for landing, shipment, storage, and removal of goods, and for use of wharves, and for services to be performed by the Board or their servants. Section 46 provides for the detention of the goods till the charge are paid, and declares that charges in respect of goods to be removed are payable before the goods are removed. Section 49 provides that the Board may remove at the risk and expense of the owner to a warehouse, within or without the premises of the Board, goods left unclaimed for five days. Section 56 gives the Board power to frame bye-laws for regulating the removal of goods within and from the premises of the Board.

It is noticeable that under these sections the Board is authorised and required to land goods and to ship goods and is authorised to remove unclaimed goods within or from the premises of the Board and to charge for that remove, and is authorised to make bye-laws for removal within or from the premises, but is not authorised to charge for removal within or from the premises except in the special circumstances covered by section 49. There being a special provision in that section authorising a fee for removal in those circumstances, a charge for any removal not covered by that section is by implication prohibited, for, otherwise, the section would be quite superfluous; for, all removals including the removal of unclaimed goods and the charges therefor would be authorised and governed by the bye-laws framed under section 56 and by the scale framed under section 43. Section 56 authorises the Board to make bye-laws for removals within and from the premises and, therefore, such removals are perfectly legal, but they may not be charged for, except as provided in section 49. The removal from the wharf to the Import Yard of the goods to which this suit relates was not being made under section 49 and, therefore, no fee was chargeable; and, indeed, we find that, according

to the scale of charges framed by the Board under section 43, the fee charged, if delivery is taken at Keamari, is exactly the same as the fee charged if delivery is taken at the Mansfield Import Yard. So far then as the conveyance of the goods from the Wharf to the Import Yard is concerned, the Port Trust was not carrying them for hire. In the Imperial Dictionary a carrier is said to be one who is employed to carry goods for others for a reward. In Wharton's Law Lexicon a carrier is defined as one who undertakes to transport the goods of other persons from one place to another for hire. It is essential that the conveyance of the goods should be for hire or reward, otherwise the person carrying the goods is not technically a carrier. In the present case, then, as no fee was charged or chargeable for the conveyance of the goods, the Port Trust were not acting as carriers. Indeed, I think it is plain that the goods are not conveyed to the Import Yard for the benefit of the owner or consignee, but for the convenience of storage by the Board. Space at the wharf being limited and the provision there, of sufficient storage, a matter of difficulty, an Import Yard is provided at a place where more space is available. There goods are conveyed and stored and there delivery is made to the consignee, but the conveyance to the Import Yard and storage there is merely part of the act of landing and delivery just as would be the removal of the goods from one part of the wharf to another and their arrangement in a pile in order to make room for other goods. The Board is not, therefore, acting as a carrier when taking goods to the Import Yard for delivery to the consignee, and Article 30, therefore, does not apply.

As, however, the suit is barred under section 87 of the Karachi Port Trust Act I dismiss the suit with costs.

Suit dismissed.

(s. c. 4 S. L. R. 244.)

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 32 OF 1909.

October 21, 1910.

Present:—Mr. Hayward, J. C., and Mr. Waley Cohen, A. J. C.

TOTALDAS AND ANOTHER—APPELLANTS

versus

UTUMAL THAKUMAL—RESPONDENT.

Decree, construction of—Mortgage-decree based on award—Decree giving personal remedy as well as remedy against mortgaged property—Personal remedy not postponed—Duty of execution Court in interpreting decree—Mortgagee's right to personal remedy.

A mortgage-decree based on an arbitration award provided that a certain sum of money be paid to the decree-holder in instalments and that on default in the payment of any two consecutive instalments, the decree-holder would be entitled to recover the whole sum at once out of the properties mortgaged and from the judgment-debtor personally. There was no express provision postponing the personal remedy to the remedies against the mortgaged property. Default was made in the payment of the instalments and the decree-holder then sought execution against moveable property other than the mortgaged properties. The judgment-debtor objected that the personal remedy must be postponed to the remedies against the mortgaged properties:

Held, that the decree-holder was entitled to enforce the personal remedy before applying for enforcement of the decree against the mortgaged properties.

Obiter Dicta.

Per *Hayward, J. C.*—

There is no absolute rule preventing a mortgagee from obtaining a decree comprising both an independent personal remedy and remedies against the mortgaged property.

Ram Baran Singh v *Gobind Singh*, 28 A. 295; A. W. N. (1906) 7; 3 A. L. J 95, referred to.

The general principle of English Law is that a mortgagee has, in default of express agreement to the contrary, a personal remedy for the recovery of the mortgage-debt independently of his remedies against the mortgaged property; this general principle of English Law is applicable in proceedings according to justice, equity and good conscience in default of usage or Acts of the Legislature.

Dada Honaji v *Babaji Jagushet*, 2 Bom. H. C. R. 36 and *William Webbs* v. *William Lester*, 2 Bom. H. C. R. 52 referred to.

Per *Waley Cohen, A. J. C.*—

As long as a decree stands, on an execution application the Court can only construe the decree and cannot consider its merits.

Sheikh Budan v. *Ramchandra Bhunjaya*, 11 B. 537; *Grish Chunder Lahiri* v. *Shikhareswar Roy*, 27 C. 951 at p. 967 27 I. A. 110 4 C. W. N. 631; *Udwantsingh* v. *Tokhansingh*, 28 C. 353; 28 I. A. 57, relied upon.

On an application in execution a Court cannot read into a decree a provision which it does not contain merely because such an opinion might be expected.

TOTALDAS *v.* UTUMAL.

Sri Raja Papamma Rao v. *Sri Vira Pratapa*, 19 M. 249; 23 I. A 32, relied upon.

If a decree is ambiguous, an interpretation of it consistent with law will be preferred to one contrary to law.

Appeal against the order of the District Judge, Sukkur-Larkana.

Mr. *Tarachand Hasomal*, for the Appellants.

Mr. *Isarsing Hazarsing* for the Respondent.

JUDGMENT.

HAYWARD, J. C.—The judgment-creditors obtained a decree upon an arbitration award decreeing a certain sum of money to be paid to them in instalments by the judgment-debtor and entitling them to recover the whole sum at once "out of the properties mortgaged and from the defendant personally" upon default in payment of any two consecutive instalments by the defendant judgment-debtor. There was no express provision postponing the personal remedy to the remedies against the mortgaged properties. The judgment-creditors thereupon sought execution against moveable property other than the mortgaged properties. The judgment-debtor objected that the personal remedy against the moveable property must be postponed to the remedies against the mortgaged properties. The Sub-Judge of Shewan overruled the objection. The District Judg, Sukkur-Larkana, on first appeal, reversed this decision on the ground that the personal remedy against the moveable property must be postponed to the remedies against the mortgaged properties by reason of Order XXXIV, rule 6, of the First Schedule of the Civil Procedure Code, 1908.

This Court, on second appeal, has now to determine whether the decree upon a proper construction is a decree granting a personal remedy independent of the remedies against the mortgaged properties under Order XX or whether it is a decree merely granting a personal remedy in default of the remedies against the mortgaged properties under Order XXXIV, rule 6, of the First Schedule of the Civil Procedure Code, 1908. There is no absolute rule preventing a mortgagee from obtaining a decree comprising both an independent personal remedy and remedies against the mortgaged properties. Such a decree would appear to have been not uncommon from the case of *Ram Baran Singh* v. *Gobind Singh* (1) and to have been contemplated by the last paragraph of section 43 of the Civil Procedure Code, 1882, which has been re-enacted as Order II, rule 2, Explanation, of the First Schedule of the Civil Procedure Code, 1908. The general principle of English Law is that a mortgagee has, in default of express agreement to the contrary, a personal remedy for the recovery of the mortgage-debt independent of his remedies against the mortgaged property (Strahan's Equity, 1st Edition, Article CXXII, page 295) and this general principle of English Law is applicable in proceedings according to justice, equity and good conscience in default of usage or Acts of the Legislature as provided by section 26 of Bombay Regulation IV of 1827; *Dada Hanaji* v. *Babaji Jagushet* (2) and *William Webbe* v. *William Lester* (3). There would appear to be no particular usage and the only Act of the Legislature applicable is the restriction in the case of usufructuary mortgages as provided by section 15 of the Bombay Regulation V of 1827, and possibly the prescription of a special agreement to re-pay as provided by section 68 (*a*) of the Transfer of Property Act, 1882, of doubtful applicability as it has not yet been extended to Sind: see *Kadir Moidin* v. *Nepean* (4). It appears to me, in view of these considerations and in the absence of any express provision postponing the personal remedy to the remedies against the mortgaged properties, impossible to hold that the decree merely granted a personal remedy in default of the remedies against the mortgaged properties under Order XXXIV, rule 6, of the First Schedule of the Civil Procedure Code, 1908.

The Sub-Judge's order must, therefore, in my opinion, be restored and the District Judge's order reversed with costs throughout on the judgment-debtor.

WALEY COHEN, A. J. C.—In the year 1899 the suit out of which this execution application proceeds, was decided by a consent decree in the terms of an award obtained by the parties in private arbitration. While the decree stands, on an execution application the Court can only construe the decree and cannot

(1) 28 A. 295; A. W. N. (1906) 7; 3 A. L. J. 95.
(2) 2 Bom. H. C. R. 36.
(3) 2 Bom. H. C. R. 52.
(4) 26 C. 1 at pp. 6 & 7.

consider its merits *Shiekh Budan* v. *Ramchandra Bhunjgaya* (5); *Grish Chunder Lahiri* v. *Shoshi Shikhareswar Roy* (6); *Udwantsingh* v. *Tokhansingh* (7). And in the case before us the decree has not only not been reversed on appeal but the possibility of appeal, if any such exists on a consent decree of this nature, is barred by limitation. The decree which we have to construe commences by ordering that the defendant do pay to the plaintiffs the sum of Rs. 685 by certain instalments. It then goes on to say "as security for the payment of the above amount the below-described moveable and immoveable properties without possession have been mortgaged, which will not be disposed of in any way until the amount is paid up. The amount that will be recovered towards the mortgage-deed will all be paid to the plaintiffs and the properties will be redeemed from their mortgage claim. If two consecutive instalments are not paid on the dates fixed, then the whole amount then remaining due, together with interest at the running rate of annas ten per cent. per mensem, should be at once recovered out of the properties mortgaged and from the defendant personally."

The plaintiffs have applied for the execution of the decree by the attachment of the defendant's moveable property of the estimated value of Rs. 245. The learned Sub-Judge at Sehwan granted the application excluding certain cooking utensils, *Katoras* and *Lotas*, from execution; and rejected the plea of the defendant that the moveable property not subject to the mortgage could not be attached under the decree before exhausting the moveable and immoveable mortgaged property. The learned District Judge of Sukkur-Larkana reversed the order of the learned Sub-Judge and upheld the defendant's plea. The plaintiffs now appeal to this Courtand the only question pressed or argued before us is, whether the defendant's plea in bar of the order for execution against his unmortgaged moveable property is sustainable or not.

I am clearly of opinion that the plaintiff is entitled on the decree to execution against the defendant personally; and I fail to find anything in the decree postponing the personal relief to relief against the mortgaged property. On an application in execution a Court cannot read into a decree a provision which it does not contain—merely because such a provision might be expected. *Shiekh Budan* v. *Ramchandra Bhunjgaya* (5); *Sri Raja Papamma Rao* v. *Sri Vira Pratapa* (8). If a decree is ambiguous, the interpretation consistent with law will be preferred to that contrary to law; and on this principle I am of opinion that this decree would justify the attachment, but not the sale in execution of the mortgaged property without a decree for sale in a mortgaged suit. *Khiarajmal* v. *Daim* (9). This consideration confirms me, in my opinion, that the language of the decree affords no support to the defendant's contention. The two cases relied upon by the learned District Judge in his decision *Raj Kumar Singh* v. *Sheo Narain Singh* (10) and *Vasudeva Mudaliar* v. *Srinivasa Pillai* (11), were decisions under sections of the Transfer of Property Act which were not extended to this Province when the decree which we have to construe was passed. Moreover the sections of the Transfer of Property Act to which they refer concern not the execution of decree but the form of decree to be passed. This Court has only to construe a consent decree already passed and these sections of the Transfer of Property Act are, therefore, entirely irrelevant to the matter before the Court. The decision reported in *Vasudeva Mudaliar* v. *Srinivasa Pillai* (11) had reference to the proper form of order as to costs to be included in a mortgage decree for sale; that reported in *Raj Kumar Singh* v. *Sheo Narain Singh* (10), had reference to the interpretation of an order as to costs in an appeal is a suit for mortgage sale. Neither case has any bearing upon the construction of this decree, which is the only matter we have to decide. Order XXXIV, rule 6, to which the learned Judge refers, merely gives power to the Court to pass a personal decree without a fresh suit being filed in certain cases when the proceeds of the mortgage sale are insufficient to satisfy the amount due by the mortgagor on the mortgage account being taken in

(5) 11 B. 537.
(6) 27 C. 951 at p. 937; 27 I. A. 110; 4 C. W. N. 331.
(7) 23 B. 353; 23 I. A. 57.
(8) 19 M. 249; 23 I. A. 32.
(9) 32 C. 296; 2 A. L. J. 71; 1 C. L. J. 584; 7 Bom. L. R. 1; 9 C. W. N. 201; 32 I. A. 23.
(10) 35 C. 431; 12 C. W. N. 364; 8 C. L. J. 152.
(11) 30 M. 431.

accordance with Order XXXIV, rule 4. These rules can have no application to this case. They lay down the form of decree to be passed in certain cases, not the rules for the construction of decrees in execution. Moreover, they did not come into force until 1st January 1908 and the decree we are construing was passed in 1899.

It was suggested before us that the order of the learned Sub-Judge ran counter to some principle of law or equity. I can find no authority for such a suggestion. The learned District Judge appears to have thought that when a personal decree and relief under a mortgage were included in the same decree, the Court was bound to postpone the execution of the personal part of the decree until all possible relief under the mortgage had been exhausted. There is no provision in the Transfer of Property Act which contains any such principle and the principle runs counter to Common Law and Equity authorities in England from a very early date. Though, prior to the passing of the Judicature Act of 1873 in England, the relief of a personal decree could be obtained only in the Common Law Court and the Equitable relief of sale or foreclosure on a mortgage only in the Courts of Equity, the mortgagee could always pursue concurrently all the reliefs to which he was entitled in both Courts and the High Court has, since the Judicature Act, refused to postpone personal relief until the time when equitable relief by sale or foreclosure could also be obtained, though, as decided in the two cases on which the learned District Judge relies, *Raj Kumar Singh* v. *Sheo Narain Singh* (10) and *Kamalamma* v. *Komandur Narasimha Charlu* (12), the costs attributable to the mortgage relief in the decree can only be recovered at the time when the mortgage relief in the decree can be executed, not at the time when the personal relief contained in the decree can be executed. *Farrer* v. *Lacy Hartland & Co.* (13).

I think it right to add, for the purpose of avoiding misconception, that this case appears to me to be a very simple one and but for the judgment of the learned District Judge, I should have been prepared to decide it by saying that the decree we have to construe is clear and unambiguous. As, however, the learned District Judge based his decision on a statement of general principles which, though irrelevant to the matter he had to decide, are erroneous. I have thought it proper to state what I consider to be the law in regard to the principles contained in the judgment of the learned District Judge. The reference to these principles must not be taken to qualify my view of this case that the only question for decision is the proper construction not of a mortgage decree, but of an anomalous decree passed by consent and that the decree, being clear and unambiguous, the sole duty of the Court is to carry it into execution.

I agree that the order of the District Judge must be reversed and the order of the learned Sub-Judge restored, and the respondent must pay the costs of this appeal and of the proceedings in the Court below.

Appeal allowed.

(12) 30 M. 464; 17 M. L. J. 317; 2 M. L. T. 359.

(13) 31 Ch. D. 42; 55 L. J. Ch. 149; 53 L. T. 551; 34 W. R. 22.

(s. c 4 S. L. R. 260.)

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 40 OF 1909.

November 24, 910.

Present:—Mr. Pratt, J. C. and Mr. Hayward, A. J. C.

TOPANMAL GORIMAL AND OTHERS—APPELLANTS

versus

MENGHOMAL AMROOMAL AND ANOTHER—RESPONDENTS.

Hindu Law—Partnership—Joint family trading firm—Power of representing firm—Manager.

In the case of a joint Hindu family firm, the rights and liabilities of the partners cannot be decided by exclusive reference to the Contract Act but must also be considered with reference to the general rules of Hindu Law which regulate the transactions of united families.

Samalbhai v. *Someshwar*, 5 B. 38 followed.

In the case of an ordinary partnership, the acts of each partner such as are necessary for, or are usually done in the conduct of, the business are binding on the co-partners. But in the case of a Hindu joint family firm, the power of representing the firm is limited to the Manager or to adult members acting as Managers

Ramlal v. *Lakhmichand*, 1 B. H. C. R. App. 51; *Sakorbai* v *Maganlal*, 25 B. 206, followed.

Appeal against the decision of the First Class Sub-Judge, Sukkur.

Mr. *Isards Udharam*, for the Appellants.

Mr. *Kimatrai Bhojraj*, for the Respondents.

JUDGMENT.—The suit was on an account and the only item contested in this appeal is the sum of Rs. 288-12-11, being loss on grain purchased and sold by the defendants as commission agents for the plaintiffs-appellants. The Court of first instance disallowed this item for two reasons,—

(1) that the defendants had not sold in accordance with the instructions given by plaintiff No. 2 Pokarmal, and

(2) that Pokarmal had no authority to give instructions, as the manager of the plaintiffs' firm was defendant No. 1 Topanmal, the father of Pokarmal.

The lower Appellate Court has, however, allowed the plaintiffs credit for the item. It has omitted altogether to consider the first reason given by the Court of first instance, *viz.*, that the sale was not made in accordance with such instructions as were given. It has decided that Pokarmal had authority to give instructions as he was a partner in the joint family firm of the plaintiffs. The learned Sub-Judge appears to rely on section 251 of the Contract Act and this is the section to which we have been referred in argument.

But it has been held that in the case of a joint Hindu family firm the rights and liabilities of the partners cannot be decided by exclusive reference to the Indian Contract Act, but must be considered also with reference to the general rules of Hindu Law which regulate the transactions of united families. *Samalbhai* v. *Someshar* (1).

The reason for this distinction is clear. A partnership by contract is formed on the personal confidence that each partner has in the other. In such a partnership if there is no express stipulation to the contrary, each partner has a right to take part in the management of the business (section 253, Indian Contract Act) with the necessary consequence that acts done by him such as are necessary for or usually done in the conduct of the business are binding on his co-partners (section 251, Indian Contract Act). On the other hand, a Hindu family firm is very often not based on contract at all. The interest of the partners is acquired by birth and the firm must include many members who are incompetent to or are not allowed to take part in its management. The element of mutual confidence which is the essence of a partnership contract is wanting and, although the business is carried on for the benefit of all, there is no implication that any one member has the right to take part in the management of the business or to bind the firm by acts done within the scope of that business. The Hindu Law does not give any co-parcener other than the manager the right to alienate joint family property and accordingly in regard to joint family firms the rule is that the power of representing the firm is limited to the manager or to adult members acting as managers. This rule was laid down in 1863 in the judgment of Sir Mathew Sause in *Ramlal* v. *Lakhmichand* (2) and it has been consistently followed ever since. I refer to the case of *Sakorbai* v. *Maganlal* (3) and the cases there cited. The instructions given by Pokarmal would not, therefore, be binding on the firm unless it were found as a fact that Pokarmal usually acted as manager with his father.

The lower Appellate Court's judgment contains the following passage: "In any case Pokar's order authorizing the re-sale was never countermanded and I can at least presume that his father acquiesced in it." It is difficult to say if this is a finding that there was ratification, for the learned Sub-Judge does not say whether Topanmal was aware of the instructions given by Pokarmal. Again, there is a suggestion that Pokarmal's share in the firm was bound. But if Pokarmal did not represent the firm, the firm would not be bound. What remedies the defendants might be able to obtain in a suit against Pokarmal personally on the ground of pretended agency, and how far a decree against Pokarmal personally might be executed against his share in the joint property, is a question that does not arise in this case.

We remand the case to the lower Appellate Court for trial of the following issues:—

(1) 5 B. 38.

(2) 1 B. H. C. R. App. 51.

(3) 25 B. 206.

HAYATU v. GHULAM HUSSEIN SHAH.

1. Did the defendants sell in accordance with the instructions given by Pokarmal?

2. Did Pokarmal usually act with Topanmal as Manager of the family business?

3. Was Topanmal aware of the instructions given by Pokarmal, and if so, did he by his conduct imply a ratification of those instructions?

Both parties to be at liberty to call evidence. Finding and evidence to be certified in two months.

Case remanded.

(s. c. 4 S. L. R. 264.)

SIND JUDICIAL COMMISSIONER'S COURT.

CIVIL SUIT No. 270 OF 1910.

December 5, 1910.

Present:—Mr. Hayward, A. J. C.

Bibi HAYATU—PLAINTIFF

versus

Sayad GHULAM HUSSEIN SHAH IBRAHIMSHAH—DEFENDANT.

Dekkhan Agriculturists' Relief Act (XVII of 1879), *s.* 11—*Civil Procedure Code (Act V of* 1908), *ss.* 15, 20, 21, *O. VII, r.* 10—*Jurisdiction—Suit instituted in Court of Judicial Commissioner—Defendant agriculturist and residing within the jurisdiction of another Court—Objection raised late—Return of plaint.*

A suit for maintenance and deferred dower was brought in the Court of the Judicial Commissioner, Sind. At a late stage of the proceeding, the defendant pleaded that he was an agriculturist residing within the jurisdiction of the Sub-Judge, Kotri, and that, therefore, the case was only triable in the latter Court. Plaintiff replied that notwithstanding the provisions of section 11 of the Dekkhan Agriculturists Relief Act, the suit should be tried in the Court of the Judicial Commissioner as a Court of concurrent jurisdiction:

Held, that in view of the imperative wording of section 15 of the Civil Procedure Code and of section 11 of the Dekkhan Agriculturists' Relief Act, the suit must be instituted and tried in the Court of the Sub-Judge, Kotri.

Nidhilal v. *Mazhar Husain*, 7 A. 230, dissented from.

H. H. Mir Husseinali Khan v. *H. H. Mir Abdul Hussein Khan*, 1 S. L. R. 121 at p. 123, followed.

When it is discovered at any stage in the original proceedings that the suit ought to have been instituted in a different Court, the plaint should be returned for presentation to that Court under Order VII, rule 10, Civil Procedure Code.

The discovery at a late stage is a matter for consideration only on appeal or revision under section 21, Civil Procedure Code.

Mr. *Dipchand T. Ojha*, for the Plaintiff.

Mr. *Isardass*, for the Defendant.

JUDGMENT.—The plaintiff sues defendant for Rs. 965 alleged to be due on account of maintenance and deferred dower. The defendant now pleads that he is an agriculturist, residing at Tatta, and that the suit is only maintainable in the Court of the Sub-Judge, Kotri, and not in this Court.

It appears to me this plea must prevail. It is not denied that defendant is an agriculturist residing within the jurisdiction of the Sub-Judge, Kotri, but it is urged on the authority of the case of *Nidhilal* v. *Mazhar Husain* (1) that the provisions of section 15, Civil Procedure Code, are discretionary and would admit of the suit being tried in this Court as one of concurrent jurisdiction, notwithstanding the provisions of section 11, Dekkhan Agriculturists' Relief Act, read with section 20, Civil Procedure Code. It appears to me impossible to follow the decision in the case of *Nidhi Lal* v. *Mazhar Husain* (1), in view of the remarks made in the case of *H. H. Mir Husseinali Khan* v. *H. H. Mir Abdul Hussein Khan* (2) by a Bench of this Court. The former case appears to have proceeded on the doctrine that a donee of a benefit may exercise the same or not at his pleasure, which, with all due deference, would seem to me inapplicable to a Court and more especially so in view of the imperative wording of section 15 of the Civil Procedure Code and of section 11, Dekkhan Agriculturists' Relief Act, read with section 20, Civil Procedure Code. When it is discovered at any stage in the original proceedings that the suit ought to have been instituted in a different Court the plaint must be returned for presentation to that Court under Order VII, rule 10, Civil Procedure Code. The discovery at a late stage is a matter for consideration only on appeal or revision under section 21, Civil Procedure Code. The plaint must, therefore, be returned for presentation to the Court of the Sub-Judge of Kotri following the remarks made in the case of *H. H. Mir Husseinali Khan* v. *H. H. Mir Abdul Hussein Khan* (2) by the Bench of this Court. In view of the late stage at which this question of jurisdiction was raised, each party must bear his own costs.

Plaint returned for presentation to proper Court.

(1) 7 A. 230.
(2) 1 S. L. R. 121 at p. 123.

In the matter of DHANBAI.

(s. c. 4 S. L. R. 266.)

SIND JUDICIAL COMMISSIONER'S COURT.

MISC. CIVIL APPLICATION No. 16 OF 1910.

December 7, 1910.

Present:—Mr. Pratt, J. C.

In the matter of DHANBAI WIFF OF HARCHANDRAI—APPLICANT.

Succession Certificate Act (VII of 1889) – Minor representative –Right of guardian to apply for certificate—Application through next friend not competent.

The legal guardian of a minor has the right of management of the minor's estate and has, therefore, an interest in a debt due to the minor and a right to collect it.

Ex parte Gangadhur, 28 B. 344, followed.

Whenever a succession certificate is required to collect a debt due to the estate of a deceased person and the representative is a minor, the requirements of the Succession Certificate Act are sufficiently complied with if the application is made by the legal guardian of the minor.

A certificate cannot be granted on an application made by a minor himself through his next friend.

Harjus Rai v. *Rameswar*, 20 A. 354, dissented from.

Mohori Bibi v. *Dharamdas*, 30 C. 539, referred to.

Mr. *Assanmal*, for the Applicant.

JUDGMENT.—This is an application for a Succession Certificate to collect debts due to a minor Dhanbai. It is made by the minor through her next friend, her husband Harchandrai. The case has been fixed for hearing of the preliminary question whether a minor can apply for a certificate under Act VII, 1889 through a next friend.

Mr. Assamal relies on the case of *Harjus Rai* v. *Rameswar* (1). The question was there answered in the affirmative and the judgment proceeds on two grounds. *First* that the petitioner must be the minor, for section 6 (1) (*d*) and 7 (2) refer to an interest in the debt vested in the petitioner; and *secondly* because the Act contains no negative provision corresponding to those in sections 183 and 189 of the Succession Act as to Probates and Letters of Administration. The second reason is not entitled to much weight. The sections of the Succession Act also forbid issue of Probate and Letters of Administration to lunatics It could hardly be contended that the mere fact that there is no similar provision in the Succession Certificate Act implies that the Legislature contemplated the issues to lunatics of certificates to collect debts on succession. As to the first reason it is true that the interest in the debt must be in the petitioner, but it was not considered (1) whether the collection of a debt would be facilitated by empowering a minor to collect it, or (2) whether another person might not apply on the ground that he was interested in a debt due to a minor.

The Allahabad judgment was before the decision of the Privy Council in *Mohiri Bibi* v *Dharamdas* (2) and it is now at any rate obvious that it would be a futile proceeding to issue a Succession Certificate to a minor. Again, it was pointed out in *Ex parte Gangadhur* (3) that the legal guardian of the minor has a right of management of the minor's estate and has, therefore, an interest in a debt due to the minor and a right to collect it.

Whenever, therefore, a succession certificate is required to collect a debt due to the estate of a deceased person and the represe tative is a minor, the requirements of the Act are sufficiently complied with if the application is made by the legal guardian of the minor.

Mr. Assanmal suggests that the certificate might be made out in the name of the next friend, but this suggestion ignores the true character of a next friend. A next friend is only a volunteer who, at the risk of costs, undertakes to protect the minor's interest in a suit or application. His limited right of representation ceases with the application and he has no power of management of the minor's estate.

Mr. Assanmal next suggests that the application be treated as one made by Harchandrai as natural guardian of his minor wife. But that would involve consideration of the question whether the natural guardian was *de facto* guardian and, further, I should not be inclined to recognize the rights of a natural guardian in a summary proceeding until he had brought himself under the control, and the minor under the protection, of the Court by being appointed legal guardian under Act VIII of 1890.

I, therefore, adjourn the hearing of the application for two months in order to enable the husband to be appointed legal guardian of his minor wife's property and for amendment of the application so as to make the guardian the petitioner.

Application ordered to be amended.

(1) 20 A. 354.

(2) 30 C. 539; 30 I. A. 114; 5 Bom. L. R. 421; 7 C. W. N. 441.

(3) 28 B. 344.

AMIBAI *v.* MOOSO RAHIMTOOLA.

(s. c. 4 S. L. R. 271.)

SIND JUDICIAL COMMISSIONER'S COURT.

FIRST CIVIL APPEALS NOS. 48, 51 AND 52 OF 1909.

December 9, 1910.

Present:—Mr. Pratt, J. C., and Mr. Waley Cohen, A. J. C.

AMIBAI, WIDOW OF *Haji* ZAKRIO—APPELLANT

versus

MOOSO RAHIMTOOLA AND OTHERS—RESPONDENTS

AND

Haji HASHIM, *Haji* RAHIMTOOLA AND ANOTHER—APPELLANTS

versus

MOOSO *Haji* RAHIMTULLAH AND ANOTHER—RESPONDENTS

AND

Haji HASHIM, *Haji* RAHIMTOOLA AND ANOTHER—APPELLANTS

versus

AMIBAI, WIDOW OF *Haji* ZAKRIO AND ANOTHER—RESPONDENTS.

Decree—Consent-decree, effect of—Construction—Compromise—Widow—"Absolutely".

When the parties to a suit agree to certain terms and these terms are embodied in a consent decree by a Court having jurisdiction to deal with the matters in suit, the decree, until it is set aside, is binding on the parties thereto and cannot be objected to on the ground that, if the matter had been contested, the Court would not have passed it.

Kherajmal v. *Daim*, 32 C. 296; 2 A. L. J. 71; 1 C. L. J. 584; 7 Bom. L. R. 1; 9 C. W. N. 201, followed.

In a compromise for partition between co-parceners, a widow was allowed certain property absolutely in the same manner as if the property had been partitioned under a decree of Court:

Held, that the widow took an absolute interest in the property.

Appeals against the decision of the Additional Judicial Commissioner of Sind.

Mr. *Hirdaram*, for Mooso Rahimtullah.

Mr. *Raymond* for *Haji* Hashim and another.

Mr. *Hurchandrai*, for Amibai.

JUDGMENT.—These three appeals which concern the same dispute were by consent heard together.

The main facts covering the three cases are admitted. One Rahimtoola, a Cutchi Memon, had two wives Rahmat and Mariam. By Rahmat he had three sons Mooso, Hashim and Abdulla. By Mariam he had one son Zakrio. Amibai, the appellant in Appeal No. 48, is the widow of Zakrio. Hashim and Abdulla are the appellants in Appeal No. 51 of 1909, and also in Appeal No 52 of 1909. Mooso is a respondent in all three appeals, and Amibai, Hashim and Abdulla are respondents in the appeals in which they respectively are not appellants.

Mooso separated from the joint family in the life-time of Rahimtoola, *i. e.*, in 1881. In 1892, Rahimtoola made a Will and by Suit No. 3 of 1892, which was apparently instituted after his death in that year, the Will was declared invalid and inoperative, on the ground that Rahimtoola was joint with Hashim, Abdulla and Zakrio and all his property joint family property.

Hashim and Abdulla were the plaintiffs in this suit, and Zakrio, Mariam and Umer and Ahmed, two minor sons of Mocso, were the defendants, not apparently in their own right, but as legal representatives of Haji Rahimtoola, deceased. The learned Judge who originally tried the suit, and the Sadar Court to which an appeal was made evidently thought the two sons of Mooso had no interest in the joint family property, and were put in at the instigation of Mooso, that he might use them as a pretext for pressing a claim, to which his separation in 1881 disentitled him and his descendants, and he as guardian *ad litem* of his minor sons was ordered to pay their costs of the suit, while plaintiffs and the other defendants got their costs from the joint family property.

In 1895, Zakrio brought a suit for the partition of the joint family property against Hashim, Abdulla, Mariam, Amibai and Rabhiabai, daughters of Mariam and Rahimtoola deceased, by their guardian *ad litem* Mariam and Ayoob and Adam, sons of Khatijabai, by their guardian *ad litem* Khatijabai. This suit was compromised and a consent decree was passed in the terms of the compromise which was certified by the learned Judge to be in the interest of the minors. By the consent decree the claim of Ayoob and Adam was satisfied by a payment to Khatijabai of Rs. 2,000 on their behalf.

The claims of Hashim, Abdulla, Mariam, Zakrio and Mariam's two daughters Amibai and Rabhiabai were settled in the following terms: "The parties thereto shall be the only persons among whom those twelve plots with buildings thereon shall be partitioned and at such partition the said

Haji Hashim, and Haji Abdulla shall take one half share thereof and the said Haji Zakrio and the said Mariam shall take the other half share of the said parties which shall respectively become owners thereof absolutely in the same manner as if the said property had been partitioned under a decree of the Court and the share to be taken by Haji Zakrio and Mariam shall be managed by the said Mariam during the minority of the said Haji Zakrio jointly with any person who may be appointed by her on behalf of the said Haji Zakrio."

It was further provided that Hashim and Abdulla were to maintain their grand-mother out of the share which came to them and Zakrio and Mariam to maintain till marriage and pay the marriage expenses of Amibai and Rabhiabai out of the share which fell to them. The parties thereto in the passage quoted above clearly means Hashim, Abdulla, Mariam, Zakrio and Amibai and Rabhiabai, daughters of Mariam. Mariam died in 1904. Zakrio died after 8 months before the suit filed out of which Appeal No. 48 of 1909 arose. Only two questions were pressed in the three appeals in this Court.

1. Has Mooso any claim to a share in the property which Zakrio and Mariam obtained under the consent decree in Suit No. 71 of 1895?

2. Have Hashim and Abdulla any claim to share in the said property?

The answer to the first question appears to us to be so clear as to leave no room for argument. Mooso separated in 1881 from the joint family. He had no interest in the estate of Rahimtoola, as it was joint family property — nor in the subject-matter of the suit in 1895. It is immaterial whether the share obtained in the compromise by Mariam was a life-estate or an absolute share. If Mariam took an absolute estate under the compromise of 1895, then there is no reversion but, in case she died intestate, an inheritance of her property to Zakrio. If Mariam took only a life-estate under the compromise of 1895, the reversion would go to Zakrio, Hashim and Abdulla, and any others who were joint with them in 1895 when the partition took place. The error into which the learned Additional Judicial Commissioner has fallen is one of the fact. Mooso had no reversionary rights to the joint family property after 1881 when he separated from it. The compromise of 1895 could not, therefore, be said to affect or deprive him of rights which he had for 15 years ceased to have.

The second question is more difficult, and depends upon the interpretation of the consent decree in Suit No. 71 of 1895. On the facts, it matters little whether the decree is interpreted as conferring on Zakrio and Mariam, a joint and absolute estate or an absolute estate as tenants-in-common. The sole question is, whether Mariam took an absolute estate under the decree.

Mr. Harchandrai for Amibi relies upon the repeated use of the word 'absolutely' in the portion of the decree quoted above. Mr. Raymond relies upon the words "in the same manner as if the property had been partitioned under a decree of the Court" and argues that this qualification limits the share which Mariam takes to the share which the Court would have given her if the suit had been fought to the finish — which, according to Mr. Raymond's arguments, would be only a life-estate.

The simple answer to this argument is, that if the words quoted have the meaning and effect which Mr. Raymond suggests, the consent decree is indeed a futile document deciding nothing and only postponing the evil day when a decision must be fought out in Court. The consent decree was drawn up by a competent Pleader and sanctioned by the Court and it is inconceivable that any such nugatory result can have been intended particularly when then as now, the exact estate which a widow takes on partition by the Court according to law, was the subject of much difference of opinion. See Mayne, 7th Edition, section 621.

We read the words on which Mr. Raymond relies as re-inforcing the word absolutely. Hashim and Abdulla as well as Zakrio and Mariam take their shares as absolutely as if the suit had been contested and the Court had decreed it to each of them absolutely.

Mr. Raymond, suggested but hardly pressed, the objection that Hashim and Abdulla could not agree to a compromise which consisted partly in the transfer by them of a mere *spes successionis*. There are two answers to this, either of which is sufficient. Hashim and Abdulla, at the time when the compromise of 1895 was come to, were co-parceners in joint family property out of which Mariam had only a right to maintenance. They had

certain vested, but undetermined rights of ownership in the property, not a mere possibility of succession. They obtained certain determined vested rights in exchange for other undetermined vested rights. Were such an arrangement void as involving the surrender or transfer of a *spes successionis* no partition would be valid.

The otheranswer is, that when the parties to a suit have agreed to certain terms and those terms are embodied in a consent decree of the Court, which had jurisdiction to deal with the matters in suit, the decree until it is set aside must be taken to be binding on the parties to the suit and cannot be objected to on the ground that the Court, if the matter had been contested, would not have passed it. *Kherajmal* v. *Daim* (1).

The result is, that Appeal No. 48 of 1909 is allowed and Mooso must pay the costs of Amibai both in this Court and of Suit No. 266 of 1908 in the Court below. Hashim and Abdulla must bear their own costs both in Suit No. 266 of 1908 in the Court below and in Appeal No. 48 of 1909 in this Court. Suit No. 266 of 1909 must be dismissed with costs.

Appeal No. 51 of 1909 must be dismissed with costs. Hashim and Abdulla must pay the costs of Amibai both in the Court below and in this Court. Mooso must bear his own costs both in the Court below and in this Court. Suit No. 272 of 1908 must be dismissed with costs.

Appeal No. 52 of 1909 must be dismissed with costs. Hashim and Abdulla must pay the costs of Amibai in this appeal. Mooso must bear his own costs.

It is, perhaps, necessary to add that in the view which we take of this case, it has been necessary for us to discuss many of the interesting questions of law which are discussed by the learned Additional Judicial Commissioner in his judgment in Suits Nos. 266 and 272 of 1908. It must not be taken that we approve or differ from the views expressed in the judgment, except in so far as they are expressly dealt with in our decision.

Decree varied.

(1) 32 C. 296 ; 2. A. L. J. 71; 1 C. L. J. 584; 7 Bom. L. R. 1 ; 9 C. W. N. 201; 32 I. A. 23.

(s. c. 4 S. L. R. 276.)

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 12 OF 1909.

December 9, 1910.

Present:—Mr. Pratt, J. C., and Mr. Hayward, A. J. C.

NARAINDAS DIPCHAND—APPELLANT

versus

H. W. D'CRUZ—RESPONDENT.

Contract Act (*IX of* 1872), *ss.* 16, 19*A*—*Exorbitant interest—Power of Court to reduce—Undue influence—Proof - Urgent need of money.*

In order to obtain a reduction of the rate of interest agreed upon in a promissory note, the defendant must plead and prove that the contract was induced by undue influence.

Mere urgent need of money by itself is no proof that the obligee was in a position to dominate the will of the obligor.

Sunder Koer v. *Rai Sham Krishen*, 34 I. A. 9; 34 C. 150; 4 A. L. J. 109; 11 C. W. N. 249; 5 C. L. J. 106; 17 M. L. J. 43; 9 Bom. L. R. 304; 2 M. L. T. 75, followed.

Appeal against the decision of the District Judge, Sukkur-Larkana.

Mr. *Isardas Udharam*, for the Appellant.

Mr. *Rupchand Bilaram*, for the Respondent.

JUDGMENT.—The plaintiff sued to recover principal and interest at the rate of 60 per cent. on a promissory-note executed by the defendant on the 28th September 1903. The plaintiff admitted a re-payment of Rs. 220 before suit and claimed Rs. 735 for principal and interest. The lower Court has reduced the rate of interest on the promissory-note to 12 per cent. and made the amount re-payable in annual instalments of Rs. 20. The substantive question raised in appeal to this Court is as to the power of the Court to reduce interest. The law on this point is enacted in sections 16 and 19A of the Indian Contract Act, and under these sections the defendant, if he wished the amount of interest reduced, could only have attained that object by pleading and proving that the contract was induced by undue influence. In money, lending cases it has now been finally decided by the Privy Council that urgent need of money is not by itself proof that the obligee was in a position to dominate the will of the obligor. *Sundar Koer* v, *Rai Sham Krishen* (1), though a prior debt to the obligee may constitute such proof, see illustration C to section 16. Here the

(1) 34 I. A. 9; 34 C. 150; 4 A. L J. 109; 11 C. W. N. 249; 5 C. L. J. 106; 17 M. L. J. 43; 9 Bom. L. R 304; 2 M. L. T. 75.

defendant, though he may have been, as the District Judge has found, in straitened circumstances has not alleged that he was already in debt to the plaintiff. Nor has he even pleaded that his signature to the promissory note was induced by undue influence.

The rate of interest in the promissory note, therefore, cannot be dealt with under section 19A. Looking, however, to the exorbitant rate of interest received by the plaintiff we make no order for interest during the suit or after the decree. We make the amount payable in the same instalments as ordered by the lowor Court. The case is a fit one for monthly instalments as the defendant receives his income monthly.

We vary the decree of the lower Court and direct that the defendant pay the plaintiff the sum of Rs. 735 and costs of this suit in all Courts. The re-payment to be made by monthly instalments of Rs. 20.

Decree varied.

(s. c. 4 S. L. R. 278.)

SIND JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL NO. 20 OF 1909.

December 16, 1910.

Present:—Mr. Pratt, J. C., and Mr. Hayward. A. J. C.

THAWAR DAS MANGHUMAL—APPELLANT

versus

Musammat VANI WIDOW OF GULABSINGH AND ANOTHER—RESPONDENTS.

Hindu Law—Widow—Residence, right of—Maintenance—Nature and extent of right—Possession of house for residence Alienation, effect of

The right of residence of a Hindu widow is a right to a provision for residence and is included in her general right of maintenance. Like the right of maintenance it is an equitable and not a legal right.

Venkatemmal v. *Andyappa Chetti*, 6 M. 130, dissented from.

Ramanadan v. *Rangammal*, 12 M. 260, referred to.

Lakshman v. *Satyabhamabai*, 2 B. 494, relied upon.

A widow's residence does not imply a right of possession of the house or of the part of the house she occupies; for the co-parceners may, from time to time, alter the provision for residence in accordance with any change in the fortunes of the family, and may require her to reside in another house or another part of the same house.

Kakebai v. *Khemchand*, S. D. of the S. S. C. Vol. 2 at p. 106, relied upon.

The right of maintenance (including residence) is an equity binding on the conscience of the co-parceners, but it may be defeated by a *bona fide* alienation, that is, an alienation made for proper purposes as for the discharge of family debts or to satisfy claims enforceable against the whole family. It cannot be defeated by an alienation which is not so justified or which is merely a pretext to shuffle off the obligation of maintenance. In the case of an improper alienation, the right is enforceable against the transferee unless he has taken for value and without notice of the right.

Ramanadan v. *Rangammal*, 12 M. 260; *Ram Kunwar* v. *Ram Dai*, 22 A. 326, followed.

Appeal against the decision of the District Judge, Hyderabad.

Mr. *Kimatrai Bhoiraj*, for the Appellant.

Mr. *Hirdaram Mewaram*, for the Respondent No. 1.

JUDGMENT.—The plaintiff, who is the mother of the second defendant, sues for a declaration of her right to maintenance and residence in the family house alleging that her son had, without her knowledge, mortgaged it to the first defendant and that the first defendant was bringing the house to sale in execution of a decree on the mortgage.

Both the lower Courts have decided in favour of the plaintiff and the case comes before us in second appeal by the first defendant.

It is suggested in argument before us, that the widow's right of residence stands on a different footing to the right of maintenance. Such a distinction was made in the case reported as *Venkatammal* v. *Andyappa Chetti* (1) but the soundness of the distinction was doubted in the subsequent Full Bench case at *Ramanadan* v. *Rangammal* (2). In the latter case Muttusami Ayyar, J., who was responsible for the judgment in *Venkatammal* v. *Andyappa Chetti* (1), sought to justify it by laying down two propositions, (1) that the widow's right of maintenance was a *jus in re* attaching to the whole ancestral property and (2) that the right of residence was something more than a real right or *jus in re* in the whole ancestral fund as it attached to the particular house in which the widow resided and was, therefore, in the nature of a specific charge. The first proposition is a misstatement of the judgment of West, J., in the leading case of *Lakshman* v. *Satyabhamabai* (3). That judgment makes it very clear that the widow's right is not a legal but an equitable right *i. e.*, a right not binding on the whole word but only

(1) 6 M. 130.
(2) 12 M. 260.
(3) 2 B. 494.

on the conscience of the co-parceners and of those who take from them for value with notice. No doubt this equity may ripen into a legal right when it is reduced to definiteness and is charged on the estate by contract or decree or when an attachment has been made of a particular parcel of the ancestral estate for the widow's maintenance, but until that is done the right is merely an equity. The second proposition seems to imply that the right of residence being more definite than the right of maintenance is in the nature of a specific charge. But the mere definiteness of the claim is not sufficient to convert a right of personal demand into an interest in property and the second proposition also proceeds on the erroneous assumption that the general right of maintenance is a legal right.

It seems to us that the correct view was that taken by Batty, J., in *Kakebai* v. *Khemchand* (4), *viz.*, that "mere residence in a house as a member of a household does not imply possession, for possession requires an *animus sibi habandi*, and that in such circumstances residence is merely permissive. The widow has, as against the co-parceners, a right of maintenance which includes a right to a provision for her residence. Her residence in the family house is allowed by the co-parceners in discharge of their duty to maintain her. But her residence does not imply a right of possession of the house or of the part of the house that she occupies; for the co-parceners may, from time to time, alter the provision for residence in accordance with any change in the fortunes of the family, and may require her to reside in another house or another part of the same house.

The right of residence is, therefore, a right to a provision for residence and is included in the general right of maintenance. Like the right of maintenance, it is an equitable and not a legal right.

The nature and extent of the right of maintenance is fully discussed in the case of *Lakshman* v. *Satyabhamabai* (3). It is an equity binding on the conscience of the co-parceners, but it may be defeated by *bona fide* alienation, *i. e.*, an alienation made for proper purposes as for the discharge of family debts or to satisfy claims enforceable against the whole family. It cannot be defeated by an alienation which is not so justified or which is merely a pretext to shuffle off the obligation of maintenance. In the case of an improper alienation the equity is enforceable against the alienee under the same conditions that apply to any other equity, *i. e.*, the transferee takes subject to the equity unless he has taken for value and without notice of the right. This is the law laid down in *Lakshman* v. *Satyabhamabai* (3) and now codified in section 39, Transfer of Property Act, which we think has been correctly interpreted by the Allahabad High Court in *Ram Kunwar* v. *Ram Dai* (5).

Now, in the present case it is not alleged that the house was ever allotted to the plaintiff for her separate maintenance. Her right of maintenance is, therefore, an equitable one and the first question that arises is, whether the alienation was a propor one. The lower Appellate Court has found as a fact that it was not and the finding is supported by the admission in the written statement of defendant No. 1. The District Judge, no doubt, remarks that "there was apparently no intention to defeat the widow's claim" as 200 feet of the house were excluded from the mortgage. But the District Judge has found that the area was not adequate for the widow's residence and still less for her maintenance. The case is not one in which there was ample property to satisfy the widow's claim out of the residue of the estate. The house is the only family property, the claim for maintenance is enforceable against the whole of it—and a wanton alienation of any part of the house was, therefore, a fraud on the widow.

The next question is, did defendant No. 1 take subject to the equity and the simple answer to that is that the lower Appellate Court has found as a fact that he had notice of it. The only defence raised for defendant No. 1 is that the widow has 200 feet of the house left for her residence. But it is not alleged that this area of the house has been allotted to the widow with her consent in satisfaction of her claim to maintenance. The widow has a right available not only against the 210 feet but against the whole house and she is, therefore, entitled to the decree made in her favour by the lower Appellate Court.

(4) S. D. of the S. S. C. Vol. 2 p. 106.

(5) 22 A. 326.

MI NGWE ZAN *v.* MI SHWE TAIK.

We confirm the decree of the lower Appellate Court and dismiss this appeal with costs.

Appeal dismissed.

(s. c. U. B. R. (1910) I, 61.)

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CIVIL APPEAL No. 30 OF 1909.

February 11, 1910.

Present:—Mr. McColl, J. C.

MI NGWE ZAN—APPELLANT

versus

MI SHWE TAIK—RESPONDENT.

Evidence Act (I of 1872), ss. 41, 110 Succession Act (X of 1865), s 242—Civil Procedure Code (Act XIV of 1882), s. 13—Question of status decided by Probate Court—Power of Civil Court to go into question in regular suit—Burden of proof—Regular suit against administratrix—Person in lawful possession.

A question of status decided in proceedings under the Probate and Administration Act can be gone into again in a regular suit.

A judgment of a Probate Court is conclusive proof that the person to whom Letters of Administration or Probate have been granted has been clothed with the powers and the responsibilities of the deceased and of nothing else.

Barrs v *Jackson*, 1 Ph. 582; 14 L. J. Ch 433; 9 Jur. 609; 65 R. R. 457; *Kanhya* v. *Radhachurn*, 7 W. R. 338; *Ma Hnyin* v. *On Gaing*, U. B. R. 1902-03, II Prob. & Ad. p. 1, relied upon.

Ma Gaung v. *Nyun*, Civ. App. No. 227 of 1904; followed.

Where a person is in lawful possession of an estate it is for any one who disputes his right to prove that he is not the owner.

A., as the widow of *B*, applied for Letters of Administration to his estate. Her status was denied by his relation *C.*, but the Probate Court held that *A.* was *B.*'s widow and granted her Letters of Administration. *C.* then brought a civil suit for the property of *B.* on the ground that *A.* was not *B.'s* widow:

Held, that the burden of proving that *A.* was not the widow of *B.*, was on *C. A.* had by virtue of the Letters of Administration granted to her as administratrix delivered to herself claiming as sole heir the residue of the estate. She was, therefore, in lawful possession

Mr. *C. G. S. Pillay*, for the Appellant.

Mr. *J. C. Chatterjee*, for the Respondent.

JUDGMENT.—On the death of Maung Ba Ya, one Ma Pwa Saing claimed to administer his estate as an adopted daughter. Her application was opposed by the plaintiff-respondent, Ma Shwe Taik, who claimed as niece and adopted daughter, and by the defendant-appellant, who claimed to be Maung Ba Ya's widow. Ma Pwa Saing's application was dismissed and it was held that the defendant-appellant was Maung Ba Ya's widow, and Letters of Administration were granted to her. The finding, and the order based on it, were confirmed by this Court on appeal. Final orders were passed on the 17th April 1907.

On the 26th February 1908, that is, considerably more than a year after Letters had been granted to the defendant-appellant, the plaintiff-respondent applied for permission to sue *in forma pauperis* for the whole of the estate, on the ground that the decision that the defendant-appellant was Maung Ba Ya's widow was wrong, and that she (plaintiff-respondent) either as niece or as *kittima* daughter was the sole heir. The issue whether the defendant-appellant is Maung Ba Ya's widow or not has been tried again on the merits and decided against her, and she has been ordered to make over the whole of the estate to the plaintiff-respondent.

This is an appeal against that decree.

I at first had some doubt as to whether the judgment in the administration proceedings was not conclusive proof under section 41, Evidence Act, that the defendant-appellant was Maung Ba Ya's widow. It seemed to me that as it was necessary in such proceedings to decide the status of the applicant, and as the Probate and Administration Act provided for the issue of citations in order that all interested parties might have an opportunity of contesting the application, there could be no possible advantage in permitting the question of the applicant's status to be fought out again in a regular suit, and that the remedy of an interested person who had not been made a party to the administration proceedings lay in an application to revoke the Letters or Probate, on the ground that proper citations had not been issued or on the ground of fraud. It also seemed to me that to permit a question of status which had to be detrmined in the administration proceedings to be fought out again in a regular suit, would be contrary to the very principle on which section 41, Evidence Act, is said to be founded, namely, that public policy requires that matters of social status should not be left in continual doubt. Further, it appeared to me that the expression "legal character" must include wifehood and widowhood from the fact that

a Matrimonial Court is included amongst the Courts, to the judgments of which the section relates.

In *Ma Gaung* v. *Ma Nyun* (1) it was held that a question of status decided in administration proceedings could be fought out again in a regular suit. But the ground of that decision was that proceedings under the Probate and Administration Act were not a suit and that, therefore, section 13 of the Civil Procedure Code of 1882 did not apply. Moreover, the opinion expressed by Mr. Irwin was really an *obiter dictum*, because what he had to decide was, whether a question of status decided in proceedings under the Lunacy Act could be fought out again in a regular suit, and, of course, section 41, Evidence Act, had no application and was not referred to.

Since then it has been held by this Court in more than one case that a question of status decided in proceedings under the Probate and Administration Act can be gone into again in a regular suit, but the decisions appear to have been based on the wording of section 13 of the Civil Procedure Code, 1882, (section 11 of the present Code,), and not on that of section 41, Evidence Act. Had the procedure prescribed under the Probate and Administration Act been summary, there would have been very good reasons for denying finality to the judgment of a Probate Court, but it is prescribed in section 83 that the procedure to be adopted when there is contention, is to be as far as possible that prescribed for a suit and ordinarily, when the status of the applicant is denied, the question is fought out at great length. It seemed to me that to allow it to be fought out again would only encourage useless and costly litigation.

But it is not for me to say what I think ought to be the law. The question is, what the Legislature intended the law to be.

Previous to 1871 it was frequently held by the High Courts of India that a decision by a competent Court of a question of status was binding on all the word. In *Barrs* v. *Jackson* (2), the leading case in England, it was held that a question of legitimacy decided by a Court of Probate could be re-opened in a regular suit. From the report of the Select Committee appointed to consider the Bill to introduce the Evidence Act of 1872, it appears that section 41 was based on the judgment of Sir Barnes Peacock in *Kanhya Lall* v. *Radhachurn* (3). After a consideration of his judgment I have no doubt that it was the intention of the Legislature to adopt the law laid down in *Barrs* v. *Jackson* (2) and that the expression "legal character" in section 41, Evidence Act, when it has reference to a judgment of a Court of Probate, means the status of an Administrator or Executor and that only, though when it has reference to a Matrimonial Court it includes wifehood and widowhood, and that a judgment of a Court of a Probate is conclusive proof that the person to whom Letters or Probate have been granted has been clothed with the powers and the responsibilities of the deceased and of nothing else, and that a question of status decided by a Court of Probate can be raised again. This is in accordance with section 242 of the Indian Succession Act, which, however, was enacted some years before the Evidence Act of 1871 became law. This also appears to be the interpretation which the Indian High Courts have put upon section 41, Evidence Act.

I am, therefore, of opinion that the learned Additional Judge was right in trying the issue whether the defendant-appellant was Maung Ba Ya's widow again. But the defendant-appellant was not in the same position in this suit as she would have been in, had the issue never been decided in her favour.

It was pointed out in *Ma Hnyin* v. *Ma On Gaing* (4) that a person claiming to be an heir to an estate could not sue the administrator for partition, but that, when the estate had been administered and the residue after the payment of debts and expenses had been distributed to those claiming to be heirs to the estate, he could follow his share of the estate in their hands. It is not clear whether the defendant-appellant has exhibited in Court the account prescribed by section 98, Probate and Administration Act, of the manner in which she has disposed of the estate, but she has apparently taken the residue of the estate herself as sole heir, and the suit was brought against her personally and not as administratrix. Otherwise, the suit would be bad *ab initio*.

(1) Civ. App. No. 227 of 1904.

(2) 1 Ph. 582; 14 L. J. Ch. 483; 9 Jur. 609; 65 R. R. 457.

(3) 7 W. R. 338.

(4) U. B. R. 1902—03, II Prob. & Ad, p. 1.

The defendant-appellant, therefore, by virtue of the Letters of Administration granted to her, has as administratrix delivered to herself claiming as sole heir the residue of the estate. She is, therefore, in lawful possession and it is for any one, who disputes her right, to prove that she is not the owner.

The learned Additional Judge of the District Court apparently placed the burden of proving her marriage with Maung Ba Ya upon the defendant-appellant, and it has been strongly urged in this Court that it lay heavily upon her to prove the marriage. This contention is clearly wrong. The defendant-appellant was in lawful possession and under section 110, Evidence Act, it lay upon the plaintiff-respondent to prove not merely that she was Maung Ba Ya's adopted daughter or niece but that she was entitled to inherit, and to prove that she had to prove that the defendant-appellant was not Maung BaYa's widow.

Had the burden of proof been on the other side, I should have been unable to hold that the view taken of the evidence adduced by the defendant-appellant was clearly wrong, though I think that the part which she took immediately upon Maung Ba Ya's death, and the fact that the plaintiff-respondent allowed her to remain in possession of Maung Ba Ya's house without immediately asserting her rights are very strong points in her favour.

But the question for decision is, whether the plaintiff-respondent proved that the defendant-appellant was not Maung Ba Ya's wife.

She is said to have been bought by Maung Ba Ya as a slave, and to have remained on in his house after the annexation as a servant. The presumption of continuity does not arise on account of the death of Maung Ba Ya's wife, Ma Kye Hmon. In an English household—in England—there would be nothing extraordinary in a female servant continuing to serve her master after her mistress's death, and no adverse conclusions would be drawn from this fact alone. But from what I know of Burmese customs such a female servant would be in a very equivocal position, and adverse conclusions as to her relations with her master would be drawn, and in the present case I do not think that Maung Ba Ya's age would make any difference.

The defendant-appellant's case in fact was that, owing to her equivocal position after Ma Kye Hmon's death, she told Maung Ba Ya that she must leave him, and that he promised to marry her in order to prevent her from doing so, and that he did marry her. She was at that time treated as more than a servant, as she took her meals with Maung Ba Ya, and there is nothing improbable in her story. Moreover, the question is not whether her story is probable or not, but whether the plaintiff-respondent has proved it to be false.

The evidence adduced by the plaintiff-respondent is entirely negative, and is to the effect that neighbours who might be reasonably expected to know of the marriage, if a marriage had taken place, had heard nothing of it. In estimating the value of this evidence the fact that Maung Ba Ya was an old man and was not likely to have a ceremonial wedding, the ease with which Burman Buddhist *eindaunggyis* can marry, and the short space of time in which there could be any repute, have to be taken into consideration. The principal witnesses for the plaintiff-respondent are Maung Shwe Daing and Maung Shwe Kan, and the rest of the evidence can hardly be said to have any value. Maung Shwe Daing is a near neigbour, and Maung Shwe Kan says that he lived in Maung Ba Ya's house from the time of Ma Kye Hmon's death until that of Maung Ba Ya. They both state that the defendant-appellant never slept with Maung Ba Ya. On this point Maung Shwe Daing appears to have gone beyond the mark, because he did not continuously sleep at Maung Ba Ya's house until some twenty days before his death, and, therefore, was not in a position to know. Maung Shwe Kan is, to a certain extent, contradicted by his own brother, Maung Shwe Than, and he appears to be biased in favour of a *pongyi*, U Oktama, who also claimed the estate and who has given evidence on behalf of the plaintiff-respondent, and his evidence is consistent with that of the doctor who attended Mauug Ba Ya in his last illness, to the effect that the defendant-appellant rubbed medicine all over Maung Ba Ya's body, including his private parts, a task which would not be performed by a female other than a wife, at any rate if there were males present in the house, as there were,

and it would be, in my opinion, unsafe to rely upon his evidence in the face of the admitted facts, that immediately upon Maung Ba Ya's death the defendant-appellant borrowed money to help to defray the expenses of the funeral, not clandestinely but openly, and remained in possession of the house and took charge of Maung Ba Ya's affairs without any opposition on the part of the plaintiff-respondent, who was in the house at the time. The defendant-appellant appears to have done everything both before and after Maung Ba Ya's death which could be expected of a wife, and Maung Shwe Kan's evidence that she never slept with him is, in my opinion, untrustworthy considering the other evidence.

The fact that Maung Ba Ya entrusted Rs. 900 to Maung Shwe Daing and not to the defendant-appellant before his death has been relied upon by the plaintiff-respondent. But there is no evidence as to the precise date on which it was entrusted to Maung Shwe Daing. The latter states that the money was entrusted during Maung Ba Ya's illness. But it is not clear what this means. Maung Ba Ya apparently took to his bed some 20 or 25 days before his death, but he is described as having been more or less ill from the date of Ma Kye Hmon's death.

I think it probable that the Additional Judge came to the conclusion that he did come to, owing to his having misplaced the burden of proof. I am of opinion that the plaintiff-respondent failed to prove that the defendant-appellant was not Maung Ba Ya's wife, and I, therefore, reverse the decree of the District Court and dismiss the plaintiff-respondent's suit with all costs.

Appeal allowed.

(s. c. 13 C. L. J. 505.)

CALCUTTA HIGH COURT.

APPLICATION FOR LEAVE TO APPEAL TO THE PRIVY COUNCIL.

No. 15 OF 1910.

March 7, 1911.

Present:—Mr. Justice Mookerjee and Mr. Justice Caspersz.

BENOY LAL ROY CHOWDHURY AND OTHERS—PLAINTIFFS—PETITIONERS

versus

KAMALAPATI BANERJEE AND ANOTHER—DEFENDANTS—OPPOSITE PARTY.

Civil Procedure Code (*Act V of* 1908), *s.* 110—*Privy Council Appeal—Pecuniary valuation—Foreclosure suit—Subject-matter.*

In a suit to enforce a mortgage security, where the proceedings are entirely *in rem* and it is not sought to make the mortgagor personally liable, the value of the subject-matter in dispute is the amount claimed, when such amount falls short of the value of the mortgaged property, while it is the value of the mortgaged property when the amount due under the mortgage exceeds the value of the property.

Application for leave to appeal to the Privy Council.

Babu *Jogesh Chandra Roy* and *Brojo Lal Chakravarti*, for the Petitioners.

Babu *Dwarka Nath Mitter*, and *Shib Chandra Palit*, for the Opposite Party.

JUDGMENT.—This is an application for leave to appeal to His Majesty in Council against the decree of this Court in a suit for foreclosure of a mortgage security. The question in controversy is, whether the amount or value of the subject-matter of the suit in the Court of first instance was Rs. 10,000 or upwards, and whether the amount or value of the subject-matter in dispute on appeal to His Majesty in Council is the same sum or upwards.

The principal amount secured by the mortgage was Rs. 7,000. The suit was brought for the recovery of a sum far in excess of Rs. 10,000 but as the suit was for foreclosure and there was no claim for a personal remedy against the mortgagor (which had been extinguished by limitation before the action was commenced) the only substantial relief which the plaintiffs could obtain in the suit as framed, was to recover possession of the property from the hands of the mortgagor. Under these circumstances, the subject-matter of the suit, in our opinion, was so much of the mortgaged property as the plaintiffs claimed to foreclose. It is beyond controversy that in a suit to enforce a mortgage security, where the proceedings are entirely *in rem* and the mortgagor is not sought to be made personally liable, the value of the subject-matter in dispute is the amount claimed, when such amount falls short of the value of the mortgaged property, while it is the value of the mortgaged property when the amount due under the mortgage exceeds the value of the property. If we look at the substance of the matter, it is plain that in the former case, the subject of the suit is not the property itself, but only the right to make it available for the realization of the debt, the

amount of which determines the value, while in the latter case, as the subject-matter is merely the right to make the property available for the debt, so far as it will suffice, the value of the property becomes the determining factor; *Janki* v. *Badri* (1), *Kubair* v. *Atma* (2), *Krishnama* v. *Srinivasa* (3) and *Phul Kumari* v. *Ghanshyam* (4), where the distinction mentioned was recognised by the Judicial Committee. But we must add that there is no force in the contention of the respondents that as Court-fees have to be paid on the plaint according to the principal money secured, under section 7, clause 9 of the Court Fees Act, the amount of the principal determines the value of the subject-matter for purposes of jurisdiction; this view is negatived by sections 8 of the Suits Valuation Act, 1887.

In the case before us, the respondents contend that the value of the property sought to be foreclosed is under Rs. 10,000 and that, consequently, the case does not fall within section 110 of the Code. In our opinion, if the value of the property is established to be less than Rs. 10,000, the appellants, upon the principles just explained, are not entitled to leave to appeal to His Majesty in Council. We are not prepared, however, upon the materials placed before us to hold that the value of the property is less than Rs. 10,000. No doubt, so far back as the 12th March 1910, the respondents filed an affidavit in which it was stated that the value is less than Rs. 10,000, and the appellants have, up to the present time, omitted to put in an affidavit in answer; but they explain that they misapprehended the true scope of section 110 of the Code, and did not consider it necessary to go into the question of value, because they were advised, erroneously as it now turns out, that as the claim was valued at more than Rs. 10,000, in he Court of first instance, and also on appeal to this Court, they were entitled as of right to leave to appeal to His Majesty in Council against the decree of this Court which had substantially varied the decree of the original Court. This appears to us to be a reasonable explanation. Although, therefore, we hold that the appellants are not entitled to leave to appeal unless they can establish that the value of the property sought to be foreclosed is Rs. 10,000 or upwards, we think they ought to have an opportunity to do so. We grant them two weeks' time to put in an affidavit. The respondents will be at liberty to file a counter-affidavit.

(1) 2 A. 698.
(2) 5 A. 332.
(3) 4 M. 339.
(4) 35 C. 202 (P. C.); 7 C. L. J. 36; 12 C. W N. 169; 10 Bom. L. R. 1; 5 A. L. J. 10; 17 M. L. J. 681; 2 M. L. T. 506; 14 Bur. L. R. 41.

(S. C. U. B. R. (1910) I, 66.)

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 167 OF 1910.

December 21, 1910.

Present:—Mr. Shaw, J. C.

NGA PO TUN AND OTHERS—APPELLANTS

versus

MI THET PON - RESPONDENT.

Civil Procedure Code (Act V of 1908), ss. 11, Exp. IV, 47—Application in execution—Regular suit—Decree for trees—Excess trees in possession of decree-holder—Suit for recovery of excess trees not barred -Pleadings—Practice—Amendment of plaint—Contradiction—Raising an objection by Court.

If execution proceedings are still going on, it is not material whether the party dissatisfied by an order in execution applies expressly under section 47, Civil Procedure Code, or purports to bring a regular suit, provided the Court is the same.

To admit of an application under section 47, the decree must be capable of execution and must be still in course of execution.

If an application has been made under section 47 and disposed of, the decision is *res judicata* and on that ground a subsequent suit will be barred.

Nga Kye v. *Mi E Me*, U. B. R. 1897-1901, II, 249; *Fakruddin Mahomed Ahsan* v. *Official Trustee of Bengal*, 10 C. 538; *Nga Sa Gyi* v. *Ye Ban*, U. B. R. 1904-06, II, C. P. 36, referred to.

For Exp. IV, of section 11, Civil Procedure Code, to apply, the claim must have been within the knowledge of the person making it, during the previous proceedings.

Manekbai v. *Virchand*, 9 Bom. L R. 1020, referred to.

A decree for possession of trees was executed. The judgment-debtor subsequently found that there were excess trees in possession of the decree-holder. The former consequently brought a regular suit for the recovery of the excess trees. It was alleged that the judgment-debtor was not aware of the fact till the execution proceedings had closed and the time for an appeal from or a review of the final order in execution was past:

Held, that the suit was not barred by section 47 of the Civil Procedure Code.

Where a plaint has been amended, the suit cannot be dismissed on the ground that the amended plaint puts forward a new case, if there is no irreconcilable contradiction between the allegations in the original plaint and the allegations in the amended plaint.

NGA PO TUN *v.* MI THET PON.

An Appellate Court should not take the objection that the amended plaint put forward a new case of its own motion, nor should it decide the point without giving the plaintiff an opportunity of explanation.

Mr. *C. G. S. Pillay*, for the Appellants.

Mr. *J. C. Chatterjee*, for the Respondent.

JUDGMENT.—On the 23rd June 1908 plaintiffs-appellants sued (in Civil Regular No. 4 of 1908 of the Sub-Divisional Court) to recover certain palm-trees, which defendant-respondent, as they alleged took possession of in excess of the number she was entitled to under the decree in Civil Regular No. 4 of 1904, (executed in Execution Case No. 4 of 1905, and subsequent Execution Cases) of the same Court. The original plaint omitted to state when the defendant-respondent took possession, whether at the time of delivery by the Bailiff, or afterwards, it only said that now when plaintiffs-appellants came to count the trees they found that defendant-respondent had taken too many. In his preliminary examination plaintiff-appellant, Po Tun, said that defendant-respondent took the trees at the time of delivery (* * *) by the Bailiff under the order of the Appellate Court, the plaint was amended, and a re-trial ordered. In the amended plaint plaintiffs-appellants said that the Bailiff delivered the correct number of trees, and that defendant-respondent took the excess afterwards.

The Sub-Divisional Court on the re-trial gave plaintiffs-appellants a decree, distinguishing the case from *Nga Kye* v. *Mi E Me* (1) on the ground of the alleged taking having been after the delivery by the Bailiff.

The District Court on appeal reversed that decision and dismissed the suit, holding that the amended plaint put forward a new case, and that plaintiffs-appellants must be held to that originally made in the previous proceedings.

Before me it is contended on behalf of defendant-respondent that the suit was not maintainable. *Fakruddin Mahomed Ahson* v. *Official Trustee of Bengal* (2) is relied on.

The lower Courts do not seem to have noticed two points which are not referred to in *Nga Kye's case* (1); but are dealt with in *Nga Sa Gyi* v. *Ye Ban* (3).

(1) If the execution proceedings are still going on, it is not material whether the dissatisfied party applies expressly under section 47, Civil Procedure Code, or purports to bring a regular suit, provided the Court is the same. This, as the authorities cited in *Nga Sa Gyi* v. *Ye Ban* (3) show, was held under the old Code, and now clause (2) of section 47 makes express provision for mistakes of the kind. Here the Court was the same, as already stated. Hence no valid objection could be taken to the present suit merely because it was called a regular suit.

(2) To admit of an application under section 47 the decree must be capable of execution, and must be still in course of execution. This is what was declared in *Fakruddin's case* (2). I may add a third point. If an application has been made under section 47, and disposed of, the decision is *res judicata*, and on that ground a subsequent regular suit will be barred.

I have referred to the three decisions cited in *Nga Kye's case* (1), and I find that two of them were cases of the last-mentioned kind, in which a previous application had been made under section 11 of Act XXIII of 1861 or section 244 of the Code of 1882 corresponding to section 47 of the present Code, and had been disposed of.

The third was one where there had been no such application, but apparently the property was made over in the course of execution proceedings. It was held that the dissatisfied party ought to have applied (under section 11 of Act XXIII of 1861), and *not having done so could not bring a regular suit*. Apparently, the execution proceedings were at an end when the suit was brought, but the report does not clearly say that they were. The judgment, however, seems to assume that the bar holds good even after the execution proceedings have closed, and that in all circumstances.

This is a very difficult question, also depending; apparently, on the rule of *res judicata* applied to the case where an objection was not but might or ought to have been raised in the previous proceedings. In the present case the execution proceedings were very troublesome. It was only on the 13th March 1908, just a little over three months before the institution of the present suit, that the final order seems to have been passed (*see*

(1) U. B. R. 1897-1901, II, 240.
(2) 10 C. 538.
(3) U. B. R. 1904-06, II, Civ. Pro. 36.

Execution Case No. 6 of 1907). It is not impossible that the execution proceedings were still incomplete then, but as far as I can gather from the proceedings before me, that was the final order, and, if so, it was no longer possible for plaintiffs-appellants at the date of suit to make an application under section 244, Civil Procedure Code, 1882; and it was also too late to appeal from or apply for review of the order finally closing the execution proceedings. Suppose, as they alleged, that plaintiffs-appellants did not become aware of defendant-respondent's taking possession of more trees than the Bailiff made over to her, till, say, within a week of the date of institution of the present proceedings, what is to prevent them from bringing a Regular Suit?

The law of limitation gives them twelve years to sue, under ordinary circumstances, for immoveable property of which they have been wrongfully dispossessed.

Even if the Bailiff had made over the excess trees by mistake, I cannot see why plaintiffs-appellants should be barred, if they were not aware of the fact till the execution proceedings had closed and the time for an appeal from or a review of the final order in execution was past. For Explanation IV of section 11, Civil Procedure Code, to apply, the claim must have been within the knowledge of the person making it during the previous proceedings.—*See* Amir Ali and Woodroffe's Civil Procedure Code, notes to sections 11—14, on page 119, from *Manekbai* v. *Virchand* (4).

But I do not find that plaintiffs-appellants ever alleged the Bailiff to have made over the excess trees. It is not clear to me that there is any really irreconcilable contradiction between their allegations in the first proceedings and their allegations after the remand. They were not required by the Court at first to give precise details. The lower Appellate Court also seems to have taken this objection of its own motion and to have decided on it without having given the plaintiffs-appellants an opportunity of explanation.

I set aside the decree of the lower Appellate Court and remand the case for the appeal to be disposed of on its merits. Costs will abide the final result. A certificate under section 13, Court Fees Act, will be granted.

Case remanded.

(4) 9 Bom. L. R. 1020.

(s. c. U. B. R. (1910) I, 69.)

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CIVIL APPEAL No. 143 OF 1910.

November 11, 1910.

Present:—Mr. Shaw, J. C.

NGA PWE—APPELLANT

versus

MICHAN THA—RESPONDENT.

Administration, letters of—Probate and Administration Act (V of 1881), scope and object of—Question of title—Effect of grant of Letters—Power of Court to give possession of property.

It is not necessary, in proceedings under the Probate and Administration Act on an application for Letters of Administration, to decide what the estate of the deceased consisted of.

Questions of title can only be determined in a regular suit.

The fact that a Court has granted Letters to a person does not authorize it subsequently to give him possession of any property. The grant of Letters of Administration does not, without further proceedings, entitle the grantee to possession. Except in regard to the exhibition of an inventory and the revocation of Letters, the Court becomes *functus officio* after the grant.

Maung Ye Gyan v. *Ma Hmi*, 1 L. B. R. 155; *Karim Bux* v. *King-Emperor*, 2 L. B. R. 161; *Mi Pwa* v. *Mi Thein Yon*, 4 L. B. R. 287, followed.

Mr. *C. G. S. Pillay*, for the Appellant.

JUDGMENT.—This purports to be an appeal under section 86, Probate and Administration Act, against an order made by the District Court under that Act. The order, as will appear further on, was not in reality one contemplated by the Act. But I do not think that fact renders an appeal inadmissible. The Judge appears to have thought that the order was one which he had power to make as subsidiary to the grant of Letters.

Respondent, under an appellate order of this Court, obtained Letters of Administration to the estate of Mi Min Thet, deceased. After that, respondent, or rather her husband, Aung Hla, on her behalf applied to the District Court to be put in possession of a house which she alleged to be part of the estate, and which he represented to be unoccupied and in danger of destruction by fire. The District Court thereupon made the order in question authorizing Aung Hla to take possession. It did this without notice to the other side, without any sort of inquiry, and without

considering whether it had jurisdiction in the matter.

In acting *ex parte* the learned Judge contravened a fundamental rule, which can hardly ever be departed from in judicial proceedings,—"*Audi alteram partem.*"

The natural result was that no sooner was effect given to the order than appellant came forward with a petition objecting to it and praying that it might be set aside.

The order which the District Judge passed on this application shows that he misconceived the meaning and effect of this Court's order in appeal, and also the whole scope and object of proceedings under the Probate and Administration Act.

These are well explained and exemplified by Sir Charles Fox in three Lower Burma cases—*Maung Ye Gyan* v. *Ma Hmi* (1); *Karim Bux* v. *King-Emperor* (2) and *Mi Pwa* v. *Mi Thein Yon* (3). It was not necessary, in the proceedings under the Probate and Administration Act on respondent's application for Letters, to decide what the estate consisted of. Questions of title could only be determined in a regular case. The remarks about the gift of the house in the appellate order of this Court, therefore, did not finally decide the question of the gift or give respondent a right to possession of the house.

Again, the fact that the District Court had granted Letters to respondent did not authorize it subsequently to give her possession of any property. For the reason just explained, the grant of letters did not, without further proceedings, entitle her to possession; and, except in regard to the exhibition of an inventory and the revocation of the Letters, the Court was *functus officio*. In making an order that respondent, or rather her husband, Aung Hla, should take possession of the house the Court was acting entirely without jurisdiction.

It appears that respondent has since in a regular suit established her right to the house and other property either as administrator to the estate or as heir of the deceased, and the appellant, therefore, has nothing substantial to gain from a reversal of the order now in question.

But it is clear that that order cannot on any ground be sustained, and I must, therefore, set it aside. Respondent will pay appellant's costs in this Court—one gold *mohur*.

(1) 1 L. B. R. 155.
(2) 2 L. B. R. 61.
(3) 4 L. B. R. 287.

(S. C. U. B. R. (1910) I, 75.)

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

CIVIL REVISION No. 62 OF 1910.

December 21st, 1910.

Present:—Mr. Shaw, J. C.

NGA TOK—APPLICANT

versus

SUBRAMONIAN CHETTY—RESPONDENT.

Civil Procedure Code Act V of 1908), *O. XXI, rr.* 58, 62—*Mortgaged property—Mortgagee in possession—Attachment as mortgagee's property—Claim by mortgagor—Position of mortgagee—"On account of or in trust for"—"As his property".*

A claim under rule 58, Order XXI, may be made by a person who has an interest in the property although he is not in possession.

A mortgagee in possession is in possession "on account of or in trust for" the mortgagor, to the extent of the mortgagor's interest. The property is not in the mortgagee's possession "as his own property" but partly on his account and partly on account of the mortgagor.

Nga Kyc v. *Po Min*, U. B. R. 1904-06, II, Sub-mortgage 1, referred to.

Where mortgaged property in possession of a mortgagee is attached as his property and the mortgagor prefers a claim against the attachment, the claim should be investigated and the property released from attachment to the extent of the mortgagor's interest.

So far as the interest of the owner and mortgagor is concerned, the property is not liable to attachment.

Monmohiney Dassee v. *Radha Kristo Das*, 29 C. 543; *Hamid Bakhut Mazumdar* v. *Buktear Chand Mahto*, 14 C. 617; *Sheoraj Nandan Singh* v. *Gopal Suran Narain Singh*, 18 C. 290, distinguished.

Kumarappa Chetti v. *Nga Pyi*, U. B. R. 1904-06, II, Civ. Pro. 18, relied upon.

Quære:—Whether a mortgagee in possession is actually a trustee?

Lall Das v. *Jamal Ally*, 9 W. R. 187; *Jogendronath Mullick* v. *Raj Narain*, 9 W. R. 489; *Kullyan Dass* v. *Sheo Nundun Pershad Singh*, 18 W. R. 65, referred to.

Mr. *C. G. S. Pillay*, for the Applicant.

Mr. *R. G. Aiyangar*, for the Respondents.

JUDGMENT.—Respondent in execution of a decree against his judgment-debtor, Nga Hlwa, attached certain land in his possession.

Applicant applied for removal of the attachment on the ground that he was the

owner, and Nga Hlwa merely in possession as mortgagee.

The Sub-Divisional Court summarily dismissed the application, saying: "The land is admittedly in possession of judgment-debtor. The remedy of Maung Tok is, therefore, by regular suit for redemption and not by suit (*sic*) for removal of attachment."

The learned Judge in this order apparently be wildered himself by speaking of a (miscellaneous) application for removal of attachment as a suit, and lost sight of Order XXI, rule 63, which expressly provides that when a (miscellaneous) application for removal has been disposed of, the unsuccessful party may "institute a suit to establish the right which he claims to the property, but subject to the result of such suit if any, the order" (in the Miscellaneous proceedings) "is conclusive."

But it is not intelligible how the Judge came to think that applicant's remedy was by a suit *for redemption*.

Before me it is contended for applicant that the Sub-Divisional Court's order was marked by illegality or material irregularity, it being the duty of the Court to allow applicant an opportunity of establishing the interest which he claims to have in the property.

For respondent the ground is taken that the provisions of Order XXI, rules 58—63, confine the Court to the question of possession. Reliance is placed on *Monmohiney Dassee* v. *Radha Kristo Das* (1) and the decisions there followed: *Hamid Bakhut Mazumdar* v. *Buktear Chand Mahto* (2) and *Sheoraj Nandan Singh* v. *Gopal Suran Narain Singh* (3); and it is contended that a mortgagee in possession is in possession on his own account, and not partly on his own account and partly on account of the mortgagor, as a coparcener in undivided joint property might be, and that in such a case the Court is bound to dismiss the application for removal, and leave the mortgagor to his regular suit under Order XXI, rule 63.

If that is what the learned Judges who pronounced the decisions referred to meant, I find myself unable, with all respect to them, to accept their interpretation of the Code. And the new Code is practically identical with the Code of 1882 in this matter.

Rule 58 says: "If any claim is preferred to . . . . any property attached in execution of a decree on the ground that such property is not liable to such attachment, the Court shall proceed to investigate the claim", etc. If applicant was the owner and mortgagor, his interest in the property was not liable to attachment. He was at liberty to prefer a claim under this rule and the Court was bound to investigate it.

Rule 59 says: "The claimant . . . . must adduce evidence to show that at the date of the attachment he *had some interest in*, *or* was in possession".

This shows that a claim may be made by a person who has an interest in the property although he is not in possession.

Rule 60 says: "Where, upon the said investigation, the Court is satisfied that for the reason stated in the claim . . . . such property . . . . being in the possession of the judgment-debtor at such time" (*i.e.* the time of attachment) "it was so in his possession *not on his own account*, or *as his own property*, but on account of or in trust for some other person, or partly on his own account and partly on account of some other person, the Court shall make an order releasing the property, *wholly or to such extent as it thinks fit*, from attachment."

I am under no doubt that a mortgagee in possession is in possession "on account of or in trust for" the mortgagor, to the extent of the mortgagor's interest, that the property is not in his possession, "as his own property," but partly on his own account, *i.e.*, to the extent of his interest as a mortgagee in possession, and partly on account of the mortgagor, *i. e.*, to the extent of the mortgagor's interest, within the meaning of this rule and that the Code contemplates and requires the Court to investigate the claim of a mortgagor in such a case, and, if it finds it established, to release the property, to the extent of the mortgagor's interest, from attachment.

Rule 62 may be compared. It evidently deals with the case of a mortgagor in possession. It implies that the mortgagee out of possession may put forward his claim, and the Court may investigate and allow it, but it provides that in such a case the Court (instead of releasing the property from

(1) 29 C. 543.
(2) 14 C. 617.
(3) 18 C. 290.

attachment to the extent of the mortgagee's interest) may continue the attachment (on the whole property) *subject to the mortgage.*

It is not sufficient to find that the property is or is not in possession of the judgment-debtor. The nature of the possession, whether this is in the judgment-debtor or in the claimant, has to be gone into: in other words, the question of title cannot be ignored.

As a matter of principle, it would be unreasonable if the Court were debarred from going into the claim of an owner and mortgagor in the circumstances of the present case. So far as the interest of such an owner and mortgagor is concerned, the property is not liable to attachment. To attach that interest is to commit a trespass for which the owner and mortgagor would be entitled to recover full compensation. [See *Kumarappa Chetti* v. *Nga I'yi* (4)]. His interest as mortgagor is nonetheless his property, because it is less than the full *dominium* by reason of the mortgagee's interest having been subtracted from it.

Why should such a claimant be excluded from the benefit of rules 58—61?

A perusal of the Calcutta cases cited does not seem to me to support the contention of the learned Advocate for respondent. The facts in them were distinguishable from those of the present case. They were not cases where the judgment-debtor was a mortgagee in possession. They were not cases of mortgage at all. But if they are applicable to the present case, I think that the effect of them is this,—that the Court in finding the judgment-debtor's possession was ostensibly that of a mortgagee of the applicant's, was bound to make an order accordingly releasing the property from attachment to the extent of the mortgagor's interest, and was not at liberty to go into the validity of the mortgage.

I am aware that Dr. Ghosh objects to the term trustee being applied to a mortgagee in possession on the ground that, although he is under certain obligations to the mortgagor, he has rights of his own which he may exercise adversely to the mortgagor (Law of Mortgage, 3rd Edition, page 257.) But in *Lall Das* v. *Jamal Ally* (5) it was thought necessary to decide that a mortgagee in possession *after the mortgage was satisfied* was not a trustee within the meaning of the Limitation Act of 1859. Subsequent Acts, *e. g.*, the present Act in section 2, expressly exclude such a mortgagee from the definition of trustee: in *Jogendranath Mullick* v. *Raj Narain* (6)—cited by Dr. Ghosh—and *Kullyan Dass* v. *Sheo Nundun Pershad Singh* (7) a mortgagee in possession was called and treated as trustee, and, as pointed out by Gour, the Transfer of Property Act in section 76 subjects the mortgagee in possession to substantially the same penalties as those laid upon a trustee by section 23 of the Trusts Act (II of 1882). (See Gour's Law of Transfer in British India, Volume 2, pages 795, 804 and 809.) But it is not material whether a mortgagee in possession is or is not actually a trustee. From the nature of a mortgage as understood in India, as to which see *Nga Kye* v. *Po Min* (8), I do not think it can be seriously disputed either that a mortgagee in possession is not in possession as owner, or that he is in possession partly on his own account and partly on account of the mortgagor. From another point of view his possession is the mortgagor's possession, and the mortgagor is in (constructive) possession through him."

In making the order it did, I am of opinion, that the Sub-Divisional Court did not duly consider the law, and was, therefore, guilty of illegality, and material irregularity.

I set aside that order and direct that the Sub-Divisional Court proceed to deal with the application in the manner laid down in Order XXI, rule 58 *seq.*

The costs of this application will follow the event.

Order set aside.

(4) U. B. R. (1904—06) II, Civ. Pro. 18.
(5) 9 W. R. 187.
(6) 9 W. R. 489.
(7) 18 W. R. 65.
(8) U. B. R. (1904—06), II, Sub-mortgage 1.

(s. c. U. B. R. (1910) I, 78.)

UPPER BURMA JUDICIAL COMMISSIONER'S COURT.

SECOND CIVIL APPEAL No. 127 OF 1910.

November 14, 1910.

Present:—Mr. Shaw, J. C.

U TEIK KA AND OTHERS—APPLICANTS

versus

NGA TIN BYU—RESPONDENT.

Buddhist Law—Ecclesiastical Courts—Decision of Thathanabaing — *Jurisdiction — Plaintiff layman —*

S. N. DAR... Vakil ... Court. SRINAGAR ... Kashmir

U TEIK KA *v.* NGA TIN BYU.

Claim for restoration of property dedicated to monastery —Decision of Revenue authorities.

Ecclesiastical Courts are not deprived of jurisdiction merely because the plaintiff is a layman.

Wun Chit v. *Zawta*, U. B. R. (1897-01), II, 52, relied upon.

Certain *wuttagan* property was originally dedicated by plaintiff's ancestor to a monastery and then confiscated and re-dedicated by the Burmese King. Plaintiff, a layman, applied to the *Thathanabaing* for the restoration of the land and after a decision was given by him and his Council, the plaintiff sued to enforce that decision. The Monks of the monastery, who were defendants, pleaded that the Ecclesiastical Courts had no jurisdiction and that the Ecclesiastical Courts could not give a decision in conflict with the decisions of the Revenue authorities. Some of the defendants had submitted to the jurisdiction:

Held, that the Ecclesiastical Courts had jurisdiction over the matter. Their decision was a pronouncement on the religious duty of Monks towards the descendant of a *taga* and it purported to give effect to the religious rule on that point and was directed against subordinate ecclesiastics. Even if the plaintiff had no right to re-claim the land enforceable in a Court of law, he was not debarred from addressing himself to the ecclesiastical authorities and invoking their own religious rules or maxims in his favour. The defendants could not object to the decision of these authorities.

Held, further, that the decisions of the Revenue authorities were no bar to the decision in question. The land was declared to be *wuttagan* and there was nothing to prevent the ecclesiastical authorities from resigning their rights in it to a grandson of a former owner.

Mr. *Tha Gywe*, for the Applicants.

Messrs. *S. Mukerjee* (Senior) and *Mukerjee* (Junior), for the Respondent.

JUDGMENT.—The plaintiff-respondent sued in the District Court to enforce a decision by the *Thathanabaing* and his Council with respect to 99·89 acres of land. The defendants-appellants, besides denying the facts that they appeared before the *Thathanabaing* or were aware of his decision, pleaded that the case had been decided by the former *Thathanabaing*, and apparently that the suit was barred by limitation, *i. e.*, that on these grounds the decision sought to be enforced was contrary to the Civil law. They also objected to the order on grounds affecting the merits of the dispute.

In appeal to the Divisional Court they took similar objections, but no longer denied having taken part in the proceedings ending in the *Thathanabaing's* decision.

Before me they add two new objections—(1) that plaintiff-respondent being a layman, the ecclesiastical Courts had no jurisdiction; (2) that it was not competent to the ecclesiastical Courts to give a decision in conflict with the decisions of the Revenue authorities.

The District Court found (1) that the alleged decision of the former *Thathanabaing* was not proved, and that anyhow it was open to the present *Thathanabaing* under the Buddhist Law to revise it; (2) that the matter was within the competence of the ecclesiastical Courts, and, therefore, if the Civil Court was satisfied that the order sought to be enforced was made, all it could do was to enforce it. Presumably, the learned Judge was of opinion that, in these circumstances, the question of limitation was immaterial.

The Divisional Court took a similar view. Holding that the jurisdiction of the ecclesiastical Courts is not confined to ecclesiastics, and that the matter here in dispute was within the competence of the ecclesiastical Courts it considered that the Civil Courts "should not go behind the order to ascertain if it was, according to Buddhist Law and procedure, barred by limitation and so on."

As regards the defendants-appellants' appearance before the *Thathanabaing*, they admitted the documents produced by plaintiff as having been filed or put in evidence by them before the *Gaingyoks*, to whom the *Thathanabaing* referred the case for inquiry, and there was sufficient evidence to show that they were represented also before the Council.

The dispute was as follows:

Plaintiff-respondent's grandfather, Kyaukke, in 1224 B. E., dedicated the produce of one piece of land (85½ *tingyes*) described in maps on the proceedings as ... ... and the produce of 1/10th of 4 other pieces of land.....and... (aggregating 400 *tingyes*) to defendants-appellants' monastery. In 1228 he was implicated in the Myingun Prince's rebellion and in consequence all his property was confiscated. A *pongyi* then represented to Mindon Nin the case of the defendants-appellants' monastery, and the King thereupon made a new dedication of the whole produce of ... and 1/10th of the produce of the other lands. In 1231 the *Le Wun* and *Le Ok* substituted for 1/10th of the produce of the 4 lands..... and...1/10th of the land (40 *tingyes*), and as such made over, for the benefit of the monastery, ... and ... The remainder thenceforth was exclusively of State.

In 1893 the Deputy Commissioner classed the land ... and ... as *wuttagan*, and the Financial Commissioner confirmed that decision in 1904.

U TEIK KA *v.* NGA TIN BYU.

Plaintiff-respondent in the present case sought to recover the land ... ... and ... undertaking to give the monasteries 1/10th of the produce.

He relied on an alleged condition in the grant of 1224 by Kyaukke, that his descendants, if reduced to poverty, might modify the dedication and offer 1/10th of the produce, or in case they were obliged to sell 1/10th of the produce only. He contended that the Burmese King did not confiscate the dedicated land, but re-affirmed the dedication with its attendant condition.

This is not borne out by the text of the Royal order put in evidence in the case and apparently admitted. It expressly states that the lands were confiscated, and in making the new dedication says nothing about Kyaukke's condition. It seems highly unlikely that the King would have intentionally maintained a provision for Kyakke's descendants. Defendants-appellants pleaded the confiscation.

But the order now in question ultimately rests on a quotation from a Pali authority laying down the duties of Buddhist Monks in such matters. The sum of it is this. If a donor suffers loss through the King, fire, or a thief and becomes poor and, therefore, asks for the return of what he has given, it should be given back even if it was a *thingika* gift. Plaintiff-respondent's grandfather was a *taga* who supported the monastery, and it is, therefore, the duty of *rahans* to support him.

The *Thathanabaing* and Council accordingly found that plaintiff-respondent "should work the land and make an offering" (of a part of the produce,) and that "the defendants who own the produce should agree."

It appears to me that this is manifestly a matter within the competence of the ecclesiastical authorities. It is a pronouncement on the religious duty of Monks towards the descendant of a *taga*, and it purports to give effect to the religious rule on that point. It is directed against subordinate ecclesiastics. I am unable to find in the published decisions any foundation for the contention put forward on defendants-appellants' behalf, that the ecclesiastical Courts were deprived of jurisdiction merely because plaintiff-respondent was a layman. Sir Herbert White in the case cited by the lower Appellate Court, *Wun Chit* v. *Zawta* (1), was evidently disposed to see no obstacle in this fact.

Assuming plaintiff-respondent to have had no right to re-claim the land which he could have enforced in a Court of law, what was to prevent him from addressing himself to the ecclesiastical authorities and invoking their own religious rules or maxims in his favour?

And how can the defendants-appellants object to the order of their ecclesiastical superiors giving effect to those rules or maxims?

In this view of the case, neither the question of *res judicata* nor the question of limitation can possibly arise. It is immaterial whether the alleged order of the previous *Thathanabaing* is genuine, or whether Kyaukke made a condition in favour of his descendants or whether, after the confiscation, that condition helps the plaintiff-respondent in any way.

Nor can the decisions of the Revenue authorities be a bar to such an order as the one in question. The land has been declared to be *wuttagan* of class (*a*). The ecclesiastical authorities choose to resign their rights in it to a grandson of a former owner. There is nothing to prevent them. The Land Records staff will have to record the transfer in their Registers, and henceforth the land will be shown as *bobabaing* of plaintiff-respondent instead of *wuttagan*.

All the defendants-appellants' objections are thus disposed of, and the omissions of the lower Courts are of no consequence.

Apart from the foregoing, the defendants-appellants also appear to have submitted to the ecclesiastical authority and taken part in the proceedings, in spite of their initial attempt to deny this.

They filed a written defence and put in evidence a long list of documents on which they prayed the *Sayadaws* to decide in their favour.

Therefore, if the order in question were considered as an ordinary award, there would still be no apparent reason why it should not be enforced.

The appeal is dismissed with costs.

Appeal dismissed.

(1) U. B R. 1897-01), II, 52.

GANDHARP SINGH *v.* HARI KRISHNA.

(s. c. 8 A. L. J. 458.)

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 440 OF 1911.

March 25, 1911.

Present:—Mr. Justice Karamat Husain.

GANDHARP SINGH—DEFENDANT—APPELLANT

versus

HARI KRISHNA AND OTHERS—PLAINTIFFS—RESPONDENTS.

N.-W. P. Rent Act (XII of 1881), s. 9—Sale of occupancy-holding illegal—Vendee's possession is that of a trespasser—Suit to eject the vendee of occupancy-holding—Jurisdiction of Civil Court—Adverse possession—Mortgagee cannot hold adversely to mortgagor.

In 1888, *A.*, an occupancy-tenant, sold his occupancy rights to *B.*, who held a mortgage over the entire *mahal* from the *zemindars*. In 1901, *C.* purchased the occupancy-holding from *B.* Plaintiffs purchased in 1906 one-half of the mortgaged *mahal* and redeemed the entire *mahal* from *B.* and entered into possession. In 1908, plaintiffs sued for possession of the occupancy plot on the ground that the original occupancy-tenant had no power to transfer it:

Held, that the suit was governed by N.-W. P. Rent Act, 1881, that the sale of the occupancy-holding was illegal under section 9 of that Act, and that the vendee's possession was that of a trespasser.

Jokhu Ram v *Harshanker Prashad*, A. W. N. (1886) 75; *Madho Lal* v. *Sheo Parshad*, A. W. N. (1890) 162, followed.

Such being the nature of the possession of the vendee, the *zemindar* was entitled to sue him for ejectment in a Civil Court within 12 years.

The derivative possession of the mortgagee, *B*, or his representative, during the continuance of the mortgage was that of his mortgagor and could not be turned into adverse possession by any act of his behind the back of his mortgagor.

Umr-un-nissa v. *Muhammad Yar Khan*, 3 A. 24; *Jeechoo Sahoo* v. *Syed Maseeoollah*, 21 W. R. 13, relied upon.

Second appeal from the decision of the Additional Subordinate Judge of Mainpuri, dated the 17th of February 1910.

Mr. *Hamilton*, for the Appellant.

Mr. *Sital Prasad Ghosh*, for the Respondents.

JUDGMENT.—Har Kishan and Bijai Singh, on the 31st of March 1884, mortgaged the entire *mahal* of Budh Sen, to Mr. Kinlock. Plot No. 611 was in that *mahal*. The mortgage purchased it from Randhir Singh on the 4th of April 1888, managed it to be excluded from the holding of his vendor, got the rent of it struck off, and had it entered in the Revenue papers as his own grove. Mr. Kinlock, on the 19th of July 1901, sold it to Gandharp Singh. On the 25th of January 1906, plaintiff No. 1 purchased one-half of the mortgage *mahal* and redeem the entire *mahal* from Mr. Kinlock. The plaintiffs entered into the proprietary possession of the entire *mahal* on the 10th of June 1906.

On the 28th of April 1908, the plaintiffs sued in the Court of the Munsif of Etawah for possession of the plot. Gandharp Singh defended the suit on the ground that Randhir Singh was the full owner of the plot; that the defendant and his predecessor in title had been in adverse possession for more than 12 years, and that the suit was not cognizable by the Civil Court.

The Court of first instance, finding that Randhir Singh was the occupancy-tenant of plot No. 611, that the Civil Court had jurisdiction, and that the suit was not barred by limitation, decreed the claim. The lower Appellate Court affirmed the decree, finding that Randhir Singh was the occupancy-holder of the plot.

Gandharp Singh appeals to this Court, and the following pleas are put forward by his learned Counsel:—

1. The *zemindar* cannot claim possession so long as the sale by Randhir Singh has not been set aside.
2. The Civil Court has no jurisdiction.
3. The suit is barred by limitation.

It has been found that Randhir Singh, when he sold the plot to Mr. Kinlock, was the occupancy-tenant of the plot. The law governing such sales at that time was the North-Western Provinces Rent Act, 1881. That Act, and not the Agra Tenancy Act, 1901, governs the case. The sale under section 9 of the North-Western Provinces Rent Act, 1881, was illegal, and the vendee's possession was that of a trespasser. This was held in *Jokhu Ram* v. *Har Shankar Prasad Singh* (1), and *Madhu Lal* v. *Sheo Parsad* (2). Those rulings are binding on me. Such being the nature of the possession of the predecessor in title of Gandharp Singh, the *zemindar* was undoubtedly entitled to sue for ejectment in the Civil Court. It is, however, urged that if the possession of Mr. Kinlock was that of a trespasser, twelve years' limitation barred the suit. This is futile, Mr. Kinlock was in possession of the *mahal* in which the plot in question was situated as a mortgagee and his derivative possession during the continuance of the mortgage was that

(1) A. W. N. (1886) 75. (2) A. W. N. (1890) 162.

of his mortgagors. Mr. Kinlock, therefore, by no act of his, behind the back of his mortgagors, could turn his derivative possession into an adverse possession against the mortgagors or their representatives. It is on this principle that (*i*) Lord St. Leonard in "his Handbook on Property Law" said,—"It has always been laid down that neither the mortgagor nor the mortgagee can by any adverse act have tha right of the other"; 7th Ed., p. 117; that (*ii*) the defendant in *Jeechoo Sahoo* v. *Syed Maseeullah* (3) was not allowed by his wrongful conduct to disentitle the plaintiff from having the benefit of the period of limitation, and that (*iii*) in the Full Bench case of *Umr-un-nissa* v. *Muhammad Yar Khan* (4), the possession of the mortgagee and his representative up to the date of redemption was held to be not adverse to the mortgagor and his representative.

The learned Counsel for the appellant contends that as Randhir Singh has been found to be the occupancy-tenant of plot No. 611 and as Gandharp Singh is a vendee from Randhir's vendee, the *zemindar* is not entitled to immediate possession, inasmuch as he has not ejected the occupancy-holder Randhir through a Revenue Court. In support of his contention he relies on the following remarks in *Gulzar Singh* v. *Kalyan Chand* (5): "A person who sues for possession of any immoveable properyt, *i. e.*, who sues to have another person in possession ejected, must, in order to entitle him to a decree, show that he had himself a right to the immediate possession at the date when he instituted his suit, assuming, of course, that his title to possession is denied,—page 401.

"The position then stands thus,—At the time when this suit was instituted, Baldeo Singh, who had not been ejected under Act No. XII of 1881 and who had not transferred the right of occupancy to any person in whose favour such transfer would be effective under section 9 of Act No. XII of 1881 and who had not relinquished his occupancy right in favour of his landlord, was alive and that right of occupancy was then a subsisting right vested in Baldeo Singh. Baldeo Singh, and not the *zemindar* was the person who, against Gulzar Singh, was entitled to possession. The right not being transferable whilst that right subsisted in Baldeo Singh his landlord, the *zemindar*, could not prove a right in himself to the immediate possession of the occupancy holding,—page 402.

The two rulings of this Court which lay down that a vendee from an occupancy-holder is a trespasser and which are binding on me, furnish a complete answer to the point taken by the learned Counsel. During the course of the arguments reference was made to *Shi Gopal* v. *Ayesha Begam* (6); *Ram Sarup* v. *Kishan Lal* (7); *Muhammad Husain* v. *Mul Chand* (8); *Sheo Prasad* v. *Indar Bahadur Singh* (9); *Badam Singh* v. *Musammat Sabta Kuar* (10) and *Ram Charan Ram* v. *Sheoraj* (11); but in the view I take it unnecessary to discuss the above cases. The suit being against a trespasser, the Civil Court is the right *forum*, and being brought within 12 years from the date of redemption is not barred by limitation. The result is that there is, no force in the pleas taken and the appeal is dismissed with costs.

Appeal dismissed.

(3) 21 W. R. 13.
(4) 3 A. 24
(5) 15 A. 399.
(6) 29 A. 52.
(7) 29 A. 327; A. W. N. (1907) 76; 4 A. L. J. 306.
(8) 27 A. 395; A. W. N. (1905) 4.
(9) 30 A. 119; A. W. N. (1908) 74; 5 A. L. J. 258.
(10) 2 A. L. J. 119.
(11) 3 A. L. J. 226.

(s. c. 8 A. L. J. 462.)

ALLAHABAD HIGH COURT.

SECOND CIVIL APPEAL No. 851 OF 1910.

March 21, 1911.

Present:—Mr. Justice Banerji.

KEDAR SAHU—DEFENDANT—APPELLANT

versus

Musammat BHAGWANTI—PLAINTIFF—AND ANOTHER DEFENDANT—RESPONDENTS.

Specific Relief Act (*I of* 1877), *ss.* 39, 42—*Suit for declaration of title and that a certain sale-deed is inoperative—Plaintiff out of possession—Consequential relief not claimed—Suit liable to be dismissed.*

The plaintiff sued for a declaration (*i*) that she owned a half share in a certain house, (*ii*) that the sale made by the second defendant in favour of the first defendant in respect of the house was inoperative as regards her half share. It was found as a fact that the plaintiff was not in possession of the house at the time of the institution of the suit:

Held, that the suit was barred by section 42 of the Specific Relief Act and could not be maintained.

Kunj Bihari v. *Keshavlal Hiralal*, 28 B. 567, distinguished.

The suit could not be considered as one for the cancellation of a document under section 39, as the deed was a good deed as between its executant and the person in whose favour it was executed.

KEDAR SAHU *v.* BHAGWANTI.

Second appeal from the decisions of the District Judge of Benares, dated the 26th of May 1910.

Mr. *Harendra Krishna Mukerji*, for the Appellant.

Mr. *Kalindi Prasad*, for the Respondents.

JUDGMENT.—In my judgment this suit ought to have been dismissed as barred by the provisions of section 42 of the Specific Relief Act. The suit was for a declaration that a half share of a certain house is the property of the plaintiff, and that the second defendant had no right to sell the said share to the first defendant under a sale-deed of the 9th of November 1909. The house originally belonged to one Bhola. He made a gift of it in 1890 to the second defendant Bhairo and to *Musammat* Sona, the wife of Bhairo, by *sagai* marriage. Sona made a gift of her half share in favour of the plaintiff on the 3rd of April 1905. After this gift Bhairo sold the house to the first defendant. The allegation on behalf of the plaintiff is, that Sona was the owner of a half share of the house and that Bhairo was not competent to sell that half. She alleged that she was in possession and prayed, merely, for a declaration of her right to a half share, and a further declaration that the sale of that half share could not affect her rights. The defendant-appellant pleaded that Sona had been turned out of the house 15 years before the institution of the suit, that Bhairo was in sole proprietary possession, that Sona's title had become extinct at the date on which she made a gift in favour of the plaintiff and that neither Sona nor the plaintiff was in possession. He also pleaded the bar of section 42 of the Specific Relief Act. The learned Judge has found that Sona was not living in the house for upwards of 15 years, but he says that, even if she was turned out of the house, the possession of her husband would not be adverse to her. Holding the view that I do in the case, I need not decide this point. I may, however, observe that if, as a matter of fact, Sona was forcibly turned out of the house and was not allowed to re-enter it, I cannot conceive how this act can be regarded other than an act of adverse ownership which would constitute adverse possession. However, the learned Judge has found that the plaintiff was not in possession, actual or constructive, at the date of the suit. He holds that, although she was not in possession, she was entitled to a declaration of her right, because she had asked in her plaint that the sale-deed executed by Bhairo in favour of the appellant be cancelled, and this was consequential relief claimed by her.

I cannot agree with the learned Judge. The suit was not really one for the cancellation of a document within the meaning of section 39 of the Specific Relief Act. As between the executant of the sale-deed and the person in whose favour it was executed, it is a good deed. What the plaintiff alleges is that, in so far as it purports to convey her half share, it cannot operate as against her interests. The prayer for cancellation of the sale-deed is, therefore, in reality a prayer for a declaration that the sale-deed cannot affect her interests in the property. Now, the proviso to section 42 of the Specific Relief Act is to the effect "that no Court shall make a declaration of right where the plaintiff, being able to seek further relief than a mere declaration of title, omits to do so." In this case the plaintiff has been found to be out of possession, and, therefore, she was able, if her case is true, to seek further relief than a mere declaration of title, namely, possession of her half share. This she omitted to claim. Therefore, having regard to the proviso to section 42, the Court should not have made a declaration of her right but should have thrown out her suit.

The learned Vakil for the respondent urges that the suit could not be dismissed, and he relies in support of his contention on the decision of the Bombay High Court in *Kunj Bihari* v. *Keshavlal Hiralal* (1). That case is distinguishable, as there was a prayer in it for an injunction which appears to have been the only substantial relief which the plaintiff could have got in addition to a declaration of his right. No doubt, the learned Judges, referring to section 42, said, "Nothing is said here about dismissing his suit. All that is enacted is that no Court shall make a declaration where the plaintiff being able to seek further relief omits to do so. With great respect, I am unable to agree with the learned Judges. The proviso to section 42 forbids the Court to make a declaration of title where the plaintiff can seek further relief than a mere declaration and omits to do so. Where, therefore, in a suit the plaintiff

(1) 28 B. 567.

merely seeks a declaration and that declaration the Court is not competent to make in consequence of the proviso to the section, the necessary result will be that no relief will be granted to the plaintiff and his suit will be dismissed. If the Court cannot make the declaration sought, no other relief can be granted, and the only result must be a dismissal of the suit. In the present case the plaintiff only seeks a declaration, or rather two declarations, first, that she owns a half share in the house, and second, that the sale made by the second defendant in favour of the first defendant is inoperative as regards that share. She does not claim the further relief to which she is entitled, namely, possession of the property, she being, as found by the lower Appellate Court, out of possesson. Under these circumstances, she is not entitled to the declaration sought and her suit must fail. I accordingly allow the appeal, set aside the decrees of the Courts below and dismiss the plaintiff's suit with costs in all Courts.

Appeal decreed.

(s. c. 8 A. L. J 505.)

ALLAHABAD HIGH COURT.

FIRST CIVIL APPEAL No. 113 OF 1910.

March 31, 1911.

Present:—Sir John Stanley, KT., Chief Justice, and Mr. Justice Banerji.

GULAB SINGH—PLAINTIFF—APPELLANT

versus

DEBI SINGH AND ANOTHER—DEFENDANTS—RESPONDENTS.

Agra Tenancy Act (II of 1901), s. 108—Entries of payment of rent in a pocket-book—Presumption as to full payment of rent—Receipt—Rent—Revision—Government revenue remitted.

In a suit for arrears of rent the defendants pleaded that they had paid the rent claimed by the plaintiff in full and that nothing was due from them. In support of their plea they produced a pocket-book which contained certain entries of payments made. The plaintiff admitted the entries:

Held, that the entries in the pocket-book did not amount to receipts within the meaning of section 08 of the Agra Tenancy Act, 190 , therefore, they raised no presumption that the payments entered in the book amounted to an acquittance in full of all demands up to the dates on which the entries were made.

Where Government revenue for a period is remitted but the rent payable by lessees is not expressly remitted and they are themselves liable to pay Government revenue, they cannot claim any remission in the rent payable to the lessor.

First appeal from the decisions of the Assistant Collector of Agra.

Mr. *Moti Lal Nehru* (with him Mr. *Mohan Lal Sandal*), for the Appellant.

Mr. *Govind Prasad* (with him Mr. *Girdhari Lal Agarwala*), for the Respondents.

JUDGMENT.—This appeal arises out of a suit brought by the plaintiff-appellant against the defendants who are his lessees for recovery of arrears of rent for the period from 6th June 1906, to the 7th December 1908. The rent reserved by the lease is Rs. 1,900, and for the three years in question arrears are claimed at that rate, as also interest. The defendants pleaded that they had paid the rent claimed by the plaintiff and that nothing was due from them. They also pleaded that there was a revision of revenue in the years in question, and that they were, therefore, entitled to a remission of their rent. In support of their plea of payment they produced a procket-book which contained certain entries of payments made. The Court below regarded the entries in the pocket-book as equivalent to receipts for the rent paid, and, applying the provisions of section 108 of the Agra Tenancy Act, presumed that the payments entered in the book amounted to an acquittance in full of all demands up to the dates on which the entries were made. This view of the lower Court is clearly erroneous. The entries in the pocket-book produced do not amount to receipts within the meaning of the Tenancy Act. No receipt such as is referred to in section 108 was produced, and, therefore, the presumption which arises under sub-section (2) of the section, could not be held to have arisen in the present case. The entries in the pocket-book are admitted by the plaintiff. The last of them was made on the 6th of December 1908. Two of the earlier entries, namely, those of the 13th of November 1908 and 21st of November 1908, are distinctly mentioned as entries in respect of rent for *Sambats* 1961 and 1962, respectively, that is to say, for the rent payable for the years 1904 and 1905. The entries anterior to these two entries are clearly entries of rent paid for previous years, and cannot be deemed to be entries of rent for subsequent years. The last entry, namely, that dated the 6th December 1908, of the sum of Rs. 1,754, is alleged by the defendants to

for p[illegible]
of the 14th of November 19[illegible]
is based upon custom as recorded in [illegible]
wajib-ul-araiz. It appears that the plaintiff is the own brother of the vendor. The village has been partitioned and formed into different *mahals*. The *mahal* in which the property sold is situate belonged solely to the vendor. The plaintiff is a co-sharer in a different *mahal* and so are the vendees appellants. The question is, whether the plaintiff has a right of pre-emption in respect of the property in question.

He relies on the *wajib-ul-arz* of 1873 as giving him a preferential right of pre-emption. This *wajib-ul-arz* was prepared before the partition to which I have referred above. Paragraph 2 of the *wajib-ul-arz* is headed "Rights of co-sharers *inter se*, based upon custom or a special contract," and paragraph 11 which refers to pre-emption provides that if a share-holder wishes to transfer he shall do so to his own brother, then to near relations, if they refused, then to co-sharers of the *patti* and after them to co-sharers in the village. Assuming that this *wajib-ul-arz* records a custom, I am of opinion that, having regard to the terms of it the plaintiff has no right of pre-emption, as he has ceased to be a co-sharer of the vendor after the partition to which I have referred. As I have pointed out above, the Chapter in the *wajib-ul-arz* relied upon relates to the rights of the co-sharers *inter se*. From that it follows that the provision as to pre-emption is a provision which applies to co-sharers *inter se*. The first category of pre-emptor must, therefore, be persons who not only fulfil the condition of being the own brothers of the vendor but must also be co-sharers of the vendor. This the plaintiff is not, and, therefore, in my opinion, he has no right of pre-emption and his claim ought to have been dismissed. On this ground I would allow the appeal and dismiss the plaintiff's suit.

STANLEY, C. J.—I agree in the order proposed by my learned colleague, but I am content to rest my decision upon the inter-

[illegible] *patti*. It will be
[illegible] the first class of pre-emptors come own brothers or nephews having one common ancestor. This is the first class of pre-emptors, and a brother had no priority in the matter of pre-emption over a nephew. They both stand on an equal footing. If we turn to the *wajib-ul-arz* of 1873, different categories of pre-emptors are mentioned. The first class consists of own brothers; the second class near relations; the third class co-sharers of the *patti*, and the fourth class co-sharers in the village. This is not the same usage as is recorded in the *wajib-ul-arz* of 1863. Consequently, as a custom must be constant and invariable, in my opinion, the *wajib-ul-arz* of 1873 does not record a custom. If the record is the record of a contract, as I hold that it is, the period of the Settlement having expired, no right of pre-emption now exists.

I, therefore, concur in the proposed order.

BY THE COURT.—The order of the Court is that the appeal be allowed, the decree of the Court below is set aside, and the plaintiff's suit is dismissed with costs in both Courts.

Appeal allowed.

(s. c. 27 P. R. 1911.)

PUNJAB CHIEF COURT.

SECOND CIVIL APPEAL No. 151 OF 1909.

December 16, 1910.

Present:—Mr. Justice Johnstone and Mr. Justice Chevis.

BULAKI MAL—PLAINTIFF—APPELLANT

versus

MR. C. J. FLOYD—DEFENDANT—RESPONDENT.

Evidence Act (I of 1872), s. 92—Oral agreement—Admissibility—Subsequent conduct of parties, when admissible.

Evidence of any oral agreement or statement as between the parties to a document cannot be admitted for the purpose of contradicting, varying, adding to, or subtracting from its terms.

But evidence of the conduct of the parties subsequent to the execution of the document is admis-

for p... e
of the 14th of November 1... v.

and promise, and, as our brother ... has pointed out, no want of consideration in the proper sense of the phrase is pleaded.

Turning to (*a*) above we have some difficulty in agreeing with Mr. Grey. It is a well-known maxim that if a plea of fraud is to be relied on, it must have been specifically pleaded. In his pleas, paragraph 6, defendant stated "plaintiff has "over-reached dofendant and has taken advantage of his ignorance of law and need." This, read with the previous pleas, seems to us to amount to a complaint of the exercise of undue influence rather than of fraud; and, at all events, the precise fraud has not been specified. In the course of the case it came out that defendant complained that he had been over-reached, inasmuch as the monthly interest was to be kept the same regardless of progressive diminution of principal debt, but there is no allegation that plaintiff deceived defendant and made him think he was promising Rs. 2, 00 in all when he was writting words (the promissory note is in defendant's own hand) embodying a promise to pay Rs. 2,100 and interest. Similarly, we doubt whether the plea of "misrepresentation" can help defendant.

Mr. Grey's contentions (*c*) and (*d*) may be considered together. Extrinsic circumstances may be previous statements or acts of the parties or statements or acts subsequent to execution of document. Of all these, in our opinion, under our law of evidence defendant can certainly be allowed to prove conduct subsequent to execution of document. A few words will explain our meaning. Subsequent conduct of parties (*i*) may serve to show what the real meaning of the contract was, or (*ii*) may operate as an estoppel when it amounts to part performance of the contract; see *Baksu Lakshman* v. *Govindji Kanji* (1) for this differentiation. A Division Bench of this Court has, in ...ge (3), the rule enunciated in Kanshi Nath Chatterji's case by Sir Barnes Peacock [*Kanshi Nath Chatterjee* v. *Chandi Charn Banerjee* (4)] had not been touched, under which evidence of "acts and conduct of the parties subsequent to the deed is admissible to show that something different from the written contract was intended by them." We propose to accept this dictum, though there is something to be said for the idea that evidence of subsequent conduct should not, in view of section 94, which was not considered in *Abdul Ghafur* v. *Abdul Kadir* (2), be admitted to show directly what the real meaning of the contract was, where its wording is plain and unambiguous but only to establish an estoppel.

Looking at the matter in this way, the only evidence we can consider is defendant's payments to plaintiff after the execution of the document and the latter defendant sent to plaintiffs showing the account to date drawn upon defendant's theory of his real liability which letter was not protested against in reply but was simply acknowledged. Our brother Rattigan has clearly taken much more evidence than this into account, in forming his opinion that defendant's version of the affair is the true one. Further, he finds that on 10th June 1906 defendant only received Rs. 1,200 and not Rs. 2,100 and, therefore, the appeal should be dismissed with costs if all that evidence is admitted. This, as we have shown, seems to us hardly to follow as a necessary consequence, for a man may receive Rs. 1,200 only and yet intentionally promise to pay Rs. 2,100. The question to be decided is, whether the evidence, which we say above is all we can consider, is sufficient to show that the real meaning of the contract was as stated by defendant, and that plaintiff should not be permitted to urge the contrary.

That evidence is partly oral, *i. e.*, defend-

(1) 4 B. 594.

(2) 72 P. R. 1901; 114 P. L. R. 1901.
(3) 22 A. 149; P. C.) 27 I. A. 58.
(4) 5 W. R. 68; L.R. Sup. Vol. 383.